IN THE SUPREME COURT OF NEW ZEALAND SC 07/2010

[2013] NZSC Trans 3

BETWEEN **JOHN HANITA PAKI**

First Appellant

TORIWAI ROTARANGI

Second Appellant

TAUHOPA TE WANO HEPI

Third Appellant

MATIU MAMAE PITIROI

Fourth Appellant

GEORGE MONGAMONGA RAWHITI

Fifth Appellant

AND **ATTORNEY-GENERAL**

First Respondent

AND **MIGHTY RIVER POWER LIMITED**

First Intervener

THE PROPRIETORS OF WAKATŪ as trustees of TE KĀHUI NGAHURU TRUST

Second Intervener

Hearing: 19 February 2013 – 20 February 2013

Court: Elias CJ
McGrath J
William Young J
Chambers J

Glazebrook J

Appearances: I R Millard QC and M P Armstrong for the Appellants
V L Hardy and D A Ward for the Respondent
J E Hodder QC and L L Fraser for the First Intervener
B W F Brown QC and K S Feint for the
Second Interveners

CIVIL APPEAL

MR MILLARD QC:
If it please the Court, I appear with my friends Mr Armstrong and Mr Smith for the appellants.

ELIAS CJ:
Thank you Mr Millard, Mr Armstrong, Mr Smith.

MS HARDY:
If it please the Court, Ms Hardy and Mr Ward for the Attorney-General.

ELIAS CJ:
Thank you Ms Hardy, Mr Ward.

MR HODDER QC:
If it pleases, Hodder with Ms Fraser for Mighty River Power Limited as interveners.

ELIAS CJ:
Thank you Mr Hodder, Ms Fraser.

MR BROWN QC:
May it please Your Honour, Brown and Ms Feint for the Wakatū interveners.

ELIAS CJ:

Thank you Mr Brown, Ms Feint. Yes Mr Millard.

MR MILLARD QC:

If it please the Court, what I propose to do is give a brief outline of the key points of the case and then go back and try and deal with some of these matters in more detail.

The first point I wanted to make is that the Waikato River was a precious taonga of the Pouakani people, both in the 1880s when a lot of these events happened and down to the present time. In 1946 the Crown began to build the first of the dams on the bed of the Waikato River opposite the Pouakani lands. That was Maraetai. It was followed, three years later, by a start on Whakamaru. In neither case did the Crown bother to consult with the tangata whenua, including the Pouakani people.

When this proceeding was issued the Crown was asked the basis on which it claimed ownership of that bed. It advanced two and two only grounds. The first was section 14 of the Coal Mines Act Amendment Act 1903 which this Court has said does not apply. The second ground advanced was that it acquired the riverbed under the English principle of ad medium filum. Importantly, the Crown does not say that it acquired aboriginal title directly from the communal owners. Nor, given a comment that appears in its submissions –

ELIAS CJ:

Well that presumably is because it had gone through the Native Land Court, is it?

MR MILLARD QC:

Yes.

ELIAS CJ:

Yes.

MR MILLARD QC:

Yes. Also relevant to a comment in its submissions, it did not claim that it got the land by way of Public Works Proclamation by application of the ad medium filum rule. This means that –

ELIAS CJ:

Sorry, the Public Works Act 1981 proclamations, you'll take us to them at some stage, will you, just the terms of them?

MR MILLARD QC:

Well it –

ELIAS CJ:

It's just the point that you make that it carried – the taking extended to the middle of the flow?

MR MILLARD QC:

Well that was the point that the Crown, for the first time in its submissions in this Court, has raised and we say well, if it was going to raise that it should have been pleaded – should have been advanced. I will come back to that a little bit later and perhaps deal with that in a little bit more detail.

Because it does not claim to have bought the aboriginal title directly, this means that if the ad medium filum principle doesn't apply then the Crown is occupying the land illegally and should give it back but of course the Crown says ad medium filum applies. When asked in interrogatories, when did it so acquire the bed of the river by the ad medium filum principle, it said it originally acquired it when it purchased the land off the Pouakani people in a series of transactions in the 1880s/1890s. When asked from whom it acquired it, it said it was the vendors in those conveyances.

The Crown, in its submissions, raises the issue that we as the appellants are somewhat inconsistent, they say, when talking about the river and they say well, it would've been owned by iwi hapū and if we have to go back and look at the original owners we may have some difficulty in saying that we represent all of them but that actually go to the very heart of their title and we say that when the Crown is asserting title it did not deal with those groups, it dealt solely with the people that we represent. It dealt with the individual owners of whom the present appellants are the descendants.

ELIAS CJ:

And you say that the title to the river, to the middle of the flow, was held by your clients pursuant to the same conveyancing presumption which is why the Crown raises inconsistency, is it not?

MR MILLARD QC:

Well, what we're saying is the Crown asserts ownership under ad medium filum. For that, first of all, it's got to say our people got that title through the Native Land Court stage 1 and for that, it wouldn't matter whether our people knew that they got title or not. The Crown has to say we got title. Now –

ELIAS CJ:

Sorry, are you saying that it's not in fact part of your argument that you obtained title ad medium filum through the Native Land Court deed grant but that the Crown position presupposes that you did, is that your argument?

MR MILLARD QC:

No, our argument is we accept – we take the Crown at its word on that part. We say that yes, we did get title.

ELIAS CJ:

Well is that then a yes to my question that you're relying on the Crown, the necessity that the Crown position entails your having obtained title through the deemed grant?

MR MILLARD QC:

Yes.

ELIAS CJ:

And what if the Court is left in doubt about that Mr Millard, whether –

MR MILLARD QC:

Well that would mean that the Crown itself doesn't have title either because it's only asserted it on two bases.

ELIAS CJ:

Yes but that probably means that you can't succeed on the claim that you have put forward in the Court?

MR MILLARD QC:
I would have to accept that.

ELIAS CJ:
Yes, I see. All right, thank you. I just flag that, for me, this is a huge issue which you will have to address because I'm not aware of any authority which suggests that the conveyancing presumption applied to Māori land, even after it has passed through the Native Land Court.

MR MILLARD QC:
Well the – because the original Native Land Act of 1863 joined the Native Land Court to assimilate Māori title as close as possible to the British title. So that it was certainly the intention to convert communal ownership into – and customary ownership, into individualised title and what we say in effect is well, even although Māori owners may not have realised it, that was the effect of the Native Land Court process at that stage and that, at least as between us and the Crown, we're entitled to take the Crown at its word on that and say yes, the Native Land Court conferred title on us, whether we knew it or not but –

GLAZEBROOK J:
So one of the difficulties possibly in that argument, because what's always been troubling me about this case since I've come into it, is the issue of customary title and whether the presumption overrides customary title but if I understand your position, it is that the Native Land Court order effectively did override the customary title and that the presumption goes along with the title that was given to the land adjacent to the riverbed and you say that it doesn't matter that the individual Māori didn't realise that at the time, that was the legal effect of it but possibly the difficulty there is then saying well, the second stage I suppose, saying well a duty arises at that stage for the Crown to have made it clear when the sale was but I can understand, it's a two stage argument that you've got, is that –

MR MILLARD QC:
That's correct.

GLAZEBROOK J:

So, I mean, one of the difficulties though is yes, as between you and the Crown but what has between your clients and the actual customary owners who we are not hearing from in this – obviously some of your clients were probably part of the original customary owners?

MR MILLARD QC:

Because the whole purpose of course of the Native Land Court process was to try and decipher who were the customary owners and allocate the land to them.

GLAZEBROOK J:

Although the process about – where they went about that has been shown to be – to have major flaws, shall we say, just as perhaps an understatement?

MR MILLARD QC:

Well there were certainly problems that you had to be present to make sure your name got on and that sort of thing which had major consequences in terms of the costs incurred.

ELIAS CJ:

Sorry. Well, is your case really that if the Crown has title then you say you have an equitable interest, if the Crown – and really, it's for the Crown to establish title which is only on the application of the presumption, both in its acquisition and in the purchase from the predecessors of your clients?

MR MILLARD QC:

That's exactly it.

ELIAS CJ:

But one outcome could be that we're not satisfied the Crown has title on that basis, I suppose?

MR MILLARD QC:

That is an outcome.

ELIAS CJ:

Yes, I see. It's just that Mr Millard, my reading which is not at all extensive in this, indicates that this issue as to whether ad medium filum applied to Māori land which had gone through the Courts was specifically reserved in *Re Bed of Wanganui River* [1962] NZLR 600 (CA) and thought to be a point of some real difficulty and although there are some dicta very slight to the opposite effect, I think really this Court would be – it's a point that's really not resolved by authority.

MR MILLARD QC:

There was between the cases, there was of course the Māori Appellate Court, I think, or Māori Land Court was consulted and they said there was evidence that the ownership was on it –

ELIAS CJ:

I think we'd have to look at that, at that determination too but that was a question of fact and my recollection, it's a long time since I looked at it, is that really the Māori Appellate Court said, given all the subdivision of land, it's too late to assert a tribal claim for the river and that's certainly the effect that was carried through into the 1962 Court of Appeal decision. Anyway, you'll probably come to this but it is rather boggling that you are relying on the same presumption the Crown relies on effectively, to found your claim of fiduciary duty in this case.

MR MILLARD QC:

And our – the declaration that we seek is to the extent that the Court has claimed ownership. So we have couched it in those terms so that it still leaves open the issue as to whether or not the Crown does have ownership but there's certainly no suggestion from the Crown that it says no, we don't own. Nor is there any suggestion from the Crown that it acquired it now at any other way other than through the application of the principle and –

CHAMBERS J:

Would it be correct though Mr Millard, perhaps a slight tweak on what the Chief Justice has just put to you, in order for your claim to succeed it's for you to establish Crown ownership, is it not?

ELIAS CJ:

Yes, that goes with the concession you make that your claim cannot succeed if Crown ownership falls away.

MR MILLARD QC:

At least – well I accept that we do have to show that the Crown acquired ownership but at least we and the Crown are of a common mind on that one. If I could move forward from that point and –

CHAMBERS J:

Just one other thing while we're just on the form of the declaration you seek, can you confirm that in no way is it intended to interfere with property rights of others than the Crown?

MR MILLARD QC:

That's correct. Our people looked – it was the Crown that dealt with our people, we looked to the Crown for any remedy.

ELIAS CJ:

And you'd be up against, if the land had transferred to other parties, you'd be up against indefeasibility of their title?

MR MILLARD QC:

Subject of course to the –

ELIAS CJ:

The resumption, yes.

MR MILLARD QC:

Well the possibility of the memorial kicking into play, at least in regard to the SOEs because they were all – you'd may be in with more convoluted to get back to it, we may have to go back to the Tribunal on that basis.

ELIAS CJ:

Yes.

MR MILLARD QC:

But of course the title taken by SOEs is not an unencumbered title.

CHAMBERS J:

Is that something though that the general courts have jurisdiction with respect to?

MR MILLARD QC:

Well at this stage we are seeking only a declaration and one possibility, if I could perhaps jump right ahead, one possibility would be that, as in the *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] and in the *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests*] case, if the Court was minded to say yes, there was a breach of duty by the Crown that conferred rights on the appellants to adjourn the remedy side, to just work out just how that then takes effect.

So we say that the effect of the original Native Land Court orders was to give Māori who went on to the title an interest in the bed whether they knew it or not, that the – when the Crown then acquired the land, they had a duty to explain to Māori what it was the Crown says Māori were selling, that the purchase of the visible land which was described in the deeds, both in words and in pictures, carried with it also the purchase of the invisible land beyond the words and the pictures in the deed and that that sort of duty should not be read down to apply only when the Crown is buying the original aboriginal title direct but also to when it was buying off the original Māori owners post Native Land Court order. That is that the interposition of the Native Land Court should not lessen any duty on the Crown and indeed, in some ways, accentuates it because the very effect of the Native Land Court was to force sales. It was its purpose and its effect because to go through the Native Land Court process there had to be a survey, the cost of which was put on to the owners. There were hearing fees, there was usually and certainly in this case, the hearings were away from where Māori resided so they incurred tremendous costs in being present at the Court hearing and their only asset was their land.

So the effect of the Crown's imposed Native Land Court process was that you could be taken to the Native Land Court on the application of somebody else, in this area it was Tūwharetoa who brought the application and, at the end of the process, you're there with land but a large amount of debt and the only way of satisfying it is to sell

the land. So that that sort of process cannot lessen the sort of duty that might apply to the Crown.

CHAMBERS J:

At a very basic level, why do you say we should develop the law in the way you advocate, with all the potential unforeseen circumstances to which the Court of Appeal referred in its judgment, rather than letting this be sorted out in what has now become a very well established method, by the Waitangi Tribunal supplemented by direct negotiation between the Crown and iwi?

MR MILLARD QC:

In this particular case, the Pouakani people did go to the Tribunal and the Tribunal referred to the Waikato River and then just parked the issue and said really, you need to negotiate with the Crown. Our people tried to negotiate with the Crown. It went in fits and starts. The Crown wasn't initially very helpful at all and it tried – I should say, the negotiations were just wider than the river. It soon became apparent that the Crown wasn't prepared to deal with the river in the context of the overall settlement, so that was why it was reserved. Our people then tried to negotiate with the Crown. Initially, the Crown was agreeable and said, get together a mandated group up and down the river. Our people went to some effort to do that. There was a change of Government. The new Government said no, we will only deal with large groups and although the Crown has negotiated with the large groups on management type issues, it has not dealt with ownership and it has excluded our people saying oh, you whakapapa to Maniapoto and to Tūwharetoa, you can deal with us through them.

So that our problem is that – and this is the problem of saying deal with it through the Tribunal and Crown negotiation, the Crown can choose who it deals with and if it doesn't want to deal with you, you're out in the cold.

CHAMBERS J:

But you could go back to the Tribunal. I just see the fact that the Tribunal thought this was an extremely difficult issue to resolve, rather suggests that the Court too should be slow to develop the law in the way you want and I suspect the difficulties are rather camouflaged by the bland nature of the declaration you seek. I suspect when we came to unpick what such a declaration might lead to, we would encounter untold difficulties such as the Tribunal themselves thought.

MR MILLARD QC:

You would have to say that the Waikato claim before the Tribunal, although it did specifically refer to the bed, was also somewhat wider and the – we accept that the river issue is a multifaceted one, there's obviously issues about the quality of the water and that sort of thing, and might even get into the issue of ownership of the water but there are those sorts of issues which are probably more appropriately a large grouping. But on the simple issue of who owns the bed, that's quite a distinct issue that we can say is a legal issue and is appropriate for the courts.

ELIAS CJ:

Isn't your answer really that for a proprietary claim they're entitled to come to the courts. The Waitangi Tribunal is a different process where you don't have legal rights. Now you have to act to establish that you have a proprietary claim and the development of the law that's being referred to stands on your proprietary claim because you don't get into fiduciary duty if you didn't have the ownership.

MR MILLARD QC:

Yes.

ELIAS CJ:

Yes. So we're not being asked to develop the law in terms of Treaty principles or anything like that, which is part of the Waitangi Tribunal processes. Is that the case?

MR MILLARD QC:

We say we're clear – this is within Article 2 rights without any elaborate exegesis of those rights. It's not a matter of – which sometimes comes up, that the Treaty, sort of 1840 didn't contemplate things like electricity and the like, so one doesn't have to say, "Well, what are the essential principles of the Treaty? Can it apply to that new development?" So to that extent we're certainly not asking this Court to develop Treaty principles. We're simply saying, "We are within, squarely within, the words in the early part of Article 2."

McGRATH J:

And you're seeking that the Court fashion a legal course of action enabling you to be given legal effect, have those rights given legal effect in the case of the riverbed adjoining your clients.

MR MILLARD QC:

That would be grouped, yes. And we say that it's –

ELIAS CJ:

Well, you could have brought a customary title claim to the Courts. You're not bringing that. You're saying that you were the proprietors of the land and that the Crown acquired it in circumstances which put it under an obligation to the vendors. That's your claim.

MR MILLARD QC:

Yes, and if we tried to bring a customary claim –

ELIAS CJ:

I know. You'd be faced with the limitation period.

MR MILLARD QC:

And also enormous difficulties of saying that would imply that the Native Land Court got it wrong when it awarded title to our people basically.

ELIAS CJ:

Well, if it carries the river to the middle flow. That's the issue really isn't it?

MR MILLARD QC:

But –

ELIAS CJ:

Sorry, we should probably stop interrupting.

MR MILLARD QC:

So what we're saying is that when the Crown purchased from our people, they owed a duty to explain what it was that they were purchasing because it's not obvious that they were purchasing the riverbed. When one looks at it against the document that the people, the vendors were being asked to sign in the Native Land Court orders, and there's no evidence whatever that the land under the river was discov – discussed in the Native Land Court or in any of the other communications.

And the Crown do say that, "Well, they had opportunities to ask the questions," which was the evidence of Dr Loveridge when he said, "Well, they could have asked questions. They had plenty of opportunities," is in our submission, no answer. Māori would not have thought, in our submission, that they would be selling the river.

Justice Williams in *Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 (CA) commented in, which was, of course, a case of European dealings or Pākehā dealings. It was in a commercial context of coalmining rights, that the grants there, which like our documents, describe the land stopping at the river and showed on the plan it stopping at the river, and he said, "No layman unacquainted with the presumption of ad medium filum, who read the grants and looked at the plans would dream that it was intended by the grants to include any portion of the bed of the river." And we say that that applies here and we further say, it would be extraordinary if the Māori vendors were acquainted with the presumption of ad medium filum. Very esoteric. Not even an English concept in the terms of English language.

ELIAS CJ:
But on your argument, conversely they couldn't have thought that in their Native Land Court title they had obtained the bed of the river, half the bed of the river.

MR MILLARD QC:
That would not matter if that was the legal effect of what happened though. It wouldn't matter if they knew it or not.

ELIAS CJ:
Well then it's a sort of a bare property argument that you're putting to us. It's really got nothing to do with other than loss of legal property they held. Is that right? So the river adds nothing much to it.

MR MILLARD QC:
The –

ELIAS CJ:
The significance of the river I'm talking about. It's just that they had property, you say according to a presumption of law. I query whether it is a presumption of law but

they had the property and they lost it and it should come back because it was their property, or there should be a trust in place because it was their property.

MR MILLARD QC:
Yes.

ELIAS CJ:
Yes.

MR MILLARD QC:
And it does have this river overlay of course that the river was a taonga in all sorts of ways.

ELIAS CJ:
Well, I understand that but that's why I asked you if they didn't know they got it through their title. I'm struggling to struggling to see what they've lost except whatever their legal title gave them.

MR MILLARD QC:
Well, the effect, of course, that the ground contends is that it gets the bed and the right to deal with what is above the bed.

ELIAS CJ:
Yes.

GLAZEBROOK J:
Well, do you say that it - perhaps provide some evidential significance in the sense that it was unlikely that they would have thought that they were selling the river as well, given the significance of the river to them, especially if it wasn't specifically pointed out to them?

MR MILLARD QC:
Yes.

GLAZEBROOK J:
Is that –

MR MILLARD QC:

Yes, and the appellants say that whether one looks at in strictly and purely Treaty terms, whether one looks at it in terms of a fiduciary duty or a duty of good faith, the Crown owed a duty, at the time, to make sure that the consent it obtained was a fully informed consent.

GLAZEBROOK J:

Can I just check why that wouldn't be the case, just in ordinary contractual principles, in terms of contractual mistake? I know there's been a reasonable amount of controversy over – I've forgotten. It was the Thomas judgment with the lady involved but – and just mistakenly selling something that she didn't realise that she owned. But there's a reasonable – because if you have diagrams and you have words that say you're selling one thing and you turn out to be selling something else, I would have thought, just in ordinary contractual principles there might be – It's just – do you need the Treaty overlay? I mean, I understand possibly why you do because you'll run into Limitation Act issues squarely with any sort of contractual claim, but that might – it's just then working out what the extra duty might be in a Treaty sense that doesn't arise in a contractual sense.

MR MILLARD QC:

I suppose the distinction between the sort of pure contractual one, in the pure contractual context it's an argument, well, what was actually sold? Here the – what the Crown says is well, what was actually sold was something a bit more and we say, well, "You initiated these transactions in the sense of being the purchaser and being the one who instituted the Native Land Court. You had a duty to tell us that we were selling a bit more and that's an equitable duty.

CHAMBERS J:

Well, in contracts you'd be stuck with limitation periods anyway wouldn't you?

MR MILLARD QC:

Yes.

GLAZEBROOK J:

Why do you need the extra duty in this case when you might have a perfect – it might have had a perfectly, apart from getting around the limitation period, and I'm not suggesting that's the only reason that's been suggested but...

MR MILLARD QC:

Well, it's certainly the equitable element, we say, gets us round the limitation.

GLAZEBROOK J:

Right, yes and, as I say, I understand that. It's just why would there be an extra equitable element though when – well, you can have an extra equitable element but is that just solely grounded on Treaty arguments or is it grounded on something further than that?

MR MILLARD QC:

It's grounded both on Treaty and on the common law type approach that applied, whether or not there was a treaty, the sort of points that was picked up in *R v Symonds* (1847) NZPCC 387 (SC) where they were saying there's an obligation on the Crown when it's acquiring aboriginal caveats, and that wasn't based on treaty. It was just a general, equitable duty on the Crown. So we say you've got that general equitable duty on the Crown, which is reinforced by the Treaty.

GLAZEBROOK J:

Okay.

ELIAS CJ:

Just thinking about the conveyancing presumption which the Crown relies on. Why isn't it sufficient for you to argue that the vendors could never have intended to part with the river and, therefore, the presumption is rebutted? It's not as if –

MR MILLARD QC:

Well, the difficulty, then, is how do you work out who owned the riverbed at this point of time going back –

ELIAS CJ:

Well, those proceedings may not be before us. It may be that all we can do is say that insofar as the Crown relies on the presumption, we don't think it can.

GLAZEBROOK J:

Well, I suppose you could still argue though, couldn't you, that you didn't intend to sell that so you actually sold that less the riverbed but nevertheless subject to the

Native Land Court order your clients, or the ancestors of your clients, did own the riverbed. It's just that they didn't sell it.

But again, my problem in the initial stages was, again, that maybe the customary owners who might actually be able to rebut that aren't before us.

ELIAS CJ:
Well, these are –

GLAZEBROOK J:
Apart from as a subset.

ELIAS CJ:
– the proprietors. These are the proprietors and the presumption is a conveyancing presumption which can be rebutted. It's not a legal doctrine. It is a factual enquiry as to what was intended in the transfer and – anyway, I just whether it might be simpler. Looking at it like that, maybe it won't be.

MR MILLARD QC:
Well, the point I was trying to make was that if we – if you accept that our people had title at the time of the sale, there was an equitable duty to explain what they were selling when it wasn't obvious that the sale extended to this invisible land. And in that basis, if the Court is with us, the Court then has to consider the issue of laches, and we say in that respect one starting point is 1946 when the Crown started to build the dams and assert in visible form its ownership of the bed.

The Crown says, "Oh, there's a prejudice because we can't go back and look at what happened in the 1880s," but, of course, that prejudice had already occurred. In any event a liberal approach should be taken on issues of delay in a Treaty context and on that basis we invite the declaration or at least an adjournment so that the consequences of the Court decision can be worked through.

So that was the overview that I wanted to give you and I want to come back and look at some particular parts of that.

The first point I made was that the river was a taonga, and if I could take the Court briefly to the evidence of Mr Tamati Cairns, which is in the second case – second volume in the case on appeal at tab 10.

ELIAS CJ:
Sorry you might need to bear with us because I'm not sure –

MR MILLARD QC:
I'm very aware of the number of volumes that are –

CHAMBERS J:
Sorry which volume?

MR MILLARD QC:
Volume 2 of the case on appeal.

CHAMBERS J:
Yes I have that.

McGRATH J:
Green, if the colour helps.

CHAMBERS J:
Right, and tab number, tab?

MR MILLARD QC:
10.

CHAMBERS J:
10, thank you.

ELIAS CJ:
Well, I certainly don't have it, sorry.

GLAZEBROOK J:
A number of us are missing it.

MR MILLARD QC:

The authorities are colour coded but the original case wasn't?

ELIAS CJ:

So what tab?

MR MILLARD QC:

Tab 10 and beginning at about – beginning at page 247, paragraph 17 he starts talking about the Waikato River and paragraph 19 he says, "The Waikato River is a taonga of the Pouakani people. It is a highly prized resort and is the personification of the people," and gives the pipihā, talks about the taniwha. It enhances the mana, or prowess of the river and inherently the mana of the people themselves.

And paragraph 26 this pipihā denotes the importance of the river to Pouakani. It was not only a source of identity but a source of mana and prestige. The pipiha shows connection of the people to the river. The rangitira of people are likened to the taniwha who reside in and are guardians of the river. It denotes special – it denotes spiritual connection between people and the river and then talks about their guardianship or kaitiakitanga, the tiki taonga and the use of kai.

At paragraph 38, or sorry, perhaps paragraph 37 he says that, "Te mana or authority over the land or river was held by the hapū." The concept of iwi was a modern concept. He said, "This is very important for the hapū associated with Pouakani. The Pouakani Block sits on a major boundary between the people descended from the Tainui waka to the west and the Te Arawa waka to the east. On the western side were Ngāti Maniapoto and Ngāti Raukawa. On the eastern side, Te Arawa and Tūwharetoa. These are all large iwi groupings. The hapū who connect to Pouakani can whakapapa to all these iwi, therefore the autonomy of the hapū at Pouakani was paramount as there was no one iwi who could assert mana over the area."

I just mention that because if the Crown tries to pigeon hole the Pouakani people into one of either Maniapoto or Tūwharetoa and they said, "Well, we can't be and, in fact, we can to go to Raukawa and Te Arawa as well."

But – so that's a slight diversion from the importance of the river.

It talks at paragraph 42 about waitapu which were in urupa and rock drawings and palings along the river bank, the spiritual use of the river and concludes at paragraph 59. "In summary the Waikato River was a highly valued taonga to the Pouakani people. It was a source of identity and prowess. The people were inseparably connected to the river. They had an obligation as kaitiaki to maintain the life force of the river. In doing so they were able to reap the benefits of the river, including using the river to gather food and using it for spiritual purposes. It was a source of sustenance and wealth and was integral to maintaining the mana of the people and the tribal relations. For these reasons the Pouakani people would never have agreed to part with or sell the river. To do so would be to lose their identity and their mana as Pouakani.:

At paragraph 3.3 of my written synopsis I say that the tribunal in the Pouakani report found that the 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 Pouakani hearings were adamant that the Waikato is regarded as a taonga.

And several years later at the trial of this matter, there were members of the Pouakani people sitting in Court that Mr Cairns said continued to exercise kaitiakitanga of the river.

I can come through to the purchasers themselves, and take the Court to –

ELIAS CJ:
Sorry, there were – I'm just looking at the evidence which follows – seven separate hapū is the evidence. The Pouakani people comprise seven hapū do they?

MR MILLARD QC:
Basically, yes, drawn from those hapū.

ELIAS CJ:
So I mean, presumably, those who were the proprietors after the land went through the Native Land Court were the hapū who were occupying that land, not the whole Pouakani people, is that right?

MR MILLARD QC:

Yes, they certainly divided it up and there was also, it appears, one or two put in as nominal people, nominal owners because they knew they had to sell to meet costs.

ELIAS CJ:

Yes, well there are always odd things happening in those sales but, basically, this would have been not the whole of the Pouakani people but the hapū with the closest connection to those particular blocks of land –

MR MILLARD QC:

Yes.

ELIAS CJ:

– is that right?

MR MILLARD QC:

Yes.

ELIAS CJ:

Thank you.

MR MILLARD QC:

Now the – if I can take you to the orders that were actually made. There was – you should have a very large volume in terms of the overall size.

ELIAS CJ:

The orders and titles?

MR MILLARD QC:

Yes.

GLAZEBROOK J:

Have you got a copy Madam Registrar?

MR MILLARD QC:

And you see the first one that I wanted to take you to was tab 1, which is Pouakani Block 1 and that's the Native Land Court order dated 24 September 1887. The land

in the order is best illustrated by the map which is just one in. If you look at that you will see the river is shown in blue and the boundaries of the land are shown in pink and, of course, the boundary is on the south side of the bank on the land side of the river. It doesn't go into the river. There's no indication that it was intended to cover the river and as you go through the other ones, Pouakani 8 is the next one –

CHAMBERS J:
Was there evidence as to whether that was standard surveying practice at that time?

MR MILLARD QC:
Basically, yes. I'm pretty sure that Mr Dwyer did say that in his evidence but... And if you look at each of these maps of the orders you will see it's the same sort of thing happens and also in the certificates of title that follow.

When one comes to the sales, they are in the third case tab and a little bit, sorry, in the third volume of the case on appeal, and you see there that that sort of concept is simply picked up again. You have the land described –

ELIAS CJ:
What page do you want us at?

MR MILLARD QC:
In the case of Pouakani B6A, it's page 809 that I wanted to take the Court to. They're sort of folded out because of the size of the signature pages but you've got –

ELIAS CJ:
But the descriptions of the land here because these deeds are in Māori, are they bounded by the river or how are they described?

MR MILLARD QC:
Well in –

ELIAS CJ:
Sorry, that's the minute book is it? No it's a statement in Māori language in contents on this deed.

MR MILLARD QC:

So for the purchase deeds I'm going to volume 3 at tabs 28 and 29.

ELIAS CJ:

Yes.

MR MILLARD QC:

And there is both an English and a Māori version. In the English version, if you look at page 804A, it's bounded towards the north by the Waikato River, and the plan that you see there shows exactly that, again with a red line running along the south bank of the Waikato River. They actually had more than one transfer because they were taking them around but you get the same thing when you come to the deed for B7, B8, B11, C3, B10 and E4 of which it's B8, C3 and B10 which are the river blocks.

GLAZEBROOK J:

Excuse me Mr Millard. Justice Young and I don't seem to have any of these volumes with us. Can you just give us the lot please? I don't seem to have anything.

WILLIAM YOUNG J:

Mr Millard, sorry. Do they show anything other than that the boundaries and the agreements refer to –

MR MILLARD QC:

That was a – I was going to suggest that perhaps that was the easiest way is that –

ELIAS CJ:

Just tell us.

MR MILLARD QC:

Yes, if I just told you.

ELIAS CJ:

Yes.

MR MILLARD QC:

In the case of the B8, B10 et cetera, it's bounded to the north east by the river and, again, the plan shows the boundary as being at the river.

ELIAS CJ:

Do you know what the word is used in the Māori translation of it –

MR MILLARD QC:

I'm sorry, I can't –

ELIAS CJ:

– for "bounded by". It's not – anyway. It's just that I have seen deeds that go into the waters but they're earlier ones, "e roto".

MR MILLARD QC:

Perhaps if we can come back to – I'll get my junior who knows.

ELIAS CJ:

Yes.

MR MILLARD QC:

So that was the conveyance to the extent they signed conveyances they signed.

In the case of Pouakani 1, it was taken by virtue of a Native Land Court order to meet survey costs. The costs were $1650, sorry pounds, but it was valued at £2000. So the 17 Māori were paid the difference, but it would have been a matter of agreement before the Native Land Court as to which block of land was to go to the Crown for the survey costs.

So in a sense, you have a truncated sale and purchase there, but it was relevant that the order that they were looking at for that purpose was a Native Land Court that had it bound by the river rather than going into the river.

At the time that these transactions took place, there were acts in force that required informed consent to be obtained. Now these acts didn't say they bound the Crown but the Native Lands Fraud Protection Act 1881 and Amendment Act 1888 was in force, and I refer to that at paragraph 4.5 of my written synopsis.

There was also section 5 of the Native Lands Fraud Protection Act 1881 which treated as invalid purchases contrary to equity and good faith with a particular linkage to sales that were procured through the sale of alcohol.

Although those acts do not bind the Crown, they are an official recognition when you were dealing with Māori at that time in New Zealand's history, there was a need to protect them against bargains that were unfair against sales without their full and informed consent. And if that obligation rested on the Pākehā purchase, how much more so must there be inequitable on the Crown as the Treaty partner.

So those were the general provisions which also sort of have been picked up in *Symonds* case which I'll come to a bit later, where the Court there recognised that there was a need to protect Māori against exploitative bargains.

In the context of Pouakani, Pouakani is a bit north of Taupō. It's adjacent to the King Country. It was in an area where there had been little European penetration at the time of these sales. There were no English language schools there. There were no missionary schools there and if you look at the deeds, there's some disagreement between the two experts but a large number of the vendors simply signed by a cross. So they couldn't even sign their own names. Even if they could sign their own names, it didn't necessarily follow that they understood written – read what was there.

It would appear that most did not have legal assistance at the time of the sale. There were one or two that were, or a small number that had lawyers witness their signature but for the large part it was postmasters, JPs and the like.

I could take the Court to the references but unless you want me to. I've got them all there –

ELIAS CJ:
Yes.

MR MILLARD QC:
– you can put notes at page 6 of my submission.

There is an issue about the price. The appellants in the first instance learned evidence that the price was too low. Dr Loveridge came back and said, "Oh, no, the price is high," but there was, then, supplementary evidence put in by Mr Stirling that gave very detailed evidence as to why he said the price was low.

But in my submission it doesn't really matter because some of the Canadian cases it's clear that the fiduciary duty was imposed notwithstanding there was a fair price and, of course, when one's looking at the price, what was being looked at was the price for the visible land, so that when you're looking at comparatives, they were looking at blocks that wouldn't necessarily be bound by the river.

At the time the Crown was the only realistic purchaser. There had been, originally, rights of pre-emption at the very beginning of British rule in New Zealand which, in fact, is – that right of pre-emption is provided for in Article 2. In my submission that's significant because Article 2 of the Treaty protects taonga and then goes on to provide a right of re-emption to the Crown. The inference has to be that the right of pre-emption was to protect the Crown by interposing a purchaser who would deal fairly with them, rather than allow them to be exploited by land-jobbers, land speculators, and that also was a comment made by Justice Chapman in the *Symonds* case.

ELIAS CJ:
Well it was also to provide for orderly settlement and to raise money for the settlement, so it was mixed, wasn't it?

MR MILLARD QC:
It was mixed but the fact that it is in Article 2 –

ELIAS CJ:
Yes.

MR MILLARD QC:
– says that part of the purpose is to protect against exploitative bargains that deprive Māori of their taonga. It doesn't stop the Crown entering into a fair bargain with proper consent and then proceeding with orderly settlement by providing services and the like, making a profit on the way through.

Now that right of pre-emption lapsed in the 1860s but was re-imposed as part of the Native Land Court processes. In relation to this area, it was a changing state as to whether it was on, whether it wasn't, what it applied to. It certainly applied to the sale of Pouakani B6, the main block.

ELIAS CJ:

Is this submission directed at the Crown was, what do you say, monopsonate –

McGRATH J:

Monopsony.

ELIAS CJ:

Yes, a monopsony.

MR MILLARD QC:

It is less directed to that and more directed to saying that the Crown was the only realistic purchaser –

ELIAS CJ:

Yes.

MR MILLARD QC:

– which, therefore, meant that it had a duty – that accentuated its duty to act fairly because Māori couldn't basically sell elsewhere. And if one thinks of the Native Land Court process which means that sale's inevitable. That is relevant to that, that the Crown must act fairly.

Even Dr Loveridge, the Crown expert, agreed that people involved, and I've got the quote there, "All that can be said with any certainty is the people involved with the Pouakani block at this time, owners and officials alike, seem to have believed that the Crown's pre-emptive rights remained in force. That was certainly –

ELIAS CJ:

What was that 1891 commission about? Was that about the – did that lead to the setting aside of the earlier sales?

MR MILLARD QC:

Yes.

ELIAS CJ:

Yes.

MR MILLARD QC:

And Lawrence Grace, local Member of Parliament, gave evidence to that commission, which is at Mr Stirling's brief which is volume 2, tab 12, page 355, para 177, Lawrence Grace also testified before the 1891 commission confirming local Māori, including Pouakani people still knew little about the government's native land laws. When asked by the Commission whether natives or Europeans generally are acquainted with these native landlords, Lawrence Grace replied, "I think the Māoris in the Taupō district," interpolated, "Know this one fact, that they're barred from any dealing except with the Crown. Beyond that I do not think they know very much about the subject."

And Dr Loveridge indicated that in the period of about 10 years leading up to that, and you can see this at page 679 under tab 16 in cross-examination, "There'd been some 550 acts covering the entire spectrum of legislation of all kinds. If you pick out the principal native land legislation, pieces of native land legislation, the number is smaller but there would be a relatively small number of people who had full command of the details," and the bench put it, but to come back to the question, "Do you agree with Mr Myer that it would have been very difficult for Māori to keep up with the legislative developments over the period?" "For most Māori."

So you had at the time of these sales, the problem for Pouakani Māori that they basically thought the Crown was the only purchaser and had to look to the Crown to protect them when they sold against selling something that they didn't realise they were selling.

There were lengthy hearings about these blocks because there were some initial orders, then –

ELIAS CJ:

Where were these hearings held? Were they Taumaranui or...

MR MILLARD QC:

Cambridge and Taupō.

ELIAS CJ:

That's right, Cambridge.

MR MILLARD QC:
It's in the – they were away from, well away from the Pouakani land which was a source of complaint and they did try to ask the government to hold them closer but –

ELIAS CJ:
Yes, I'd forgotten that.

MR MILLARD QC:
So there were these lengthy hearings and the first time round most of the orders were then set aside and they had to come back and begin all over again. The one exception was Pouakani 1.

Dr Loveridge, in his evidence, at tab 15 says at para 91 that, "None of the material available relating to these proposed sales contains any reference to the status of the Waikato River. If this was discussed between the prospective vendors and the Crown purchase agents, no record of these conversations has survived.

Then at 115, "As in the case of 1887," this is the rehearing, "The Court heard a very large quantity of evidence about the Pouakani blocks, less block 1 and little related to the Waikato River. Most references to the river were once again simple geographical comments and the importance of the river to the various hapū, or members, was not discussed. No requests appear to have been made to the Court to have the river or its bed treated differently than the land, to have any part of it reserved or to have special restrictions placed upon it. Although B6, one of the sections with a river boundary did have restrictions on alienation placed upon it. Nor does it appear that when the ownership lists and titles were under discussion, the Court was asking the questions by Māori complainants concerning the legal status of the Waikato River or its bed. There is no record to the best of my knowledge of such questions being asked informally outside the Court session."

He then comes on to the later sales and at paragraph 149 on page 657, "None of the documentation relating to this sale," B6 and the like – sorry, B8 and the like, "Contains any record of questions or discussions concerning the legal status of the Waikato River or its bed, relative to B8, B10 and C3, or how it would be affected by the sale."

Then he makes a rather extraordinary comment, “There was ample opportunity for the owners to raise such issues with the Crown purchase agent more reasonably or vice versa when the deed was explained but we simply do not know if anything like this took place. With the sale of B8, B10, C3, all of the land on both sides of the Waikato River, below its junction with Maraemanuka Stream were owned by the Crown say for Whakamaru and gives those references.

At page 1, at paragraph 170 dealing with B6A, “The documentary record for this purchase is even poorer than that for the 1892 purchases. Once again, none of the documentation relating to it contains any record of questions or discussions concerning the legal status of the Waikato River or its bed relative to B6 or how it would be affected by the sale of B6 or B6A. There’s ample opportunity for the owners to raise such issues with the Crown purchase agent when the deed was explained and with the Native Land Court when the partition application was heard in 1899 but we do not know if it happened.”

Just by way of explanation of that last comment, the Crown seems to have lost the records of the partition application, so...

ELIAS CJ:
Is – which of the sales of the deed books lost, the minute books lost for?

MR MILLARD QC:
Well, in the case of Pouakani B6 not everybody signed.

ELIAS CJ:
Yes.

MR MILLARD QC:
So they had to go back to – the Crown went back to the Native Land Court and had it partitioned so that those – so it could get land from those who had sold. And so you end up with B6A as being the one that didn't –

ELIAS CJ:
No but there is indication that some of the minute books have been lost. The Crown makes that point, which –

MR MILLARD QC:

Well, it was the minute book of that partition application that's been lost.

ELIAS CJ:

I see. Yes.

MR MILLARD QC:

Then at page 674, paragraph 176, Dr Loveridge says, the Crown expert again, "Conspicuous by its absence from this documentary record from the point of view of the present case is any explanation of what Māori thought or knew about the impact of the sales on land on the Waikato River or its bed. If they did ask any questions about the subject no sign of either the questions or the answers has been uncovered in the course of the research of this report." And his was a, a very detailed and thorough report. We don't agree with everything in it but quite obviously he had searched diligently to find it. And you get a similar sort of comment from Mr Stirling for the appellants at paragraph 245.

WILLIAM YOUNG J:

Which tab is Mr Stirling again?

MR MILLARD QC:

Mr Stirling is tab 12.

CHAMBERS J:

Tab 12. Thank you. And the paragraph number was?

MR MILLARD QC:

245.

CHAMBERS J:

Thank you.

MR MILLARD QC:

We say, of course, that the duty was on the Crown to explain what was being sold rather than an onus on the vendor Māori to ask the question, which – whereas Dr Loveridge seems to put it the other way round. And –

WILLIAM YOUNG J:

What if it was just uncertain? I mean there's certainly scope for the view that it's only the *Mueller* case that establishes the application of the ad medium filum rule in New Zealand. So perhaps there wasn't a view as to who owned the river.

MR MILLARD QC:

I have to go back on my – trying to recall my submissions last time round. There were other cases that –

ELIAS CJ:

There were a – I could only find two when we considered the case last time and there are indications to the contrary. I mean it really does seem that the whole issue didn't arise until or was brought into focus by the *Mueller* case.

MR MILLARD QC:

There'd been the earlier *Lord v Commissioners For the City of Sydney* [*Sydney Harbour*] (1859) 12 Moo PCC 473, 14 ER 991 (PC) case that, which was quite a bit earlier, that applied that principle in Australia.

ELIAS CJ:

Yes. But its application in New Zealand circumstances hadn't been considered, although I think there are a couple of cases where it seems to have been assumed.

MR MILLARD QC:

Yes.

ELIAS CJ:

But those may well have been in conveyances between Europeans. In fact it seems very likely that they were.

MR MILLARD QC:

Yes. There was, there was one in Taranaki which I think was, which I'm not sure that the Court referred to I referred to because it was fairly equivocal and it was just basically an assumption. And then there was one of Chief Justice Stout on an inlet where he didn't apply it because he was looking at the issue of navigability.

WILLIAM YOUNG J:

What – another sort of related point, what was the evidence about continued use of the river after the sales?

MR MILLARD QC:

There, there was a – it was – there wasn't any specific evidence on that.

WILLIAM YOUNG J:

Because if the owners thought they hadn't disposed of the river presumably they would've continued to use it. Whereas if they had thought they'd disposed it they might not have. Or alternatively the sale of the land may have inhibited the use of the river.

MR MILLARD QC:

There was some evidence, and I, without great specificity from Cairns that they continued to exercise kaitiakitanga over it, but not specific evidence of usage.

ELIAS CJ:

On the Whanganui River the eel weirs continued to be used after sale of blocks up the river, so one would have thought that there is evidence that you've got here, must be Mr Cairns I think, that the river was used for, as a food source.

MR MILLARD QC:

But not in any way of – the river flows far too fast for eel weirs and that sort of thing. It was getting the crayfish and the like that the – which would be a non – you wouldn't need structures for. So you weren't actually interfering with the bed of the river.

CHAMBERS J:

What would be the practicality of getting to the river? What's the riparian land with sole – I mean who physically occupied land? Was it farmed or what happened?

MR MILLARD QC:

Well part – there was B, the remainder of B6 was still on the riverbed, is still along the river shore. There were also some crossing points which were outside that bit which seemed to continue to be used, but – so there must have been access still available.

CHAMBERS J:

What was happening on the other side of the river?

MR MILLARD QC:

Most of that land had been sold before the Pouakani land.

WILLIAM YOUNG J:

And that's largely in private ownership isn't it?

MR MILLARD QC:

Yes.

WILLIAM YOUNG J:

And then was that later compulsorily acquired as and when needed by the Crown for hydro development?

MR MILLARD QC:

Some of it, sorry, some of it still was still in Crown and some of it was – some of the land even in the 1880s was in Crown, remained in Crown throughout on the north side or the right side of the river, depending –

WILLIAM YOUNG J:

On the right, true right bank.

MR MILLARD QC:

Right bank. But –

ELIAS CJ:

To get the true right bank do you face –

WILLIAM YOUNG J:

Downstream.

MR MILLARD QC:

You face downriver.

ELIAS CJ:

Yes. Thank you.

MR MILLARD QC:

So some of that was still in Crown ownership by the time of the dams.

WILLIAM YOUNG J:

Some of stretches of the river adjacent to these blocks were gorges and rapids. Is that right?

MR MILLARD QC:

Yes. Yes, quite deep ones. And which –

WILLIAM YOUNG J:

Have we got a map which depicts that in relation to the block boundaries?

MR MILLARD QC:

In terms of dividing between blocks, or...

WILLIAM YOUNG J:

Yes. I'm just – I mean I've – there's quite a useful map attached to the Crown submissions that breaks out the various blocks and the areas and ownership. I'm just wondering where the original gorges and rapids would've been in relation to that. It may be that – no, don't – just to – it was just a thought. Don't try to deal with it now.

MR MILLARD QC:

I can only speculate. I know that there was difficulty get to the, even to the cliff, but on the really steep gorges for survey purposes Dwyer made some comment to that effect, so I suspect that the boundaries on these blocks were at a more leisurely pace of river rather than the deep gorge. So that they could get their, their marker –

WILLIAM YOUNG J:

Oh, you mean the – so the survey lines would've been on the easier, bits of easier access?

MR MILLARD QC:

That would be my – I'm speculating a bit but I know Mr Dwyer said that there were some problems in just carrying out some of these surveys on the really steep gorge areas.

ELIAS CJ:

You said there, that there was a strip that was reserved and was not – was reserved from future sale. Was that –

MR MILLARD QC:

It was partitioned out might've been the better expression.

WILLIAM YOUNG J:

Is that B6E?

MR MILLARD QC:

Yes.

WILLIAM YOUNG J:

The upstream end.

ELIAS CJ:

6E. So was that an area – that was a strip occupied presumably, was it, by –

MR MILLARD QC:

Yes.

ELIAS CJ:

– kāinga or something?

MR MILLARD QC:

So when they were – the non-sellers were sort of put into that area, as I understand it. I think that's right, that it was an occupied area. I can probably – I can check that over the adjournment.

ELIAS CJ:

Yes.

MR MILLARD QC:
That in fact might be a convenient point, because I'm just about to go to the new documents.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.50 AM

MR MILLARD QC:
Madam President, a little earlier you raised the issue of the Māori translation of the deeds. Perhaps if I got my junior to deal with that.

ELIAS CJ:
Yes, thank you. So it's?

MR ARMSTRONG:
Volume 3 Ma'am. And starting at tab 28.

ELIAS CJ:
I don't actually have a 28. I've got a line. I've got 27 and I then I go to –

MR ARMSTRONG:
It should be the second tab in, Ma'am, which is Pouakani B6.

ELIAS CJ:
Yes, thank you.

MR ARMSTRONG:
And if you move from there to page 804 there should be a yellow page there headed, "A clear statement in the Māori language of the contents of this deed." And there's a fairly long introductory part to the deed there. On the fourth line down you'll see it referring to Pouakani B Number 6, or Pouakani B6, and the key part where it begins the, outlining the boundaries is the sixth line down, the sentence beginning (speaks in Māori language).

ELIAS CJ:

Yes.

MR ARMSTRONG:

And that first part there (speaks in Maori language) and I can confirm Ma'am that I consulted with Mr Cairns on the translation of this arguing that he has greater expertise than I but "rohe" is boundary, "hauraro" is north and "te awa Waikato" is the Waikato River.

ELIAS CJ:

So bounded to the north by the Waikato River?

MR ARMSTRONG:

Yes Ma'am.

ELIAS CJ:

Yes, thank you.

MR ARMSTRONG:

The next deed is the following tab, tab 29. That is the deed for –

CHAMBERS J:

Sorry, what page?

MR ARMSTRONG:

It begins on page 810, that's the beginning of the deed for B7, B8, B11, C3, B10 and D4 and the actual page in question is 813, which contains the Māori version. It should have 813 in the top right-hand corner and be headed, "A clear statement in the Māori language of the contents of this deed." Again there's a fairly long introductory part there but if you move down to the eighth line, beginning with (speaks in Māori language).

ELIAS CJ:

Yes.

MR ARMSTRONG:

Now this part Ma'am it actually doesn't describe the boundary as it did in the earlier deed. It refers there to (speaks in Māori language) the blocks known as B7, B8, B11, C3, B10 and D4. It then goes on to describe them in the Pouakani block (speaks in Māori language), so the area as shown on the map. (speaks in Māori language 11.54.57), so shown marked with red lines.

ELIAS CJ:

Yes.

MR ARMSTRONG:

So there's no description of the boundary there but it refers to them as etched in red.

ELIAS CJ:

Yes, I see, thank you. So it just refers to the red line?

MR ARMSTRONG:

Yes Ma'am.

ELIAS CJ:

It doesn't refer to the river?

MR ARMSTRONG:

No Ma'am. And that can be seen, the plan there over the page on 813A which shows those blocks and the red line etched in red on the landward side of the boundary.

ELIAS CJ:

Thank you very much.

MR MILLARD QC:

I got the point in my submissions where I was saying there was no evidence that the Crown had explained to Māori what they were, in fact, selling when they sold. If I could just take the Court to two Tribunal reports that bear on the issue, the first of which is in volume 5 of our authorities, the yellow, the one with the yellow page, and it's at tab 88. This is the Mohaka River report where at issue was basically a direct

dealing between Māori and the customary owners. So it was not one of those cases that had been through the Native Land Court.

WILLIAM YOUNG J:
Do you mean a direct dealing between the Crown and the customary owners?

MR MILLARD QC:
Yes, sorry. And page 38, second complete paragraph down, the Tribunal found that, "In the light of the Crown's land purchase policy and practice it seems to us that the Crown's imposition of riparian law on a people who have little direct contact with Pakeha or previous experience of land selling was essentially an assertion of colonial power and disregard of Māori customary rights and interests under the Treaty. It would also reflect the prevailing assumption that New Zealand was a colony of settlement inhabited by indigenous people without settled law or social and political organisation. It was the beginning of a process of converting customary land and water rights into land titles and water rights derived from the Crown. And of dispossessing Ngati Pahauwera of a taonga on which they depended for their livelihood and tribal identity. Far from carrying out its fiduciary duty to protect Ngati Pahauwera customary and Treaty rights in the river, the Crown's overriding concern was to facilitate the opening up of the area to Pakeha settlement."

So it found that the Crown had a duty to explain fully the particular, as well as the general nature, of the sale in terms that could be understood by the vendors. Replacing the boundary in the river separating the lands of the Crown from those of the tribe was a novel concept and one did that not fit easily into tradition. If the Crown had wanted to acquire ownership of any part of the river it had a duty to spell out in detail the exact nature of the transaction. The treaty allowed for new ways of doing things but it incorporated a promise that Māori rights would not just be respected but actively protected. The Crown could not acquire land or other resources from Māori by sleight of hand, particularly resources of such significance as Mohaka.

So in that instance they concluded that no part of the river was included in the direct dealing between the Māori customary owners and the Crown. But it's relevant to note a little earlier the reference to the process of converting customary land and water rights into land titles. So the Tribunal did appear to accept that it was feasible for the water rights to be converted into land titles.

ELIAS CJ:

Sorry, what are you referring to there, what you've just taken us too?

MR MILLARD QC:

Yes.

ELIAS CJ:

Yes.

MR MILLARD QC:

In the *Wanganui River* case in the second round 1962, which are the cases in the volume 2, the green covered volume of authorities, tab 27, the case, it had *R v Morison* [1950] NZLR 247 (SC) case in the 50s. You'd had the amending legislation. It then came back to a full Court of – to Court of Appeal, but in the meantime the legislation that allowed it to come back had also allowed the Court to seek the opinion of the Māori Appellate Court, which it had done, and it's apparent that the, that Court had given an answer more or less along the lines that there was no evidence to displace the concept of the riparian owners owning out into the bed.

ELIAS CJ:

I'm not sure that that's an accurate description of it, but – where are you taking that from in the *Wanganui River* case?

MR MILLARD QC:

If I could take the Court to page 613, there seems to be one part of the answer given there down the bottom. Then a more –

ELIAS CJ:

They did have to rather reinterpret the '55 decision in this case. However. You're not taking us to that?

MR MILLARD QC:

Well – then at page 615 you get another quote from it. It's unfortunately doesn't seem to have been given in one nice, neat part to it, and you get that, "The whole of the tribal territory, even the most extensive, hard been investigated as one block. The Māori Land Court might well have been disposed to issue a freehold title or

series of such orders or other form of orders for title according to the relevant form described by statute at the time of investigation. Such order or orders would have been founded upon the claims made by the tribe according to its ancestral and other rights under Māori custom, leaving the claims of the hapūs to their respective territories to be determined by native partition," et cetera. "But this procedure was not followed either by the Māoris themselves or by the Court. On the contrary, the subtribes or smaller groups themselves made separate applications to be awarded their respective areas."

ELIAS CJ:
That's what I was referring to in indicating that my recollection is that the Māori Appellate Court said it's too late for reasons of practicality and that that's what the Court picked up. But they – Cleary rather extrapolates from that.

MR MILLARD QC:
But in this – just sort of continuing down on page 616, Justice Cleary says, "Once the position is reached that there existed no ancestral title to the riverbed in the tribe separate from the ancestral right to the riparian lands in the hapū, it seems to me that the substratum of any separate tribal claim to the ownership of the riverbed is gone. So he's accepting that once they sort of divided out then the implication was that the, the riparian hapū were entitled to the bed.

If you come down he deals with navigation at line 41 but didn't consider that continuing navigation on the river derogated from what is in turns described as, "the rights of ownership of sections of the river residing in the riparian hapū." The decision in *Mueller* was invoked to support the argument the existence of right of passage was inconsistent with the right of ownership but he didn't run with that.

Now, a little earlier the – at page 608 in the judgment of President Gresson beginning near the top, he says, "I am sceptical that under the customs and usages of the Māori people it was ever thought that those who owned the banks were different from those who owned the bed of the river. It would have been a very inconvenient state of affairs if the members of the tribes or hapū who owned and occupied the land on the banks should set their weirs or fish traps on land owned by another or others. There is no convincing evidence to support a contention which apparently was raised for the first time in 1938 upon an application for the investigation of the title to the bed

of the river and I adopt the view of Justice Hay in *Morison*. It is difficult to understand why it should be sought to make a distinction between the Wanganui tribe as a whole and the persons who as a result of the investigations of the title have had their title established to the various blocks respectively. The Court is entitled to assume that the rights of those persons arose through there being branches or subdivisions of the tribe and a perusal of the judgments deleted by the Courts makes that clear," et cetera, "that according to Māori custom the bed of the Wanganui river belonged to the Māoris through whose territory it ran just as much as did the land forming the banks. Moreover, those judgments also establish that according to Māori custom it was not a case of the bed being owned by a separate unit by the tribe as a whole. To quote the following statement from the judgment of Judge Brown in the lower Court, 'The Court, in all its experience of native land and investigation of titles thereto never once heard it asserted by any Māori claimant that the ownership of the bed of a stream or river running through or along the boundaries of the land the subject of the investigation, whether that stream or river was navigable or not, was in any way different from the ownership of the land on its banks, nor was it ever heard denied that the tribes of hapūs that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it.'"

CHAMBERS J:
So what, to what end are you citing this to us Mr Millard?

MR MILLARD QC:
Well, earlier this morning there was the issue of whether when Native Land Court awarded title how far the title went. Was that title out to the river line?

CHAMBERS J:
So you're – and the point of this? What do you say this helps establish?

MR MILLARD QC:
Well...

CHAMBERS J:
I would've thought what was said in that passage, if you rely on it, rather goes against the argument you've been presenting to us. I mean the logic of what the

President is there talking about is that everyone would have assumed that the river and the banks went together.

ELIAS CJ:
But that's the argument for the appellants.

WILLIAM YOUNG J:
Well no, no it's not, because they're saying when we sold the banks we kept the river, we thought we were keeping the river.

CHAMBERS J:
Yes.

ELIAS CJ:
This is an extremely controversial decision which is arguably inconsistent with Ngāti Apa and I'm surprised that you take us to this – I can see that it supports in some respects your case but as –

CHAMBERS J:
It also cuts against it to some extent, that's why I wanted to find what you saw as significant in this for us.

MR MILLARD QC:
What I'm saying is that it is not inconsistent with the concept that when the Native Land Court sought to convert customary title into individualised title it was – it included the bed of the river. I'm not saying, however, that Māori owners necessarily realised that and so that when it came to the sale they realised they were selling it. What I'm –

CHAMBERS J:
Well this seems an odd passage to be citing to us if that's the proposition.

MR MILLARD QC:
If I could come back one stage and look at the process, what was – the Crown at least was trying to achieve in the period of 1865, or 1863 forward with the Native Land court is it was trying to create individualised titles out of customary ownership.

It would be consistent with that, that if Māori custom treated ownership of the bed as being with the riparian owners that that did, in fact, occur. But it's a different issue to say that Māori, when they sell, would be aware, when they're looking at a plan on a piece of paper that, in fact, they were selling beyond what was on that piece of paper and basically the reason for going to that case, which I certainly accept is controversial and it's not clear that it is necessarily still good law, is that it does illustrate that there would be difficulties with somebody who wasn't on the title to come along and say, "We're still entitled to the river," in light of what had happened at that stage and the sort of evidence that is there.

But it still doesn't get round the problem for the Crown that did it properly explain the transaction when it was buying the land? And in that respect I'd like to take the Court to a Tribunal report that came out on 24 December of last year, after our submissions were in, and this is in the supplementary bundle that you should have received yesterday at tab 1. Now this is the *Waitangi Tribunal National Park District Enquiry Report*.

The National Park area was an area where the land sales were through the medium of the Native Land Court. The Tribunal there was confronted with the same reality that we're confronted with the Waikato River that for all practical purposes, the local Māori had lost possession and authority over their waterways. So they start at that practical point at page 1215 under paragraph 13.5.3.

GLAZEBROOK J:
Sorry, what tab? I've just found this sorry.

MR MILLARD QC:
1215, page 1215, tab 1, paragraph 13.5.3, "Having considered how Ngā Iwi o te Kāhui Maunga came to be deprived of the possession and authority they once wielded over the waterways of our inquiry district, it is necessary to question whether such deprivation met with their consent. In other words, did Māori knowingly and willingly seed such possession and authority over their streams, rivers and lakes. Crown counsel submitted that the issue of consent may need to be examined on a case by case basis and commented too on the need for caution where there is a lack of eve. We acknowledge these concerns but note that the evidence in this inquiry is such that it is possible to identify instances in which Ngā Iwi o te Kāhui Maunga did not relinquish possession and authority over their waterways wither knowingly or

voluntarily. For those instances where there is an evidential gap in the documentary record, we must bear in mind Māori conceptions of waterways are single and divisible entities with whom they are intrinsically connected. In our view these conceptions are of utmost importance when assessing whether Māori knowingly and willingly seeded possession and authority and, of course, that concept applies to the Waikato River. Commonly or not common at all, it is important to note at the outset that following the signing of the Treaty, the law operated in New Zealand was to be sourced to two streams namely English law comprising both common and statutory, and Māori customary law.

The Whanganui River Tribunal commented on this, noting that the Treaty of Waitangi stands as an authority for this duality and the English Laws Act 1858 makes it possible for the two traditions to stand side by side. One must, therefore, consider, as the Whanganui River Tribunal did, what Māori had in mind when they parted with the riparian land. In other words, we must gauge whether the Ngā Iwi o te Kāhui Maunga can see if land transactions, in terms of Māori custom or in terms of the English legal system. It is necessary to bear such questions in mind as we examine how Māori lost possession and control of the district's waterways.

Applying the common law understanding to all land transactions is problematic. Indeed, while the common law may have certain connotations, these may be neither accurate nor valid when applied to the New Zealand context."

They then go on to consider the common law on different conceptions of waterways, noting the Māori concept of a single and divisible entity, refer to Judge Acheson's decision on Lake Omapere. Then, having gone through that they come, at page 1218, to the onus of proof. "Given the discrepancies between British and Māori understanding of waterways and the effects that alienation of land would have on Māori possession and authority, we are of the view that the Crown is under an obligation to ensure that Ngā Iwi – and accordingly we believe that the onus of proof should shift to the Crown and it should be the Crown that needs to prove, on a case by case basis, that Māori knowingly and willingly relinquished possession and control of the district waterways. This approach is consistent with the contra proferentem which holds that where there is an ambiguity an agreement or contract should be construed against the party which prepared it.

WILLIAM YOUNG J:

I'm not sure that it does actually but never mind.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But it's a Treaty principle. It's not a principle of common law or equity. Are you trying to say it's similar?

MR MILLARD QC:

Tell me, does the Tribunal deal specifically with what was said in the *Wanganui River* case by the president, by Sir Kenneth Gresson.

ELIAS CJ:

The Wanganui River Tribunal dealt with it but also the *Wanganui River* case fed into *Re The Ninety-Mile Beach* [1963] NZLR 461 (CA) which has been –

MR MILLARD QC:

Overruled.

ELIAS CJ:

And also the '62 case is very different from the '55 case, the approach taken which is why the Judges felt necessary to explain '55 case.

MR MILLARD QC:

So just continuing at the bottom of page 1218, "Land sales in our inquiry district were overwhelmingly initiated by the Crown," and that applies here, "Thus for our purposes it is appropriate that any ambiguities in the deed of sales can be construed forever by, in fact, Māori. Indeed that accords with the approach of the Mohaka River Tribunal."

Basically, what the National Parks Tribunal was doing or District Inquiry Tri –

WILLIAM YOUNG J:
Just pause there. I noticed the last bit of that paragraph, "Evidence presented to this tribunal in the case of customary use of the district's waterways continued long after the bed was vested in the Crown ad medium filum."

MR MILLARD QC:
That strengthens the conclusions drawn. It doesn't necessarily –

WILLIAM YOUNG J:
It's not necessarily fundamental to them.

MR MILLARD QC:
Well I would read that as not necessarily being fundamental.

WILLIAM YOUNG J:
Yes.

MR MILLARD QC:
But it's – but what is clear on that sentence is that the Tribunal accepted that the Crown had obtained title under ad medium filum but said that that was a breach of the Treaty because of the failure to get informed consent which in my submission the evidence of use may be helpful to whether or not informed consent was obtained but what the Tribunal is saying, and what we say, is the onus has to be on the Crown to prove that it got informed consent.

Just on continued use, it is implicit in para 52 of Mr Cairns' evidence, when he's talking about the river being used to provide food as koha increased with the establishment of the kīngitanga, the kīngitanga became the practice of pōkai, pōkai was the economic cycle for the kīngitanga representatives would travel around the Rohe Pōtae visiting different hapū. Each hapū was expected to offer kai to the kīngitanga as their contribution to the movement and its kaupapa. Pōkai continues today and last took place in early 2007. So it's implying that they would come to Pouakani and of course part of the koha and part of the increasing the mana of Pouakani was to provide food from the Waikato River.

I'd like to come on to the position of the Treaty which is part 5 of my written submissions. What I've endeavoured to show so far is that the Waikato River was a

taonga and if the Crown is correct that when they purchased the land they purchased the bed of the river then that was undermining the tino rangatiratanga the Pouakani people could exercise over the river, over their taonga. As such it is a direct breach of Article 2 of the Treaty.

CHAMBERS J:

The effect of your argument, Mr Millard, is, I think, given that you aren't claiming as customary owners, the effect of your argument, is it, that the High Court becomes an alternative venue for all, effectively for all Treaty breaches, isn't it?

MR MILLARD QC:

At least for direct breaches that potentially is. It depends, well it depends on what the Treaty breach is. We –

CHAMBERS J:

Well wouldn't you be able to dress up any Treaty breach as a breach of the fiduciary obligation for which you contend?

MR MILLARD QC:

Well it depends – if, for instance, as we conceded first time around, if section 14 of the Coal Mines Act Amendment Act applied we were out, in other words we do not –

WILLIAM YOUNG J:

Why would you be out? Because I mean you wouldn't be out under the Treaty because it would be expropriatory.

MR MILLARD QC:

But the act itself is a breach of the Treaty.

WILLIAM YOUNG J:

Yes –

McGRATH J:

It would have to go the Tribunal, it couldn't go to a High Court, you would accept?

MR MILLARD QC:

Yes.

McGRATH J:
That's the way I understood your argument.

ELIAS CJ:
You're not seeking to argue that the Treaty prevails over legislation?

MR MILLARD QC:
No. But we are saying that if there is a clear breach of the Treaty which doesn't involve a sort of modern exposition of Treaty principles which is reserved for the Tribunal then you can come to Court.

ELIAS CJ:
But you're coming to Court on your legal claim to which if there – on which you are grating an equitable responsibility, is that right?

MR MILLARD QC:
That's right.

ELIAS CJ:
Because of the Treaty.

MR MILLARD QC:
Because of the Treaty.

CHAMBERS J:
But the legal claim is not brought as customary owners.

MR MILLARD QC:
It's brought as vendors.

ELIAS CJ:
Well the Treaty claim is a claim of protection of property so I suppose arguably post-1840 Māori were entitled to expect that their property would be protected, is that right –

MR MILLARD QC:
That's right.

ELIAS CJ:
I'm just sort of – it's not necessary that their property be, is this what you're saying, customary property?

MR MILLARD QC:
That's correct, yes. Well particularly where the conversion from customary to individualised title was by way of an instrument that was imposed on them against their wishes, namely the Native Land Court.

CHAMBERS J:
Well is the net effect of the argument then that any Treaty breach can be brought before the High Court?

MR MILLARD QC:
No. If the Treaty breach –

CHAMBERS J:
Excluding a case where a statute might intervene.

MR MILLARD QC:
That's a major carve out, number 1. Number 2, it would have to be a breach of the – a clear breach of Article 2 rather than trying to develop the Treaty principles concept. Number 3, Article 2 of itself contemplates sale by Māori of its land, because of the right of pre-emption that is contained within Article 2, so that what we would say is that in developing how far the Courts should intervene, it can be done on a case by case basis, bearing in mind that the sale of the taonga is permissible in Article 2, is contemplated in Article 2, but does that sale nevertheless breach Article 2 because of some factor, as we say here, wasn't a willing sale. Because what Article 2 contemplates is a willing sale.

ELIAS CJ:
So is it the breach of the guarantee that you're bringing, that adds the fiduciary element?

MR MILLARD QC:

Well –

ELIAS CJ:

Because there has to be a subsisting property.

MR MILLARD QC:

What we would say is that Article 2 means that the Crown should not take away the promised, the guaranteed taonga, other than by a proper purchase and that that is a fiduciary duty that is sitting there under the Treaty that was then breached in this case.

CHAMBERS J:

So are the principles of the Treaty to which you've referred different from the Articles of the Treaty?

MR MILLARD QC:

Well no not –

CHAMBERS J:

On your argument?

MR MILLARD QC:

The principles are derived from the Treaty but there are some areas where the – it requires a more elaborate exegesis of the Treaty itself. If you're looking at modern rights which is where, one of the battlegrounds for Māori in the Tribunal is rights, do they have rights to petroleum, do they have rights to kiwifruit, these are the sorts of things that aren't obviously taonga when one's looking at Article 2 and one's –

CHAMBERS J:

They're all derived from Article 2, aren't they?

MR MILLARD QC:

Well they have to, the Māori claim has to be, well, Article 2 implies the right of development and that right of development therefore means that modern assets, modern resources are within the Treaty. But what we're concerned about here is a

very basic item, that it was guaranteed in the Treaty, so you don't need to go down that exegesis, that development.

McGRATH J:

Mr Millard, I understood you said that there was something there for the cause of action to arise a fiduciary duty there have to be something as well as the Treaty breach. Is that right? I understand that you – it's the breach of Article 2 you're relying on, but I'm just saying, there must be something on top of that to provide the cause of action if – am I right in that?

MR MILLARD QC:

What we're saying is that the – you need to look at a basic transaction, Crown, Māori, and look at that transaction in the context of the Treaty and say, "Does this transaction engage Article 2?" That will occur if it is dealing with a protected taonga. You then have to say, "That transaction may not be a breach of the Treaty if it is a fully informed sale, because Article 2 of itself contemplates sale."

McGRATH J:

So the answer to my question, "Is there something in addition?" am I perhaps misunderstanding you? I think you've analysed the elements of a direct claim under Article 2. But is there something in addition to Article 2 that's necessary to create the cause of action of a breach of a, breach of a legal, enforceable duty of good faith?

MR MILLARD QC:

It's the – what we're looking at is – we're looking at saying the transaction needs to be, can be understood in common law terms but with a Treaty overlay in the sense that common law would always respect a bargain between two willing parties each fully sui generis, each fully aware with no misleading conduct. What – the, the overlay that we say is that in deciding whether there is a remedy the Court should look at the Treaty and say, "Does that impose any evidential or extra burden on the Crown that requires the Crown to show that the transaction was between sui generis parties fully aware of what they were doing?"

McGRATH J:

Thank you.

CHAMBERS J:

Mr Millard, what do you say should happen on this appeal if we were to conclude that no one, Crown, Crown officials, or Māori, really understood what the law was at all with respect to non-navigable rivers in the 1880s?

MR MILLARD QC:

In my submission the Crown, virtually by definition, must have known what the law was.

CHAMBERS J:

Well what was the law?

WILLIAM YOUNG J:

Well that doesn't mean anything. The manifestations of the Crown, the people who dealt with the vendors, they wouldn't necessarily know about the ad medium filum principle or how it would apply to this particular stretch of water. The *Mueller* case was still a long away ahead.

MR MILLARD QC:

But it can't be announced or even in common law that if you employ an agent, the agent, you look at the knowledge of the agent and ignore the knowledge of the principal.

WILLIAM YOUNG J:

But what's the knowledge of the principal? Who is the – in whose head is the knowledge you attribute to the Crown?

MR MILLARD QC:

Well...

WILLIAM YOUNG J:

Or is it just a sort of an assertion?

GLAZEBROOK J:

And would anybody really have been thinking about this in terms of a river that, if it was non-navigable, had no particular use to it? It obviously had a spiritual

significance and a use significance to the Māori people, but I'd be surprised if it had the same use significance to the Crown at the time of the purchase, would it?

MR MILLARD QC:
Probably not.

GLAZEBROOK J:
So would they necessarily have been thinking about it in those terms at all?

MR MILLARD QC:
Well in that event you have the Crown saying, as they do now, that, "Although we didn't know about it and although we didn't think about it, we got it."

WILLIAM YOUNG J:
That could've been said of virtually every transaction in relation to a river-bounded property that occurred before *Mueller*.

MR MILLARD QC:
It, it can't be though that, particularly if you sort of think of rivers that, that can change course. You know, there will have been rivers in that category in the South Island pre-*Mueller* that nobody simply thought of what happened if it changed course and you've got a bit of land on one side and lost a bit on the other.

ELIAS CJ:
But Chief Justice Stout said in one of the cases, I'm not sure whether it was *Mueller* or one of the other ones, *Morison* was it? One of the other ones, that there was no – well, I think this right. That I – the impression I had was that there's no necessity to have had recourse to the principal to determine boundaries because in New Zealand from the earliest times the boundaries were surveyed. So that while some – in earlier times, in England or somewhere, you did have wandering boundaries according to the flow of the river, in New Zealand I think he said that that really wasn't an explanation for it.

WILLIAM YOUNG J:
Unless the boundary was defined by reference to the course of the river.

ELIAS CJ:

Unless – yes.

MR MILLARD QC:

I'm sorry, I don't recall that in the –

ELIAS CJ:

Oh, well I might be astray in that, so perhaps we should check.

MR MILLARD QC

Mind you, it's a little while since I've read those cases for this matter.

ELIAS CJ:

They do seem to be right at the heart, however, of what you're asking us to do in this case. That is, apply – you're proceeding on the assumption, which the Crown also asserts, that it has title by virtue of the presumption. It's not clear to me, I must say, that that is a sound assumption.

MR MILLARD QC:

Well, the effect would mean that the Crown didn't have title at all other than by force of occupation. And that could, that would apply across many rivers.

ELIAS CJ:

Yes.

MR MILLARD QC:

It – the – at least the approach of the National Park Tribunal was to say, except, in effect, the de facto position –

ELIAS CJ:

Because they're looking, the Waitangi Tribunal is looking for acts of the Crown that are contrary to the principles of the Treaty. So of course they can accept that assertion that Māori lost properties through application of such a presumption, but in this Court we really have to, surely, be a bit more concerned with what is the accurate legal position.

MR MILLARD QC:

I really – this – can I think a little bit further and perhaps get back to the Court on that?

ELIAS CJ:

Yes, of course. Yes, yes. Anyway, we – you wanted to take us –

MR MILLARD QC:

Well, it's just –

ELIAS CJ:

Oh, we were on – we're talking about the Treaty.

MR MILLARD QC:

I was just looking at the position of the –

CHAMBERS J:

But I mean the position today might be in some way, and I can't, haven't thought this through, that the principle does apply. But it may not have applied, no one may've turned their minds to it as to whether it applied in the 1880s, but it is central to your argument that people must have known then because otherwise the conscience of the Crown can't have been impressed with this duty which you say was breached.

WILLIAM YOUNG J:

Your case seems to be the Crown didn't tell the vendors about something which the Crown may well not have known.

MR MILLARD QC:

But if one starts and goes back to the Native Land Court Act 1863 and say, "Well we want to assimilate title as closely as possible to the British title," the British Crown clearly knew about the, then, ad medium filum.

ELIAS CJ:

But it was a highly rebuttable presumption and, as close as possible itself, is not a very firm indication of how far you would go. So even if it applied it might well have been rebutted in the case of taonga of particular importance.

WILLIAM YOUNG J:

Another possibility, of course, is that they may have thought, the Crown officials may have thought, along the lines, later articulated by Sir Kenneth Gresson in the *Wanganui Riverbed* case that it was obvious that the sort of use of a river that involved the use of the land adjoining it was tied up with the use of the land adjoining it.

MR MILLARD QC:

Well particularly if you think about some of the other rivers that would be less swift and where you would have the ability to use the set nets and the like, and, of course, just generally fish in the river.

And it's –

CHAMBERS J:

All of these difficulties bring me back, Mr Millard, to thinking this is why this is pari semble, something for the Waitangi Tribunal, and that one would be cautious about engrafting fiduciary obligations on the Crown for every purchase in the way that you now suggest but I don't know what the downstream, no pun intended, consequences of finding such an obligation would be but anyway.

You do accept the Waitangi Tribunal would have jurisdiction to look into the sorts of matters you're raising.

MR MILLARD QC:

It has jurisdiction – it does but only a recommendatory authority. It can't go beyond that unless there's a resumption under the SOE Act.

WILLIAM YOUNG J:

Are there resumption claims in relation to these two dams or have they been settled?

MR MILLARD QC:

There's been no resumption application for the...

WILLIAM YOUNG J:

So there are no resumption claims in relation to these two dams?

MR MILLARD QC:
No.

CHAMBERS J:
Are you sure or – it's just that we've been told in our other case that all the dams bar two, I think, there was –

ELIAS CJ:
Are they these two? Because Mr Hodder's put in submissions saying that the Crown hasn't transferred some titles.

MR MILLARD QC:
One title to –

ELIAS CJ:
One.

MR MILLARD QC:
– is affected by this.

ELIAS CJ:
Yes.

MR MILLARD QC:
Well, I may be wrong but had not understood there was a resumption application in relation to these dams.

McGRATH J:
So what do you mean by "resumption application" then, Mr Millard? What do you mean by resumption –

ELIAS CJ:
Perhaps –

McGRATH J:
– as part of a treaty claim.

WILLIAM YOUNG J:
A section 27B claim.

McGRATH J:
Yes thank you.

CHAMBERS J:
Ms Hardy might know the answer

MS HARDY:
Yes Sir. There are broad claims that haven't been settled yet which why resumption hasn't been lifted on the Maraetai Dam and I think you would have picked up, your Honours, in the water claim that there is not yet a memorial on the Whakamaru Dam because that is still held by the Crown.

ELIAS CJ:
Yes.

MS HARDY:
But it's not a matter of all this area having been settled.

ELIAS CJ:
No. Yes, thank you.

So, I'm sorry. That means there's no – the two dams with which we're concerned, is that right?

MR MILLARD QC:
Yes.

ELIAS CJ:
There are two dams.

MR MILLARD QC:
There are two dams.

ELIAS CJ:

The resumption has not been – the section 27 memorial has not been limited because there hasn't been a settlement in relation to that in respect of one, and in respect of the other the land is still owned by the Crown.

MR MILLARD QC:

But as I understand it there's no existing application that the Waitangi Tribunal specifically asking it to exercise its resumption jurisdiction.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But could there be? I can't remember how the time limits work.

MR MILLARD QC:

I don't think there is a time limit.

ELIAS CJ:

No, there's no time limit.

WILLIAM YOUNG J:

No time limit, okay. So both dams are subject to the possibility of resumption.

ELIAS CJ:

Yes.

MR MILLARD QC:

Yes because the one that's been transferred will have the memorial on the title and the other that hasn't been transferred, of course, it's still there.

If I could come on and just talk about the Treaty.

ELIAS CJ:

Well what are you trying to convince us of in relation to the Treaty? Are you just responding to the Crown...

MR MILLARD QC:

First of all what we – our first proposition is that the rights in the Treaty can be given effect to in the domestic Courts if they're not contrary to legislation which is contrary to Te Heuheu Tukino but if the Court is against us on that then we say that the very least the Treaty illuminates and forms a background to a duty, fiduciary duty or an equitable duty to act in good faith.

McGRATH J:

Would that, then, be a duty that was separate from the Treaty, Mr Millard? I'm just trying to work out the difference between your two positions.

MR MILLARD QC:

Well, it is separate from but illuminated by.

ELIAS CJ:

Well whether – is that to say that if the Crown does owe equitable duties to the Pouakani people in relation to its purchase from them, is a circumstance of the actual dealings plus the Treaty obligation? Is that...

MR MILLARD QC:

Yes. When you're looking at the –

CHAMBERS J:

So would this obligation that you assert apply if the Treaty wasn't there?

MR MILLARD QC:

If – yes but the Treaty reinforces it. This is under the second one because if you start – if you look at the Canadian authorities, if you go to *Symonds*, that sort of thing, there is seen to be a duty when the Crown was dealing with the indigenous First Nation but what the Treaty does is really reinforces that and say that – well, the Treaty reinforces it and gives it much more strength.

McGRATH J:

Without being part of the duty. Well if it's separate from, it's illuminating –

MR MILLARD QC:

Yes.

McGRATH J:

– strengthening concept.

MR MILLARD QC:

Yes.

ELIAS CJ:

Because the fiduciary obligation in Canadian cases, for example, has been used in cases where there was no treaty relationship.

MR MILLARD QC:

That's right.

ELIAS CJ:

Yes.

MR MILLARD QC:

So if I come to the Treaty itself and make some general comments –

ELIAS CJ:

But what are you, what are the – I'm just trying to – all of this is quite familiar stuff. I'm just trying to work out what the, why you need to take us through it in such detail?

MR MILLARD QC:

Well, -

ELIAS CJ:

What's it directed at? Is it directed at a suggestion that we can't take account of the Treaty?

MR MILLARD QC:

Well, first of all the Crown, as I understand its position, sort of says, "Well, we can't raise *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC) and dispute it because we didn't do it in the lower Courts and the obvious –" and I'll come back to that but if we do, if we get beyond that they say basically that that case is correct and that we can't rely on the Treaty to advance a claim

independent of other duties and then they downplay those other duties by ignoring the Treaty so that we say that that is inappropriate.

ELIAS CJ:

Well you say that that's to say that you can't have regard to the Treaty in considering New Zealand law, do you?

MR MILLARD QC:

I'm not sure that they go quite as far as that.

ELIAS CJ:

No.

MR MILLARD QC:

But –

ELIAS CJ:

I just really wonder whether – well perhaps you better develop it, but I should just flag that I'm not sure that it's going to be necessary to get into this. Because you're not saying that the Treaty is the source of the legal obligation, you're saying that there are fiduciary duties which for which the Treaty is important context, aren't you?

MR MILLARD QC:

We're putting it on the alternative basis. We say that there is a Treaty right or alternatively if the Court is against us on that then it assists in – so we are, we are firmly saying –

ELIAS CJ:

You are taking the higher ground. So what is the Treaty right that you assert? Just say it for me again?

MR MILLARD QC:

It is that when the Crown is acquiring from Māori a taonga that is protected by Article 2, the Crown must not act in a way inconsistent with Article 2 in the sense of obtaining that taonga without full and informed consent.

CHAMBERS J:
And insofar as the asserted duty is not based on the Treaty, is it a duty owed only to indigenous people or is it a duty owed to anyone who is under some disability or other?

MR MILLARD QC:
We would say it's owed to indigenous people. It's specifically indigenous people is the basis of our claim in that context.

If I could come then to the role of the Treaty. We say that it's no ordinary Treaty. It's our founding document. Without it there would have been no declaration of sovereignty. That much is clear from the Lord Normanby instructions. It was originally recognised in legislation the very first Act after New Zealand got its own legislative ability in 1841 infers to the right of pre-emption in the Treaty. You see that in, it's referred to in the Privy Council in *Tamaki v Baker* [1901] AC 561, (1901) NZPCC 371. It was referred to in the preamble of the first Native Land Acts but then over time it fell into neglect in line with the increase in settler power and settler appetite for Māori land. It has, of course, gained some resurgence. It's referred to in an expanding list of statutes and of course in the founding document of this Court. But the relevance, we say, of the Treaty in jurisprudential terms should not depend on the happenstance of whether it was referred to in an Act, particularly when some of our Acts go back to 1908. Now that has, of course, been recognised in cases like *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), (1987) 12 NZTPA 129 (HC) and in Its special place in New Zealand is expressly recognised in the likes of the preamble to the Te Ture Whenua Māori Act which is in the supplementary bundle and that says, "Whereas the Treaty of Waitangi established the special relationship between the Māori 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 goes on from there, and, of course, that's the sort of concepts that we're relying on here.

So we say it's inappropriate to read down its legal significance by reference to law and ordinary international treaties as the Crown now urges. That is reinforced by a practical consideration that one sees in one of the authorities relied upon by the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC). If I could just take the Court to that decision which is at volume 3, tab

51. That case was concerned with legislation. The Crown had, in fact, intervened and rather absolved a commercial power of some problems that had arisen in a forestry venture and put the loss onto Tūwharetoa. Two arguments were run in the Privy Council. The first was that the legislation was obtained by, in effect, fraud or the like and the Privy Council said well we can't go past the legislation, can't look at the background. The second was reliance upon Article 2 of the Treaty and you see the discussion on that beginning at page 324 and having recited that the Privy Council said, in the middle of the page, "It is well settled that any rights purporting to be conferred by such a treaty of sessions," and they're recognising that as a treaty of sessions, "Cannot be enforced in the Courts except insofar as they're incorporated in municipal law."

The principle laid down on a series of decisions summarised by Lord Dunedin in the particular Indian case gives the quote from there and then over the page comes, in my submission, an important passage in line 4 where Lord Dunedin says, "The right to enforce remains only with the high contracting parties." And that particular case there were two high contracting parties quite independent of the subjects who were trying to bring this case because one of the local Indian rulers had ceded territory to the British Crown in exchange for other land. So that there was two high contracting parties. Now what we say is that there is a problem when you get a treaty like the Treaty of Waitangi that is a treaty of session, there is a dispute as to how much was ceded, kawanatanga versus sovereignty or tino rangatiratanga but nevertheless it is clear that there was some session and that session was relied on by the Government to assert authority over New Zealand. But there's a problem when the people who are making that session then become the subject of the power to whom they've given – whom the right to govern because there is no longer than a high contracting party that can enforce the Treaty the way envisaged by Lord Dunedin. And it's also unlike UN conventions on human rights and the like which provide domestic protections because those conventions normally give some right to complain to an independent United Nations Human Rights monitoring agency or the like.

ELIAS CJ:

This is really all on whether there was power – the appellants have run their case totally on section 73 of the New Zealand Constitution Act 1852. It's a pretty limited argument.

MR MILLARD QC:

Yes.

ELIAS CJ:

We'll take the lunch adjournment now and resume at 2.15.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.18 PM

MR MILLARD QC:

If I could just go back on one point, it was put to me in the session earlier today that there was some doubt about the application of the ad medium filum principle in New Zealand and the issue of whether or not the Crown would have known of the principle. With respect, I believe that point has been answered in the previous judgment of this Court, *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, and in particular at paragraph 20 on page 291.

WILLIAM YOUNG J:

Page 291 of what?

ELIAS CJ:

Of the first judgment.

MR MILLARD QC:

Of the reported judgment of –

WILLIAM YOUNG J:

Oh I'm sorry. All right.

ELIAS CJ:

Is that – that's that rather odd sentence, is it?

MR MILLARD QC:

I wouldn't accept anything in the majority judgment was an odd sentence.

ELIAS CJ:

But it is a bit stray.

CHAMBERS J:
Do we have that document before us?

MR MILLARD QC:
It's not in the case on appeal at all.

CHAMBERS J:
Hold on. I'll get it from the Court's website.

ELIAS CJ:
Oh, show off.

MR MILLARD QC:
But if I can perhaps just read paragraph 20 to the Court and refer to the relevant footnote, there the majority said, "Although in *Mueller*, the Court of Appeal affirmed application of the conveyancing presumption to Crown grants, it held that the presumption had been rebutted", and then it goes a little bit about the background and continues, "The Court affirmed the application of the common law presumption that the riparian owners shared in the bed of the river which was the boundary of the land granted, in application of the decision of the Privy Council on appeal from Australia in *Lord v Commissioners for the City of Sydney* that the presumption applied in colonial territories. While *Lord* was treated as authoritative, it was noted in *Mueller* that the application of the presumption had already been "tacitly assumed" by the New Zealand courts in a handful of cases." The majority referred to a comment by Chief Justice Stout, but the cases that were cited were *Borton v Howe* (1875) 2 NZ Jur 97 (CA), (1875) 3 NZCA 5, *Costello v O'Donnell* (1882) 1 NZLR 105 (CA), and *The Jutland Flat (Waipori) Gold-mining Company (Ltd) v McIndoe* (1895) 14 NZLR 99 (CA).

The first two, the 1875 and the 1882 cases were of course before the transactions involved here, so – and I have had a quick look at the *Borton* case and it's quite clear that the Court did specifically use the term "ad medium filum aquae" in it, so...

ELIAS CJ:
But what were those cases Mr Millard? Were those cases between European vendors and purchasers? It's just that I do recall, and I think I did – it is mentioned, I

think, in the judgment, the reference to what was said by three of the Judges in the 1955 *Wanganui River* case indicating that in respect of Māori land that was an open question.

MR MILLARD QC:

Well – I accept that that may be so, but there was an issue that Justice Young raised as to whether the Crown knew of the principle.

ELIAS CJ:

Yes, I understand that. Yes.

WILLIAM YOUNG J:

Well, I was just looking at my own judgment. I did say that it was, it would've been open to argument that the law wasn't applicable in New Zealand, particularly in relation to rivers that were significant to Māori, a point that was discussed at length in the *Whanganui River Report* and mentioned the Whanganui River litigation. So I can't – I find it hard to believe that it wasn't open to question whether rivers of significance to Māori were subject to ad medium filum.

MR MILLARD QC:

But it could hardly be said that the Crown when it was purchasing wasn't aware of the, of that principle, and if the Crown was to later assert that it obtained the riverbed under that principle then it really can't have it both ways. It can't say, "We obtained it but we weren't under any duty to explain to Māori that we might obtain it because we weren't sure at the time whether it applied or not." Because they're clearly saying it did apply.

WILLIAM YOUNG J:

Well, see, at least two Judges in the Court of Appeal in *Mueller* didn't think it applied.

MR MILLARD QC:

That –

WILLIAM YOUNG J:

Because of a pattern of statutory provisions.

MR MILLARD QC:

That was in the peculiar circumstances around Huntly, but the point that I'm making is that obviously it's a presumption –

McGRATH J:

The presumption was displaced isn't it? That's what they find: the presumption was displaced.

WILLIAM YOUNG J:

Yes, that is true. That's right. That's right.

MR MILLARD QC:

Yes. Exactly.

McGRATH J:

But I think that they held that the ad medium filum principle applied in New Zealand. It was displaced in particular circumstances.

MR MILLARD QC:

Yes. Yes.

McGRATH J:

And I think *R v Joyce* (1905) 25 NZLR 78 (CA) is another case where I think some Chief Justice Stout actually accepted –

ELIAS CJ:

Oh, that's where I was thinking of Stout.

MR MILLARD QC:

Yes.

MCGRATH J:

What was the paragraph number you're reading from now I've got the judgment up?

ELIAS CJ:

Oh, I haven't.

MR MILLARD QC:

Paragraph 20.

McGRATH J:

Thank you.

ELIAS CJ:

Well can you take us to the ’55 case? Have we got that? We have got it haven't we? Because I think there is something said in that. I’d just like to...

MR MILLARD:

It’s at tab 26 of our bundle, which is the – of volume 2, which is the green covered ones.

ELIAS CJ:

Oh, it might take a little while to find it. Maybe it’s not worth it. But isn’t there a reference in the majority judgment in the first case? There’s a – I’m sure there is. To the three Judges.

MR MILLARD QC:

There’s –

ELIAS CJ:

I think you have to –

MR MILLARD QC:

On page 437 there’s a reference to, about line 30, Justice Cooke –

CHAMBERS J:

Might be...

MR MILLARD QC:

At page 437 he says that, “In *Hotene v Morrinsville Town Board* [1917] NZLR 936 (SC) Justice Cooper took the view that the presumption applied to titles originating from orders of the Native Land Court, although the argument is not reported and his judgment does not show whether or not the question was argued. It is a question of great importance and one upon which I should be disposed to think

that the settled practice and understanding of conveyances would be of no little weight. The question was, however, discussed only shortly at the hearing and I do not think that it should be decided without full argument. If the presumption is capable of application to titles originating from orders of the Native Land Court it becomes necessary to consider whether there were circumstances that rebutted it in the present case."

ELIAS CJ:
Well that's precisely our case really, isn't it?

MR MILLARD QC:
Yes.

ELIAS CJ:
I mean not on the argument you're addressing to us, but it is that precise question.

MR MILLARD QC:
Of course our – as I mentioned earlier, our declaration that we seek is to the extent that the Crown has claimed ownership and that would leave it open for somebody to say that Pouakani, the presumption was rebutted in this case. But it's really up to somebody to come along and rebut the presumption. It is, after all, the presumption which puts, which moves an evidentiary, the evidentiary burden. So that declaration could be made and still leave open an attack by somebody further up the ladder, as it were.

WILLIAM YOUNG J:
I mean it's pretty clear it's uncertain, isn't it? It was uncertain in the '50s. Mr Justice Hutchison at page 426 and 427 deals with it and deals with the reactions of the Judges in the Māori Land Court and Māori Appellate Court.

ELIAS CJ:
I think three of the Judges expressed doubt and only, I think, maybe F B Adams didn't have doubts.

MR MILLARD QC:

Justice Hutchison does go on over at page 427 to sort of look at some of the evidence there, but of course by the time it got to the next round they had more evidence.

ELIAS CJ:

Well I think – yes. I think one needs to read the Māori Appellate determination, because it's many years since I read it but I do recall thinking it was most unsatisfactory.

WILLIAM YOUNG J:

Not much reference to the evidence, I think.

MR MILLARD QC:

And at least as far as I've been able to find it's not fully – unfortunately it's not fully set out in the reports that at least I've found in the short time.

Perhaps I could come back to where I specifically broke off just before lunch where I had submitted that if one takes the principle that was relied upon by the Privy Council at face value then there is a problem for the full effect of the decision in that case in the sense that they said, "A Treaty of cession can only be enforced by the high contracting parties," but that ignores that in the present context one of the high contracting parties has been subsumed into the other.

ELIAS CJ:

Sorry, we're back to the Treaty.

MR MILLARD QC:

Yes, and certainly there is a Canadian authority that has said that you can't treat Indian treaties in the same way as international treaties. They're truly unique and I refer to *Simon v The Queen* [1985] 2 SCR 387 (SCC), which is in the appellant's supplementary bundle at tab 7. Admittedly an over comment but the comment is at 404 where one of the issues was whether the Treaty had been terminated and one of the parties tried to argue it had been terminated by applying the principles of international law.

The first complete paragraph on page 404, “In considering the impact of subsequent hostilities on a peace treaty of 1752, the parties looked to international law on treaty termination. While it may be helpful in some instances to analogise the principles on international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique. It is an agreement sui generis which is neither created or terminated according to the rules of international law,” and we would say nor should its affect be decided by the ordinary rules of international law or the rules that New Zealand Courts apply to international treaties on other topics.

ELIAS CJ:

But in any event there is so much legislative reference to the Treaty that if the common law ad statutes are to be read together, it’s a bit late in the day, as the Privy Council said in another context, not to recognise that the Treaty is foundational in New Zealand law. In fact the statutory references, even the 1909 consolidation of Māori land law said that the origin of the whole edifice was the Treaty of Waitangi, so it’s a bit – I mean, I don’t – even accepting what the Privy Council says, this is not a treaty that is not recognised in municipal law.

MR MILLARD QC:

Yes.

ELIAS CJ:

Whereas a lot of treaties are - they operate in a different sphere altogether.

MR MILLARD QC:

I’ll certainly accept that and the question, however, is does it give a direct right as in any other right, that you can establish a common law even using the Treaty as an aid.

If I could just make one other general comment about the Treaty, sorry two other comments? It seems, from my reading of the Crown’s written submissions at least, that they downplay the present claim on the basis that it is a claim by those who received individualised title through the Native Land Court and, thereby, seemed to say that the Treaty no longer bites. There are two answers to that. The guarantee in the Treaty, in the English version is, “Her Majesty the Queen of England, confirms and guarantees to the chiefs and tribes of New Zealand and to the respective

families and individuals thereof." So individuals are expressly mentioned in the English version.

The Māori version as translated in the *Lands* case is the Queen of England agrees to protect the chief, sub tribes and all the people of New Zealand. So, again, is that sort of individualised approach.

The second point is that the duty to protect Māori rangatiratanga over the taonga can hardly be treated as having vanished if the ownership of the taonga is converted from communal ownership to individual ownership by a process which Māori didn't like, objected to but, nevertheless, because of the power of legislation had to accept.

ELIAS CJ:
But to hark back, not that I go necessarily with him all the way, but to hark back to what Justice Chambers was saying to you, isn't your forum for complaining about that Waitangi Tribunal if you didn't like the workings of the Native Land Act. I'm just not sure how you ask us to take that into account.

MR MILLARD QC:
All we're saying is that the interposing of the Native Land Court should not weaken the guarantees in the Treaty if you're still looking at the right to the taonga and that right and the need to protect that.

CHAMBERS J:
So is the Crown responsible in some way for the Māori Land Court, the Native Land Court was it, as it was then called?

MR MILLARD QC:
Well it did enact a legislation that brought it into existence and its representatives said that its purpose was to individualise titles to it could be sold. One of them went so far as to say that it had the good – I'll just take you to it a bit later, but it had the good purpose of breaking down Māori communism. The Crown deliberately opposed –

CHAMBERS J:
Just so I've got this clear in my mind, the ultimate submission we're working towards in all of this is a proposition that the Crown owed a private law fiduciary duty to the

vendors as indigenous people or as Treaty partners. Is that the ultimate proposition we're working towards?

MR MILLARD QC:
Yes, fiduciary or at least a duty of good faith.

CHAMBERS J:
But it has to be something that sounds, in law, for it to be justiciable in the High Court doesn't it?

MR MILLARD QC:
Yes.

CHAMBERS J:
So it's an equitable – it has to come ultimately within equity to be justiciable there.

MR MILLARD QC:
Yes.

CHAMBERS J:
Okay. If we are not with you, and I'm only testing propositions, if we are not with you on a private law fiduciary obligation in these circumstances, regardless of what ad medium filum might have meant or people understood, the appellant's case would fail if we weren't with you on the creation of the duty.

MR MILLARD QC:
That would be correct. There has to be a – we accept that there needs to be a duty.

ELIAS CJ:
Do you –

CHAMBERS J:
And – can I just ask one more question? And is the breach of the duty on which you rely, exclusively related to the purchase?

MR MILLARD QC:
Yes.

ELIAS CJ:

And do you accept that the word "private" adds anything to that? Is it a private law or is it just simply a legal claim you assert?

MR MILLARD QC:

It's the legal claim. The Canadian Courts have sort of punched round that issue when it sort of said, "It's not really private and neither is it public in the sense that –

ELIAS CJ:

Well, we've never really been –

MR MILLARD QC:

– it's only a public law trust.

ELIAS CJ:

We've never really been terrifically hung up on distinctions between private law and public law in New Zealand. I'm just really wondering whether this is an area where we need to bring it in but maybe that's more for Ms Hardy to answer.

CHAMBERS J:

Well does it give rise ultimately to the possibility of damages or compensation?

MR MILLARD QC:

It could do, yes.

McGRATH J:

As to whether it has to move from being a private – as to whether it's private or public, is – I mean I can recall from the *Lands* case, of course, that the Judges are there talking about a duty of good faith analogous to or akin to a fiduciary duty and I wondered whether that was behind their thinking. But whereas in private law you would have a duty, once you moved into the public law arena you were drawing analogies or looking at a duty that was somewhat akin to the private law duty of good faith or private law fiduciary duty.

MR MILLARD QC:

The – if I could come into it a slightly different way, if you look at the New Zealand Bill of Rights, that confers rights on individuals which in one sense are not a private

law right but nevertheless can sound in damages in certain cases. So it's – and given that we would put the Bill of Rights and the Treaty as being to some degree analogous that's what we're really talking about.

ELIAS CJ:
I've been wondering whether you do in fact rely on section 27 of the Bill of Rights Act.

MR MILLARD QC:
We do refer to that –

ELIAS CJ:
Yes. That's right.

MR MILLARD QC:
– under section 20 as well.

ELIAS CJ:
Oh you do refer to it. Yes.

CHAMBERS J:
But doesn't the proposition you advance, Mr Millard, really go against the whole legislative framework, and I'm looking at statutory law in general and in particular the creation of the Treaty of Waitangi Act. If your proposition is right, the fact that a specialist Tribunal was set up but in general with only recommendatory powers, this does to some extent cut across that, doesn't it?

MR MILLARD QC:
We would say it complements that because the Tribunal has special investigatory powers, it can receive different sorts of evidence, it can deal with matters that aren't dealt with or can't be dealt with in the Courts. So that it's – it is –

CHAMBERS J:
But generally speaking you'd be better off, wouldn't you, going with your fiduciary obligation in the general Courts?

MR MILLARD QC:
In some circumstances, yes. But in others you may not.

CHAMBERS J:

I mean that's not an argument against it. I'm merely saying if you look at the statutory framework this requires a bit of –

MR MILLARD QC:

But –

CHAMBERS J:

– thinking as to whether this is a step the Court should take.

MR MILLARD QC:

Well we say that it's not inconsistent to have the Tribunal there with broad powers, different sort of investigatory approach and also leaving open the ability of the courts to rule on specific case by case basis where we, where you get within that fiduciary duty, duty of good faith breach.

CHAMBERS J:

And one last question which I will disclose my ignorance compared with my colleagues. Do the Canadians have a Tribunal similar to the Waitangi Tribunal?

MR MILLARD QC:

No, but paragraph 5.13 of my synopsis, and I've sort of been jumping around a bit about it, a comment that the – at least in terms of recognition of Māori customary title and possession and also the obligations to protect Māori interest, Article 2 was to a large extent declaratory of the position of the British Crown and United States Government's position. And the particular case that I wanted to take the Court to is in volume 3 at tab 45. Unfortunately it's not a particularly easily read transcription I notice and apologise for that.

CHAMBERS J:

Justice Young may have some difficulty with this.

WILLIAM YOUNG J:

I'm trying to find it actually.

ELIAS CJ:

I'm certainly having difficulty with this one.

WILLIAM YOUNG J:

Right, 41. Sorry?

CHAMBERS J:

45. Tab 45.

WILLIAM YOUNG J:

Oh, crikey.

MR MILLARD QC:

Fortunately this was a fairly early case, 1847, and in that, and if you look at page 12 of my synopsis I have actually set out, which might be a little bit easier than straining one's eyes on this authority, the comment which can be found at page 390 of the printed judgment. And it is that, "The practice of extinguishing native title by fair purchases is certainly more than two centuries old. It has long been adopted by the Government of our American colonies and that by of United States. It is now part of the law of the land, and although the courts of United States in suits between their own subjects will not allow a grant to be impeached under the pretext that native title has not been extinguished, yet they certainly do not hesitate to do so at the suit of one of the native Indians. Whatever may be the opinion of jurists as to the strength or weakness of Native title, and whatsoever that may have been the past vague notions of the natives of this country, whatever may be their present, clear and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected and it cannot be extinguished, at least in times of peace, otherwise by the free consent of the native occupiers. But for their protection and the sake of humanity the Government is bound to maintain and the Courts to assert that what is called the Queen's exclusive right to extinguish it. It follows from what has been said that in solemnly guaranteeing native title and in securing what is called the Queen's pre-emptive right the Treaty of Waitangi confirmed by charter of the colony does not assert either in doctrine or in practice anything new and unsettled."

Now that passage was endorsed by the Privy Council in *Tamaki v Baker*. I've given a reference. I won't take the Court to it. It was endorsed by this Court in *Ngati Apa v*

Attorney-General [2003] 3 NZLR 643 (CA) and Justice Toohey in *Mabo v Queensland (No 2)* [1992] HCA 23, (1992) 175 CLR 1 (HCA) at page 193 also cited this passage. So that, to the extent that we're saying that the limited duty we contend for in this case of free and informed consent, in my submission that's implicit in what Justice Chapman said when he talked about free consent. It must be – to be free consent it must be an informed consent.

So in essence what we are asserting here is something that the Treaty provides ready access to be nevertheless was a right recognised pre-Treaty. So that it is not asking the Courts to go too great a step to say that that right should be enforceable through the Courts.

A similar route is one of fiduciary duties –

ELIAS CJ:
Sorry, that's the property right?

MR MILLARD QC:
Yes.

ELIAS CJ:
But nobody's arguing against that are they?

MR MILLARD QC:
Well, in essence what has been extinguished is a property right to the bed of the river.

ELIAS CJ:
Well, yes, maybe.

MR MILLARD QC:
The alternative limb or way of putting it is at page 14, and I'm just skipping over some of the other stuff there which – authorities that I cite given the time constraints. And the second limb is the fiduciary duty or duties akin to fiduciary duties. Now we say that its duty has its sources in the enduring honour of the Crown in relation to indigenous people, which distinguishes it from an ordinary fiduciary. The Crown's

imposed rights of pre-emption which were still considered to apply de facto, if not de jure, and the position of the Pouakani Māori at the time.

At one stage, they weren't vulnerable. At the time of the Treaty, in fact the settlers were the vulnerable ones but by the Treaty process and allowing British rule, with the subsequent settlers coming in and the like, the tables had turned and Māori became vulnerable to at least inadequate dealings, unless such dealings were carefully explained to them.

6.4, I say that, "It's important to recognise that we don't contend that every Crown Māori dealing creates a duty." We certainly accept that there will be broad policy areas where the Crown can and must act but when it comes to dealing with Māori, at every least, they should owe a duty to obtain informed consent.

CHAMBERS J:
Would this duty still exist today if the Crown bought some property from Ngāi Tahu?

MR MILLARD QC:
Given that Ngāi Tahu, it's financial position and indeed, even if you divorced it away from Ngāi Tahu, we would say no, it wouldn't exist because we've now moved so far down the track and there's so much more ready access to legal advice and the like.

I mentioned that part of our grounds for advancing a duty was the right of pre-emption. Justice Harrison dismissed the significance of that. He observed that the right of pre-emption was provided for in the Treaty and that was, as the Crown acknowledged, to protect Māori from exploitation from land speculators and one can see then the instructions of Lord Normanby. That concept was also noted by the Court in *Symonds* but when pre-emption was re-imposed, it's interesting that the actual legal re-imposition limited the right of pre-emption to blocks where there were more than 20 owners and one has got to ask well, why do you choose 20 owners, obviously no magic in the particular number but if one has got a diverse number of owners it's much easier for a unscrupulous purchaser to pick off the minor ones, gradually build up a basis and then say to the others well sorry, I've got most of your land anyway.

So to have the rationale, it would appear to be that the Crown was to prevent – imposed itself to prevent that happening, so it's still the same concept in that pre-emption of protection.

ELIAS CJ:
Does the United Nations Declaration on the Rights of Indigenous Peoples provide any sort of support for a relationship akin to a fiduciary relationship?

MR MILLARD QC:
It certainly imposes an obligation for protection and reinstatement and for an adjudicative process, article 27 –

ELIAS CJ:
That's all right Mr Millard, don't hold it up for that. I just had a note wondering about that because effectively, you're asking us to recognise in New Zealand law a fiduciary, or something akin to a fiduciary relationship, of the categories, analogist to categories that have been recognised I suppose, like solicitor/client, parent/child, or something like that but this would be the sovereign authority and indigenous peoples, would it?

MR MILLARD QC:
Well it's a duty to the indigenous people to protect their lands, respect their customs and traditions and I'm actually reading from article 26 and that's the sort of article, or sort of duty that we say applies here. The – I don't think that the Treaty actually uses the word "fiduciary" but you can certainly read that concept as underlying the written word of the Treaty, or the Convention, I should say. There's also article 37 which, "The indigenous people have a right to recognition, observance and enforcement of treaties."

The concept of a fiduciary duty, or a duty of good faith, at least in the New Zealand context, began in the *Lands* case and at paragraph 6.13 I give the various cases where the Court of Appeal, over a course of several years, differently constituted Courts of Appeal, there was one common factor throughout of course, the President at the time but it was different Judges concurring and that and sometimes expressing it in different ways where there was a separate judgment, this concept of a fiduciary, it began as akin to fiduciary duty but by the time the *Te Runanga o Muriwhenua Inc v Attorney-General* [Fisheries] [1990] 2 NZLR 641 (CA) [*Sealords]* and *Te Runanga o*

Te Ika Whenua Society Inc v Attorney-General [1994] 2 NZLR 20 (CA) [*Hydro Dams*] cases came along, the Court was just using fiduciary duty.

In *Muriwhenua*, Sir Robin Cooke as he then was, considered the duty recognised in Canada was applicable in New Zealand, notwithstanding constitutional differences. Now I couldn't – this is reasonably familiar stuff, unless you want me to, I don't propose to take you to the cases.

ELIAS CJ:
No but are you going to take us to the section 10(1)(a)(i) of the – it's the Pouakani Settlement Act, is it?

MR MILLARD QC:
Yes.

ELIAS CJ:
I haven't seen that. You say that that recognises a fiduciary duty, do you?

MR MILLARD QC:
I'll take you to that in one moment.

ELIAS CJ:
Oh, I'm sorry, I thought you were up to there.

MR MILLARD QC:
The one quote that I do want to refer the Court and again, I've set it out in the text of the submissions minus citations, is in *Te Ika Whenua*, Sir Robin Cooke picked up the comment that I've already referred the Court to in *Symonds* and said, "Justice Chapman also spoke of the practice of extinguishing native titles by fair purchase. An extinguishment by less than fair conduct, or on less than fair terms, would likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power," and then gives the authorities there.

Then section 10, if one goes to – I'm sorry, I'm just having a little difficulty picking up where in our bundle of documents, maybe it wasn't in. I apologise, I thought the Pouakani Settlement Act was in the bundle of authorities. However, it is set out in the appendix to the Wakatū submissions at page 48, item 21. It's in the respondent's

bundle 1, tab 18. So that you have in statute in regard to the Pouakani people and a whole lot of other settlements, this concept that –

ELIAS CJ:
Sorry, did you say volume 1?

MR MILLARD QC:
Volume 1 of the Crown authorities, tab 18.

CHAMBERS J:
Do you deal with this Act in your submissions?

MR MILLARD QC:
Not specifically.

CHAMBERS J:
No, that's all right, I hadn't remembered reading it in yours and I just –

MR MILLARD QC:
Well other than the reference at 6.17, I don't with it. It's accepted that it carves out our ability to bring this case.

ELIAS CJ:
Oh, this is the extinguishment provision?

MR MILLARD QC:
Yes.

ELIAS CJ:
Yes.

MR MILLARD QC:
And we simply make the observation that it's put there, it's not said to be for avoidance of doubt.

ELIAS CJ:
But it's probably quite prudent.

MR MILLARD QC:

And of course, the New Zealand Court of Appeal had, in talking about fiduciary duties, had picked up on the Canadian cases, the first of which is *Guerin v The Queen* [1984] 2 SCR 335 case, where the source of duty lay in the surrender of the land to the Crown. Admittedly, there the Crown then dealt with it and then indigenous people received the benefit of how the Crown dealt with it and what happened was that the Crown persuaded the Indian band to surrender land for a golf course on the basis that the terms of the lease to the golf course would be one set of terms and then the Crown proceeded to lease it on different terms.

To that extent it has special facts but nevertheless the Canadian Court saw that there was a fiduciary duty between the Canadian Government and indigenous people and placed it in a wider context than the very specific facts of that case. It saw that duty as arising from the relationship of the Crown with the indigenous people, rather than based on the Canadian Constitutional Act or anything else like that. In fact, the Canadian Constitutional Act was not then in force.

That concept is then followed down in cases like *Blueberry River Indian Band v The Queen* [1995] 4 SCR 344 (SCC), then *Semiahmoo Indian Band v Canada* [1998] 1 FC 3 (FCA). That was a case where the Crown was acquiring compulsorily, or with the threat of compulsory acquisition, land for a custom post and it acquired quite a large block of land. The Judge held that the terms of acquisition were fair in the sense that a fair price was paid but the Supreme Court held that the acquisition was still a breach of the fiduciary duty owed because the Crown had taken far more land than it needed and it had to account for that.

The next case of *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746 (SCC) was another one of where the Crown was acting for itself because it was a public works taking and again, it was held that the Crown owed fiduciary duty in that context to take the minimum required for the public works and there they had taken more than the minimum and so were in breach of the fiduciary duty.

So those two cases are important from our perspective because they involve a finding of breach of fiduciary duty, even although the Crown was dealing in its own interest with the Indian band in question and I've given some other citations where the concept of a fiduciary duty was accepted but then wasn't always applied and one

area where it wasn't applied was where the Indian bands were still to establish that they had customary title, they were asserting it but had yet to establish it and the Court said, given that it was yet to be established, you couldn't get to the stage of a full blown fiduciary duty but nevertheless there was a duty on the Crown to consult about what it was doing but it couldn't, in the case, it was grant of timber rights, it couldn't stop the grant but nevertheless the Crown was in breach of its duty to consult and consider the Indian interests that were, at that stage, in co-act.

CHAMBERS J:
To what extent do these Canadian cases rely on section 35 of the Indian Act?

MR MILLARD QC:
Some of the later ones do refer to it but they are, in my submission, just building on the general concept of a fiduciary and seeing section 35 as to some extent reflecting that earlier concept. So it's a bit like saying, as I would say, that the Treaty, to the extent that it talks – it can be used for a fair purchase, builds on the concepts that Justice Chapman had already seen as applying.

Now the Crown of course take the Court to the civil cases of fiduciary duty and say (a), that a vulnerability is not the absolute requirement – sorry, I'll rephrase that. That it is not sufficient just to establish vulnerability and (b), they say that you can't have a fiduciary duty where the alleged fiduciary is acting in its own interests, that the qualifying criteria is the obligation to act exclusively in the interests of the protected person.

We say that, at least in the context of a dealing between the Crown and the indigenous people because of the sort of old law that I've referred to, you still have that fiduciary relationship, it is just that the duties of the fiduciary are somewhat different from the full blown duties that are applicable in a purely two independent people situation.

The Canadian Courts recognised that, they say that not all fiduciary relationships and not all fiduciary obligations are the same, these are shaped by demands of the situation and our argument is that, at very least, you cannot take away the need for informed consent.

In the Court of Appeal, the Court of Appeal was concerned about the legal baggage of absolute loyalty and also the inference downplays the position of Māori. It gives a sense of inferiority. We say that that is not a reason to say, "No, you shouldn't have a duty here," because if one looks at what happened at a time when Māori did have power, the point I made a little earlier today, it – Māori voluntarily agreed to rely on the Crown in terms of issues of purchase of land et cetera. That is in the Treaty. When it had power it entered into an agreement of trust of with the Crown and therefore put its trust in the Crown on an ongoing basis which then subsequently, because of the vulnerability in relation to their understanding of English law concepts, the Crown was able to exploit.

WILLIAM YOUNG J:
Are there any cases where the label "fiduciary" has been applied to someone who was dealing in their own interest other than in the indigenous area?

MR MILLARD QC:
I'm not sure of that. I can't think of any. The, the only other oddity, which is the one I point out at 622, is that in local Government area the local Government has been held to be a fiduciary to the ratepayers.

WILLIAM YOUNG J:
Once, I think.

MR MILLARD QC:
Well –

WILLIAM YOUNG J:
MacKenzie District Council v Electricity Corporation of New Zealand [1992] 3 NZLR 41 (CA). A slightly awkward concept when it's actually applied.

MR MILLARD QC:
And of course it was following decisions in Britain including in the House of Lords.

WILLIAM YOUNG J:
I think there are later decisions where I think Justice Richardson rode back a bit from that proposition.

ELIAS CJ:

Was that the ...

MR MILLARD QC:

Well certainly it was the issue –

WILLIAM YOUNG J:

That local authorities are fiduciaries in relation to rates.

ELIAS CJ:

Yes.

MR MILLARD QC:

Yes. And in particular, differential rates.

WILLIAM YOUNG J:

What?

ELIAS CJ:

Lester and that sort of thing.

WILLIAM YOUNG J:

Well there are cases where the – came back from that proposition.

MR MILLARD QC:

It's basically arisen in the context of differential rates. That was *MacKenzie District Council v Electricity Corp of New Zealand* one where in one sense the Council was trying to gouge the ECNZ, but in Britain it's been applied where the council has been giving concessionary fares to people on, using public transport and they said that's a breach of your fiduciary duty to ratepayers. So it has had that – it serves several purposes. I cite it not because it's directly relevant here but it does show that the Courts have been prepared to look at fiduciary duty in different contexts.

And so we say that the Treaty here should inform the scope of the duty. It doesn't prevent the Crown from legislating the result, which is sort of Article 1, but it does require the Crown when it's purchasing from Māori, as predicated in Article 2, to do

so in a way that doesn't mean that Māori are deprived of their taonga against their will.

And even in the context of fiduciary duties, it doesn't mean that the fiduciary can never deal with the protected person. They can do provided they get full and fair consent, and the onus is on them. But it does require full disclosure, and if I could take a different analogy, if you sort of think of a partnership, partners owe fiduciary duties to each other but that doesn't stop them arguing over profit shares. But what would be wrong is for them to argue over profit shares concealing facts. If one person knows that something is happening and the other partner doesn't and exploits that informational imbalance, that would definitely be a breach of the duties as between partners. And that is not far different from what we're saying is happening here.

CHAMBERS J:
Just remind me what your argument is as to why the Crown is not entitled to rely on the Native Land Court.

MR MILLARD QC:
Well, we're not saying that it wasn't entitled to rely on the Native Land Court. What, what we're saying is that it can't use the Native Land Court as a shield to say that the duties that would've existed if it had dealt direct with the owners of the aboriginal title vanish simply because that aboriginal title was converted into individualised title by the operation of the Native Land Court. So that we say the duty – the mere fact that it wasn't a pure dealing with the aboriginal title never – doesn't prevent the first dealing between the Crown and the indigenous people now post Native Land Court, doesn't remove the protections of the Treaty.

CHAMBERS J:
But all these sales were ratified by the Court, weren't they?

MR MILLARD QC:
No. They were simply –

CHAMBERS J:
Weren't they?

MR MILLARD QC:

– basically recorded. The Native Land Court had to partition the –

CHAMBERS J:

I'm looking at the wording in your statement of claim. "Ratified by orders of the Native Court."

MR MILLARD QC:

The – there's the – the only area where the Native Land Court came into play in the purchase was when it carved out B6E.

CHAMBERS J:

Oh I see. Oh, I thought it said, "with the exception of B6E"?

MR MILLARD QC:

Sorry, I'm...

CHAMBERS J:

I'm on page 19. I may have the facts wrong. I was just looking at paras 18 and 19 of your statement of claim.

MR MILLARD QC:

It's not – there's been no specific reference to, by the Crown to the orders of the Native Land Court. There's, there's no evidence that in fact the, the Native Land Court adjudicated on the adequacy or otherwise of the purchase. So that there wasn't an adjudication that this purchase was an appropriate purchase.

CHAMBERS J:

I'm not terribly familiar with all of this, as some of my questions may indicate, but should the Native Land Court have investigated the fairness of it? That wasn't its job?

MR MILLARD QC:

Not, not at this stage, no.

CHAMBERS J:

Okay.

MR MILLARD QC:

As I mentioned, Justice Harrison –

ELIAS CJ:

Sorry, where are your actual submissions?

MR MILLARD QC:

Page 21. Justice Harrison placed some emphasis on, not on the fact that the Native Land Court had adjudicated but simply that the role of the Native Court, the Land Court, had converted the customary title into individualised title. And as I read his judgment he is saying, "Therefore the Crown's duties, whatever they might have been, fell away."

I mentioned a little earlier that the –this seemed particularly given that the Native Land Court was imposed. The Māori in this area had said, "Look, we want to try and have our own committees to decide who should go on the title," and the Crown just overrode that. You could be brought before the Native Land Court by anybody applying to have the land and then go through. It only took one person, in fact and –

ELIAS CJ:

Are we talking about the investigations of title now?

MR MILLARD QC:

Yes, which –

ELIAS CJ:

I thought we'd moved on to the dealings with the Crown.

MR MILLARD QC:

Well, I'm simply trying to address Justice Harrison's point that somehow the imposition of the Native Land Court removed the duties and I'm saying that's particularly inappropriate.

ELIAS CJ:

Right. I can't remember what Justice Harrison said about it but don't take the time now. I am getting a little worried at the time, Mr Millard. Are you –

MR MILLARD QC:

I'm conscious. I certainly hope to finish by four.

ELIAS CJ:

Yes thank you.

MR MILLARD QC:

And I simply refer the Court to paras 6.27, the concept that the whole function of the Native Land Court was to mean that you had titles that could be purchased and were purchased and if one needs to refer to some of the admissions by the Crown at the time, then they're encapsulated by Mr Stirling at para 159, 160 of his brief, I won't take the Court to it, accepted by Dr Loveridge under cross-examination at pages 677 to 378.

The impact was that you got dragged before the Native Land Court, you had pay survey fees, you had to pay Court fees, you had to attend the hearing which was at a distance from where you lived. That meant that you could take some produce with you but you ended up buying supplies while you were there, you ran up debt and then the only thing you could do was sell your land. And even Sir Robert Stout was fairly critical to what happened to Māori there.

So, in effect, the Crown talks about these alienations being voluntary but they were inevitable. They weren't – there might have been some voluntariness as to which block was sold but inevitably some block had to be sold. So to consider the imposition of Native Land Court as sanitising the duty of the Crown we say is wrong.

At page 23 I deal with the relational duty of good faith. Now that concept was very much to the fore in the *Lands* and several of the other cases that followed. It's also consistent with the Crown's obligation in relation to treaties under the Vienna Convention on the Law of Treaties and also consistent with customary international law, and I've given the authorities. In the authority of *Chung Chi Cheung v The King* [1939] AC 160 (PC) which I cite at para 141, the Privy Council said that customary international law in enforceable in domestic law if not contrary to statute. That was a case about the law of the sea, but general application and if –

ELIAS CJ:

What's the rule of customary international law that you rely on here?

MR MILLARD QC:
That the parties to the treaty will act in good faith.

And in this area we basically adopt the approach that the Court of Appeal took in the case under appeal and say, “Yes that is an appropriate basis.”

GLAZEBROOK J:
The customary international law that you act in good faith relates to the Treaty obligations, so you would have to have the Treaty obligations themselves enforceable in order to have the rule of customary law applied. It’s not a rule of customary law in the way of, in the way of the prohibition against torture, for instance, which is independent of any treaty.

MR MILLARD QC:
The –

GLAZEBROOK J:
It’s just that I can't see that that actually gives you an independent right from the Treaty. I mean it might be that there is an independent relational good faith argument but I can't see that it’s one that is separate from the Treaty.

MR MILLARD QC:
It’s not separate from the Treaty. I’m sorry, I think I gave a wrong reference at para 140. It should be back to paragraph 5.12. What the Vienna Convention does and what the principles of customary law do is say that you perform your obligations under the treaty in good faith.

GLAZEBROOK J:
Well, that’s what I was putting to you –

MR MILLARD QC:
Yes.

GLAZEBROOK J:
– that’s it’s not a separate good faith obligation. It is related to the Treaty.

MR MILLARD QC:

It is related to the Treaty. But it doesn't require the Treaty to be adopted by your domestic law and *Chung Chi Cheung* says because that one, the law that they were enforcing had not been adopted but they nevertheless applied it because of a duty to apply customary law as to the sea.

ELIAS CJ:

I don't understand what a relational duty of good faith adds to the duty in the nature of a fiduciary duty that – what's the different in result?

MR MILLARD QC:

No difference in result. It's simply a different way – another way of getting to the same result.

ELIAS CJ:

Well, they both arise out of the relationship. They're both relational. I just don't quite understand the distinction.

MR MILLARD QC:

The relational duty of good faith avoids any trip wires of absolute good faith or absolute loyalty. You can deal with each other in good faith but still act in your own interests. But what you can't do is pull a swifty.

ELIAS CJ:

I see, right.

MR MILLARD QC:

Put it in the vernacular. So that gets us there on the basis that well, if the Court has got concerns about extending the private law concepts of fiduciaries to the Crown, then a different way of getting there is through relational good faith.

ELIAS CJ:

Well I know – I just can't understand what it is as a legal concept except by reference to the sort of concepts you were talking about earlier. Why it's distinct except that because, as the Canadian Supreme Court has said, the content of the duty you owe is a fiduciary will change according to the circumstances, so I'm just not sure that it's a distinct course of action or basis for claim.

MR MILLARD QC:

Well, it's –

ELIAS CJ:

You're just avoiding trip wires as you say.

McGRATH J:

What's your best case on relational duty as a concept?

ELIAS CJ:

The Court of Appeal referred to it didn't they?

MR MILLARD QC:

Yes and it sort of stems from the *Lands* case. The *Lands* case certainly talks about it.

McGRATH J:

Okay.

GLAZEBROOK J:

Have we got the *Chung Chi Cheung* case somewhere?

MR MILLARD QC:

Appellant's bundle 13, tab 13, volume 1, tab 13.

If I could come then to the issue of relief which we've dealt with a little bit already. One of our points here is that the Crown endeavours to defeat both the claim and the proposed leaf by emphasising customary claims but it lies ill in its mouth because its title depends on coming through the people that we represent.

It also refers to or asserts that the river has been dealt with through legislation, and it is true that there is some legislation that affects the river, but it doesn't affect the ownership of the bed. Nor is it appropriate for the Crown to say, well, deal with this through your respective iwi given, as I've pointed out, that the Pouakani people are at the crossroads and are or can relate to any one of four iwi, and because they can relate to any one of four iwi they can be ignored by all four iwi.

CHAMBERS J:

Could we grant relief though, Mr Millard, when we do not have all adjoining owners as parties to this litigation?

MR MILLARD QC:

Yes, because we're only asking for the half the river opposite our lands. We're not asking for it opposite the other adjoining lands. We, we don't do, we only go to the middle.

CHAMBERS J:

Yes, but won't there be people on both sides of the river who might potentially be affected by a declaration of constructive trust effectively giving the appellants ownership rights?

MR MILLARD QC:

But the whole basis of the Crown's claim is that, in effect, the Native Land Court order dealt, found the true owners and said, "You are the true owners."

CHAMBERS J:

Yes. What I'm just – I mean we already have Mighty River here, but I'm wondering whether there might be any people other than the Crown who might be affected by the declaration that you seek.

MR MILLARD QC:

Well –

CHAMBERS J:

Quite apart from its precedent effect. I'm merely talking about here.

MR MILLARD QC:

Yes. Well of course the Crown says, "We own the bed and that's the basis on which we can, we originally built the hydro dams."

CHAMBERS J:

Correct.

MR MILLARD QC:

So that the Crown has in a sense – anybody else coming along would have to say, "Notwithstanding what the Crown's done, we've got rights that the Crown's ignored."

CHAMBERS J:

I'm merely wondering whether there aren't riparian owners or people downstream –

MR MILLARD QC:

There, there, there –

CHAMBERS J:

– who might be potentially affected by the declaration you seek.

MR MILLARD QC:

There will be some riparian owners that have taken rights from the Crown after the construction of the dam, but clearly they weren't being given rights to the lake when they, as it now is, and indeed the area that we're looking at will be partway into the lake, it won't be the whole of the lake. So that there can't really be anybody else that can claim, other than us in that sense, is to downstream owners we're not asserting ownership of the water. So they won't be affected.

As do Mighty River Power, we say, "Well, we're dealing – we sold to the Crown. We look to the Crown. It's over to the Crown to deal with Mighty River Power." We're not, we're not seeking remedies against Mighty River Power.

And some of that was, some of that was, lay behind the regime that came into place after the *Lands* case in that the resumption regime leaves Māori dealing solely with the Crown and not with the successor in title to the Crown. That's for the Crown to deal with. So that even if you sold land to an SOE who then sold it on to some truly third party, it's still, it's still an issue between Māori and the Crown and it's for the Crown to bear the consequences and, to the extent in those sorts of cases if the land was returned to Māori, then the Crown would have had to buy it back off the third party. We're not going that far. We're just wanting to deal with the Crown.

CHAMBERS J:

Yes. Would Mighty River Power – any application for a new water permit, wouldn't that be affected if you were the owner of the bed rather than the Crown?

MR MILLARD QC:
We don't own the water.

CHAMBERS J:
No, but –

MR MILLARD QC:
So that it shouldn't be affected by that.

Now the Crown raises two further, two defences in the alternative. One is the Limitation Act 2010 and the other is laches and acquiescence. We say in regard to the Limitation Act that we're relying on a, on equitable relief and therefore we are protected along the lines of the case of *FAI (NZ) General Insurance v Blundell and Brown Ltd* [1994] 1 NZLR 11 (CA), (1993) 4 NZBLC 103, 280 which is at tab 20 in volume 1. And in any event, because the Crown is in possession of at least some of the land we can rely on section 21 of the Act. We can distinguish *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400 (CA) at page 26, bottom line of the first paragraph I referred to, pages 412 and 413, it should be 414 and 415 is the correct page references, which is basically where the Court refused leave to the plaintiffs to amend to plead a breach of fiduciary duty on the basis it was too late. But the reason that the plaintiffs wanted to amend, which was recognised in that case, was that if there is a pre-existing duty that arises apart from the breach, then the limitations in section 21 don't apply. And we're saying, of course, the duty here is a pre-existing duty that isn't based on the breach itself.

And it is appropriate to approach it on an equitable basis because that is, goes back to the whole Treaty concept of equitable dealing between Crown and Māori, and it would be inappropriate to introduce technical limitations. You see something of that where there's an ongoing breach because the breach is not just the original purchase but the Treaty obligation leads to a duty of restoration on the part of the Crown, which of course is an ongoing obligation, and at least in an international and New York context you see something of that in the case of *Bodner v Banque Paribas* (2000) 114 F Supp 2d 117 (EDNY) that we cite at 9.5, which was the ongoing obligation as seen by the Courts there to, to return confiscated property that had been taken off the Jews by the Nazis.

In terms of laches and acquiescence, of course as I mentioned a bit earlier, the Crown really only started to assert its ownership in 1946, by which time most of the actors, if not all of them, would have been dead, so that prejudice as to what, as to what had happened at the time had already occurred. After that, given the state of the New Zealand law and that the very – one of the side consequences that was, was seen as a good by the Crown, namely the destruction of Māori tribal structures, had occurred, making it for difficult for Māori to group to then challenge what was happening. And of course we'd had the concept of assimilation continuing right through to the, through the Maori Affairs Act 1953 in the 1960s and it really wasn't until the 1980s that there was a recognition of the resurgence of Māori and Māori started to become empowered and orientated towards asserting legal rights both in the Courts and in the Tribunal. The Tribunal itself could only start to hear historic cases from 1985 on and at paragraph 10.40 I refer to the comment of Justice Vickers in the Canadian case where there was a plea of laches and it was said in that context that the plaintiff could not reasonably have brought these claims for aboriginal title, infringement of aboriginal title and compensation for infringement, if the Court still considered that aboriginal title throughout British Columbia had been extinguished in the colonial period. While that's now fully applicable here it's nevertheless of some significance that there was a reluctance to recognise Māori concepts including in cases like *Re Bed of Wanganui River*, *The Ninety-Mile Beach*, which were all very disempowering for Māori.

So coming a bit further forward the – Mr Paki, the first named appellant, commenced a Waitangi Tribunal claim in March 1987. He was – the evidence of Mr Weir shows that he was prompted into that because he'd been trying to get the Crown to address survey issues on his land without success. He'd gone through the Māori Land Court so he then went to the Waitangi Tribunal. At that stage it was a very novel jurisdiction but on 27 April 1989 he sought to extend the claim to the Waikato River and its bed and they did specifically refer to the bed in that claim although they were concerned at that stage that the later Coal Mines Act was the one that prevented them from asserting title. Their claim was that section 261 of the Coal Mines Act 1979, vests the bed and any navigable river on the Crown. That section and antecedents are a breach of the principles of the Treaty to the extent that it deprives the claimants of their rightful interests in the bed of the Waikato River is prejudicial. Prejudicial being, of course, the jurisdictional hinge for Waitangi Tribunal jurisdiction.

The history after that is covered in the evidence of Mr Weir and is summarised in the chronology. I invite the Court to look at that. Given the time constraints I won't take you through it. But my submission is, that that shows an active prosecution of the claim to the river bed from the point forward thwarted on occasions by a reluctance of the Crown to deal and in some occasions requiring firm action, including going back to the Māori Land Court and to the High Court to get the Crown to move forward. There was then progress of trying to negotiate outside the Settlement Act until the Government, there's a change of Government and a change of policy towards dealing with large groups. But, of course, the Settlement Act itself carved out the right to bring the claim so that the Crown could hardly have been under any illusion of acquiescence or abandonment of it.

In short we say that there's, Crown can't put to any disbarring acquiescence or prejudice subsequent to its assertion of ownership in 1946 and therefore there are no countervailing equities that should prevent relief even although the Crown might have dealt with Mighty River Power and the like, that was its action and it should not be able to inhibit its 100 per cent subsidiary and it should not set that up to say you can't get some relief from us rather than – given that we're not planning against Mighty River Power. Mighty River Power might have been in a different category if we'd tried to assert something against them but that is not the case for the appellants.

I'm conscious of time. I have tried to proceed quickly.

ELIAS CJ:

Yes. There's been a lot to get through. Thank you Mr Millard. Mr Brown. We're very stingy in terms of hearing from interveners. We have read your written submissions. We would be principally assisted if matters arose during the argument today which you would like to comment on?

MR BROWN QC:

Yes, there are two matters, Your Honour, if I may. I prepared notes on the basis of speaking to five points but there are two matters that I would submit that I can assist on that are particularly referable to the concerns, I think, that Justice Chambers expressed about what might be encapsulated in the, what I call, *Guerin*-style fiduciary duty obligation. I think I can capture them in two points. The first one is that I was struck when I was rereading *Sealords* and reading what the President had

written about the fact that the constitutional system had been left open in terms of argument. There's a passage that says this. That in New Zealand the Treaty –

CHAMBERS J:
What is the reference?

MR BROWN QC:
Yes the *Sealords* judgment is in the appellant's bundle, volume 3, at tab 54. This is at page 306 and it is an interesting page, I think. Indeed it's the foundation for both points I wish to make. The passage I'm looking at is towards the bottom of page 306 so having on page 305 and the first paragraph reflected in what earlier decisions *Lands*, *Forests* had not had to deal with, 306 in the penultimate paragraph the President says, "In New Zealand the Treaty of Waitangi is a major support for such a duty." He's talking about a fiduciary duty. "The New Zealand judgments are part of a widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement." And my first point is the emphasis on "effective" for that reason. That following *Ngati Apa*, where Māori, like the Canadian Indians, are recognised as being in a position of having a pre-existing independent legal right to land, that survived the Crown's acquisition of sovereignty, it's my submission that a Māori claimants only effective protection is by access to a High Court proceeding in relation to that entitlement.

It is not effective, whether or not the President had this in mind at the time, to say in relation to that type of right, which is going to be my second point, the type of right, that type of equitable proprietary right, that your entitlement is to be part of a recommendatory body's inquiry, commission of inquiry, which can often be very extensive involving many things and the minutiae can get lost in the totality of it, Wai 262, 15 years in duration, that ultimately produces a recommendation that save for the binding recommendation jurisdiction, the memorials, is entirely in the hands of the Crown as to whether anything happens with it. Sort of a, perhaps not going as far as the *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 sole arbiter but that's what it comes down to. Whereas if one has a right of action, essentially similar to the *Guerin*-style private law fiduciary duty obligation, then one can come to the Court on that and get an adjudication. I don't place the argument on the use of the word "adjudicate" in drips but that's what it comes down to and the difference between having entitlement to have the Court rule on something of that nature as opposed to the I wouldn't say happen stance but what can happen in that process and it depends

then on Crown negotiation, the large natural group policy, all the issues that you looked at in *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53. I come back to what the President said about effective, effective protection.

Now the second point I want to make is really addressing your concern I think about the width of what might be involved as it were a parallel universe to the Waitangi Tribunal and the important point about that is the second limb of the *Guerin* fiduciary duty, if I can put it that way, I'm not just talking about importing into New Zealand/Canadian law, one of my five points would be looking at New Zealand law recognising that the New Zealand common law, a la *Takamore v Clarke* [2012] NZSC 116, the Bill of Rights, section 20, all the rest of it. But as to this point, and could we go back to that page on 306 and look at line 35 where the President was referring to the seminal judgment of Chief Justice Dickson in *R v Sparrow* [1990] 1 SCR 1075 where he said, "The sui generis nature of Indian title and the historic powers and responsibility assumed by the Crown."

There's two legs to that. Happens to be assumption of responsibility, the same phrase that finds its existence in the law of tort and your Honour Justice Glazebrook's analysis in *Carter Holt Ltd v Rolls-Royce New Zealand Ltd* [2007] NZCA 495, but that's the second limb and that's why its so context specific because it's one thing to have this pre-existing independent legal right but to found a context specific fiduciary private law cause of action against the Crown, there has to be the assumption of responsibility and so while not to argue the facts of *Proprietors of Wakatū Inc v Attorney-General* [2012] NZSC 102 here but it provides an interesting contrast. The Wakatū people, having sold their land pre the Treaty, and hence subject to the 1841 ordinance about looking back and approving, having sold pre the Treaty on the basis that a tenth would remain theirs and the occupation reserves would be there, then when the Crown comes to do that, after pre-emption, and fails to do that, having assumed the obligation to do so, that satisfies the second leg of the double.

So if I haven't been able to make these brief points my plea would have been for cases coming through the system would have to navigate the Court of Appeal before they get here, not to have a sort of a liberal obiter about the suitability of the Waitangi Tribunal because it's context specific these cases. My learned friend is arguing one here on the basis of the river. We come with another one in relation to a particular type of transaction in relation to land that is pre the Treaty itself and that's how it comes together.

ELIAS CJ:

Your point is that you come to the Court as of right to seek a legal remedy.

MR BROWN QC:

Yes and it's not a case of saying, of depriving the Waitangi Tribunal of its specialist jurisdiction. In fact Justice Joseph Williams delivered a judgment just before Christmas that he talked about the Courts treading carefully where the Tribunal has been and he recognised a power for the Court to make a declaration there separate from the introduction of legislation scenario. But that's exactly that area and it's quite, it could be quite narrow. We don't, when we argue in our submissions for the recognition in New Zealand law of a private law fiduciary obligation and we, I agree with the Chief Justice with respect about the public/private dichotomy although the key point, and this is the key point about *Guerin* and why I've asked you to look at those passages in *Guerin* and Justice Binnie's then review of them in *Wewaykum Indian Band v Canada* (2002) SCC 79, [2002] 4 SCR 245 (SCC) it was the jettisoning of the political trust defence. The *Tito v Waddell (No 2)* [1977] 3 All ER 129 defence. You brought a trust claim, you ran into the *Tito v Waddell*, this is a political trust, and that was jettisoned by, that's what the Supreme Court in *Guerin* jettisoned and it's what we ran into and it appeared in the first time I think, second time, in Justice Clifford's decision in *Wakatū*. It makes a brief appearance in the Privy Council in the *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC), actually *Tito v Waddell* is referred to there, albeit that's in the context of that, that particular arrangement of the, the agreement in relation to the, the *Sealords* ultimate disposition. So the –

ELIAS CJ:

And the – sorry. I was going to say, the five points you wanted to link?

MR BROWN QC:

Well the five points would be, would be these, and I just, and in sequence, one would be the substantial parallels in New Zealand and Canadian history, and that's easy read for oneself, but it's designed to respond to the Court of Appeal's unjustified concern about the, what they call the, "unfortunate and visceral downside of the employment of the fiduciary concept," because they saw it in terms of superiority and inferiority, whereas of course the guardian, the welfare that that, that that proposition has been right back in the Canadian proclamation of 1763, the Treaty, *Symonds*, it,

it's all the way through. So the trust concept sat there and it was only in *Guerin* that was actually started as a trust case at first instance, it was in the Supreme Court in *Guerin* that it transformed into the fiduciary obligations. That's the first point.

The second point would've been the evolution from the concept of unenforceable political trust to recognition of legal obligations, and that's set out quite clearly in the key paragraphs in *Guerin* and –

ELIAS CJ:
You mean the *Tito v* – evolution of *Tito v Waddell*?

MR BROWN QC:
Yes.

ELIAS CJ:
Yes.

MR BROWN QC:
The rejection of that at the – it was only latterly referred to in *Pawis v R* [1980] 2 FC 18 of '79, *Guerin* comes along and, and Justice Binney's, who I think is counsel in *Guerin*, but Justice Binney's encapsulation in *Wewaykum* of, of that short history, and I think paragraphs 73 to 80 in *Wewaykum* are a wonderful encapsulation of what I would say about that.

The third point was the, the issue-specific nature of the fiduciary duty. So in further paragraphs in *Guerin* they say, in *Wewaykum* they say it's, "specific and cognisable". The Crown naturally make much of the, the generic free-standing fiduciary duty. That's not what's being contended for. This is, this is very *Donoghue v Stevenson* [1932] AC 562 (HL) if I might put it that way. This is, in terms of Felix Frankfurter, it's, it's retail, not, not –

CHAMBERS J:
Donoghue v Stevenson got a little wider over time, however.

MR BROWN QC:
It did. It did, but it was over time. And we don't ask for that all to happen in one day, but the idea that because the constitutional review is coming, let's wait and see if

there's a piece of legislation that says, "We recognise a fiduciary duty. You go ahead and fill in the gaps," that's – Felix Frankfurter wouldn't have brought into that proposition.

The fourth point, the importance to develop the law according to New Zealand's own traditions. That's in your statute, section, section 3(1)(a) about the histories and traditions. We don't come here saying, "Gosh, the Canadians have got this. Let's do it too," even though President Cooke and co have all identified that, that trend, but we do say that the New Zealand environment – that the passage of a whole series of cases, going right through from the *Lands* case, *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whale Watching*], the, the section 20 of the Bill of Rights, the, the – then the Government's changed and adopting the DRIPS, we call it – sorry, it's not, not terribly helpful an acronym, but that, that – the, the, the environment – Professor Palmer has a word for this as "creep", and we say it is entirely apt that you take the small incremental step of recognising a right that is essentially equivalent to *Guerin*.

And the last point I would make, I would've made would, was the, the point that it's suitable for development by the Courts and unsuited to legislative attention and, you know, the, the, the importance – the, the role this Court, the risk of the tyranny of the majority in terms of, of, of legislation, the role this Court has in recognising a right like that which we say is a right, and that, that's, that's what I would have said and probably have said.

CHAMBERS J:
If you had said it would've been helpful.

ELIAS CJ:
Right. Well thank you counsel. We'll resume tomorrow at 10.

COURT ADJOURNS:3.50 PM

COURT RESUMES ON WEDNESDAY 20 FEBRUARY 2013 AT 10.01 AM

ELIAS CJ:
Yes Ms Hardy.

MS HARDY:
Your Honours. I propose to frame submissions today with some preliminary comments about the Crown's stance then go to some of the facts that relate to the property in issue then focus on the fiduciary argument argued by the appellants and then return to the written submissions for any outstanding matters. By way of preliminary point clearly the appellants are bringing a property rights claim, one that is said to relate to property rights lost over a century ago and it goes without saying that the appellants are entitled to come to this Court, the ordinary Courts, for determination of this issue rather than the Waitangi Tribunal.

Mr Millard then frames that property rights claim as being a simple issue as to who owns the riverbed and in the Crown's submission the proceedings are far from simple in getting to that property rights assessment. The claim is actually an assemblage of a range of quite contradictory propositions and it's the tension within those propositions that, in the Crown's submission, discloses the fundamental flaw with the causes of action pleaded.

So to run through those tensions and contradictions first the submissions challenge the very essence of the Native Land Court regime, the statutory regime, and the Court decisions, and yet it exactly relies on the Native Land Court title and orders as the basis for the claim. It relies on the Waitangi Tribunal's critique of the Native Land Court so sometimes it's been framed as the land taking Court and yet rejects the Tribunal's own views about how the Treaty partners should deal with the issue of the iwi Māori and Crown relation to rivers. In fact it rejects the very recommendations made, or commentary made rather, in the Pouakani report that the issue of the range of interests associated with river and riverbed are too broad to be dealt with adequately in the claim put forward by the Pouakani people.

Looking at the remedy the appellants say on the one hand in their statement of claim that they are seeking redress for the descendents of the original 19th century owners of the Pouakani block. In their application for leave to appeal they say that the claim

is prosecuted for the successors of those owners. They frame the claim as if it were –

ELIAS CJ:

Well ultimately they would have to be, wouldn't they, but that would have to be investigated so is it very different? Descendents and successors? Ultimately there'd have to be a succession determination by the Māori Land Court wouldn't there?

MS HARDY:

That's right and there'd have to be a determination of legal succession to acquire the rights of the original owners.

ELIAS CJ:

Yes.

MS HARDY:

So that notion of individual owners and legal succession is an entirely different kind of claim from a hapū or collective claim. When we look at the particular blocks the riparian blocks, which are the only ones at issue here, then we've got a range from the C3 block, had a single owner. B10 had six owners. B8, 20 owners and then a partition out from B6A, that reduced to 160-odd owners. So the successors would actually be the people who are variously linked to those individual trusts generated by the individual transactions over the blocks. The –

ELIAS CJ:

Sorry, I don't understand the appellants to be saying anything different from that.

MS HARDY:

Well the appellants' pleading talks about the owners of the Pouakani block.

ELIAS CJ:

Yes.

MS HARDY:

The Pouakani block was actually a large block that encapsulated inland blocks as well as the riparian blocks –

ELIAS CJ:
Yes.

MS HARDY:
I think this is a point that Justice Glazebrook commented on yesterday, so in fact for a legal claim to subsist the declaration would have to be modified to adjust to the riparian blocks and the successors of the owners of those riparian blocks. Not the original owners of the entire Pouakani block.

ELIAS CJ:
I understood the claim to be about the separate blocks and successors to each of the separate blocks.

MS HARDY:
And, Your Honour, that reinforces the point that is currently characterised as a hapū or collective claim.

ELIAS CJ:
No I don't think it is put forward on that basis.

MS HARDY:
The statement of claim again and it's in paragraph 38 of the fifth amended statement of claim which articulates the content of the trust that is sought, says that the ingredients of the trust, or at least the content of the remedy, is a return of the property and accounting for profits, but also setting up some sort of ongoing relationship of consultation. Again a hybrid of the kind of expectation Treaty partners might have of a relationship in consultation with what we might call private law remedies of return of trust property and accounting for profits.

When Mr Millard spoke yesterday about how the Treaty was deployed in these proceedings his submission, as I understood it, was that this is a case about Article 2 of the Treaty and not the principles and again that notion of enforcement of the articles rather than the principles is quite contrary to the approach that the Court of Appeal took in the *Lands* case and would be a departure from that view about how to make the Treaty an operational agreement between the Treaty partners.

ELIAS CJ:

Sorry, I don't understand that submission because it is a very different claim because there it was consistency of the Crown's actions with the Treaty which were the legal issue because of section 9. So why do you say it's inconsistent, the approach here? It's a different claim.

MS HARDY:

Well the Court in *Lands* was through a judicial review and statutory provision talking about Crown obligations in relation to Treaty principles.

ELIAS CJ:

Yes.

MS HARDY:

And it was about land and property and preservation of capacity to make an ultimate return of property.

ELIAS CJ:

Well it wasn't about a property claim. It was about return of capacity to respond to Treaty of Waitangi Tribunal recommendations.

MS HARDY:

Yes rooted in redress for loss of property.

ELIAS CJ:

Well rooted in Treaty breach, yes, but it wasn't a property claim.

MS HARDY:

Not in the same way as this –

ELIAS CJ:

No.

MS HARDY:

– claim Your Honour but the Court did make it plain, in my submission, that the relevant way of thinking about the Treaty is to look at it as a living document with principles that are relevant for interpreting and checking the behaviour of the parties

and didn't make a, the kind of distinction that I see Mr Millard making between enforcement of the articles and disregarding here the principles.

McGRATH J:

Well it's spelt out as, what's the content of the term in the statute, Treaty or principles of the Treaty was. That's what spelt out, and applied that, and in talking about the principles of the Treaty it started, it drew a contrast between the specific terms of the articles and their spirit or the principles, whatever the broader phrase principles denoted but that was what they had to do in that context, wasn't it?

MS HARDY:

They had to do that because that was the term of section 9 of the State-Owned Enterprises Act 1986 but I'd submit the Court went beyond that. When analysing the history and background to the Treaty the Court made the point that the Treaty wasn't a contractual document to be interpreted in that fashion. They termed it an embryonic –

McGRATH J:

Set of ideas.

MS HARDY:

Set of ideas, yes, and therefore needing to be elaborated by the principles that they then articulated.

ELIAS CJ:

The Privy Council, of course, said that the Treaty principles include the terms of the Treaty but go beyond it and I don't understand the Court of Appeal in the *SOE* case to have expressed a different view on that but the Privy Council expresses it more clearly perhaps.

MS HARDY:

I'd submit the point is relevant because one of the enquiries that was being made yesterday was to what extent would the Court accepting the cause of action pleaded here amount to a transportation of the jurisdiction of the Waitangi Tribunal into the ordinary Courts and the, an aspect of the response was, well this is a framed case about Article 2 rather than the broader Treaty principles concept but –

ELIAS CJ:

Sorry, isn't the important part of Article 2 is that it recognised pre-existing property and what is being – and the protection of it. Now we're not dealing with the pre-existing property, we're dealing with the property in the form in which it was at the time it was acquired but it is, Article 2 is a guarantee of protection of Māori in their properties. Is it more than – is there more to it than that, in this case?

MS HARDY:
Well the only point that I would add, Your Honour, is that in endeavouring to deploy Article 2 now for recovery of property the Courts, I would submit, would take a broader view about implementation of the Treaty or application of the Treaty, because the Treaty principles are about good faith and reconciliation rather than –

GLAZEBROOK J:
Well surely they're about the protection of property. Isn't that the fundamental thing about Article 2? You can't ignore the words of Article 2 and say it's not anything to do with that, it's some broader sort of fluffy framework of consultation and that's all it does. Can you?

MS HARDY:
No you can't say it's a fluffy commitment but just by comparison with the Canadian cases about section 35 of the Constitution Act there which also protects property the cases indicate that that's not an absolute protection. There needs to be a broader view of contemporary balance so one of the Judges in recent cases said we're all here to stay and in my submission it's that breadth of analysis that the Waitangi Tribunal brings to historical claims that is difficult to import into a property claim here and my only point is that if a property claim is going to be brought to this Court in this way it needs to meet the requirements of the fiduciary duty, the breach, and the trust remedy that is argued for, not deploy the Treaty in some vague way to bolster that case.

Returning to that concern that the Crown has had about the contradictions within this case, again one of them that featured in the discussion yesterday was a reliance on the Tribunal's concept of the significance of rivers such as the Waikato or the Wanganui. Mr Millard referred to the importance in his opening of the river as taonga but then at the same time the claimants rely on *Re the Bed of the Wanganui River* which, of course, is a case which reinforces the notion of common law property rights and the division of riverbed riparian land, the waters of the river. So there's, again

there's a contradiction there between a Tribunal view, which is deployed on some occasions, and the case law that's relied on by the appellants.

So in my submission what the Court is being asked to do is to expand existing legal principles about fiduciary duty in order to achieve the outcome sought here from the appellants. Again –

ELIAS CJ:
Sorry, expand existing legal principles. What do you – what expansion of legal principles as opposed to their application in perhaps novel circumstances, perhaps not, but what expansion of legal principles are you referring to there?

MS HARDY:
Well this case primarily rests on an argument that there was a fiduciary duty owed to the vendors prior to the sales in the 19th century.

ELIAS CJ:
Well what's the principle as opposed to the application? I'm just trying to understand what you mean about expanding legal principles.

MS HARDY:
Well –

ELIAS CJ:
Is it just the application?

MS HARDY:
Well the core principles about a fiduciary duty focus on notions generally of absolute loyalty –

ELIAS CJ:
So it's application rather than expansion of principles you're concerned with?

MS HARDY:
Well, Your Honour, I'd submit –

ELIAS CJ:

Application to these circumstances.

MS HARDY:
It's both that one would need to take a very broad view of the content of a fiduciary duty or fiduciary relationship or how that is generated and then –

ELIAS CJ:
Well that's the application. I think we're ad idem on it, I just wanted to check if there was anything more to it.

MS HARDY:
Because it's important, in the Crown's submission, for this case and its consequences to be looked at in a broad context, in the round, I also want to submit that the causes of action being pursued here actually cut across and to some extent are inconsistent with the kinds of agreements that Crown and Māori are increasingly making over the river, and those settlements which include the two over the Waikato River, the Waikato-Tainui River Settlement 2010 and then the settlement which deals with the upper section of the river in relation to Raukawa, Tūwharetoa, Maniapoto, those all are –

ELIAS CJ:
Do we have that settlement before us? We've looked at the Waikato-Tainui one in the context of the case we had last week or the week before but I don't know that we've seen the terms of the Raukawa, Tūwharetoa Settlement.

MS HARDY:
I'll just check. They're recorded in legislation, 2010 legislation.

ELIAS CJ:
Yes, that's all right, you don't need to take time now, thank you.

MS HARDY:
So as Your Honours have noted previously the focus of those settlements is on engagement and management of the river rather than allocation of property rights to the riverbed but I would note that there is also a Wanganui River settlement which is

finally being negotiated and underway and one of the proposals there is for a vesting of the riverbed in a legal entity that represents the river. So again it's creative efforts achieved through negotiation based on Tribunal recommendations which endeavour to go some way in responding to the, the Māori view of the river as a whole rather than a river...

ELIAS CJ:

Presumably that's possible in the case of the Whanganui because it's a navigable river and the Crown has the capacity to transfer ownership of the bed. That's not an option here unless – that's not an option here because of the finding of this Court that this section is not navigable and therefore the Crown's principal argument earlier advanced goes. Your argument is that you – as I understand it, the Crown owns this segment of the river by virtue of the ad medium filum presumption. So I'm just not sure really whether this in fact is a river to which those creative solutions can be applied.

MS HARDY:

It's not unusual in a settlement for the parties to agree that to the extent that there is a Crown ownership that is available to the Crown to provide as redress or acknowledgement, then that will go to the iwi and hapū, and then it's a question, I suppose, subsequently of whether there are any – how one would actually define the private property intrusions in that, and clearly the Crown can't broker with that. Here there are stretches of the Waikato River that we know are navigable and vested in the Crown, and the Crown continues to contend here that the riverbed opposite Pouakani is owned by the Crown, so depending on, on how the decision comes out on that it is capable of becoming part of that kind of, of arrangement.

ELIAS CJ:

Of course Mr Hodder says it's subject to contract, the bits that still remain in Crown ownership, but maybe you'll come onto that later.

MS HARDY:

Well there are, there are portions that are particularly related to the dams. There's one that has already gone to Mighty River Power under Maraetai Dam and there's a piece of land associated with the Whakamaru Dam which is under contract, but that doesn't cover the, the remainder of the River.

ELIAS CJ:

I see. Yes, of course. Thank you.

GLAZEBROOK J:'

Ms Hardy, if I understand the point you're making though, it is to a degree that specific ownership by the specific claimants of this particular part of the riverbed is in fact inconsistent with the passages that we were taken to yesterday from the Tribunal report which spoke of the riverbank looked at as a whole and not portioned, and especially not portioned among what may not be the hapū or the customary owners. Is that – and that in fact in a Waitangi Tribunal case that these things can be looked at in a broader fashion.

MS HARDY:

Yes, that's exactly the submission.

GLAZEBROOK J:

Although presumably the answer to that, which the Crown says is contradictory to a degree, is that in fact they're relying on their private law title that was taken from the Native Land Court order. And effectively private law remedies, but then you'd probably say well if it's private law remedies they should be submission to Limitation Act and not a graft on other, other types of notions of fiduciary duty that are, that are more relevant in the Waitangi Tribunal because they can take a broader and, and probably more culturally appropriate look at those with some more culturally appropriate solutions that take into account all of the interests. Is that –

MS HARDY:

Yes, it –

GLAZEBROOK J:

Am I –

MS HARDY:

Exactly, Your Honour. It's not that there's no entitlement to pursue a property claim but rather it's the hybridising and deployment of the broader Treaty approach to, to bolster that claim that's, that's the concern.

I'd like to go to some of the more detailed facts about the property at issue, and attached to the Crown's written submissions at appendix 2 there's a map. And that map is an effort to sketch out the status of the land as it relates to that left-hand side, the true left-hand side of the bank alongside Pouakani blocks. And, and exactly how the Crown now holds that land. So if one works from the top left-hand side there's the Waipapa Power Station, and as Mr Parker's evidence shows, that was built back in 1918 and the lake actually encroached into the Pouakani blocks at that B8 area. So when Waipapa was under consideration, it hadn't been built, that yellow line records a Public Works Act taking. Then the red line –

ELIAS CJ:

Sorry, the yellow line is – did it take land back from there or is it just the bit that's coloured yellow?

MS HARDY:

It took land behind that strip as well.

ELIAS CJ:

It took the block? The balance of the block?

MS HARDY:

Not the balance of the block but into the, into the land in order to accommodate –

ELIAS CJ:

So we don't have that boundary? We don't have the landward boundary. Is that right?

MS HARDY:

No, we don't.

ELIAS CJ:

No, that's all right.

WILLIAM YOUNG J:

Sorry, I didn't quite understand.

CHAMBERS J:

No, I haven't understood that either.

WILLIAM YOUNG J:

Sorry, was the B8 block ever sold to the Crown? No?

MS HARDY:

Yes, yes it was. The – these entire blocks were sold to the Crown. Then you'll see the shading that covers B8, C3 and Pouakani number 1. That represents the 1915 transaction when the Crown vested by statute that large block in Wairarapa Māori because there was a land –

ELIAS CJ:

That's right.

MS HARDY:

- swap. So by 1915 then that land was in, in private hands in terms of the Wairarapa Māori.

ELIAS CJ:

They never settled there, did they? Isn't that –

MS HARDY:

I think it was a very unattractive arrangement from the point of view of the Wairarapa Māori. This is all, tends to be pumice land that's not particularly productive.

McGRATH J:

But it was transferred to them?

MS HARDY:

But it was transferred under statute, 1915. So that meant that –

ELIAS CJ:

Whose evidence contains all this information? Is that Mr Parker's evidence?

MS HARDY:

Mr Parker's evidence. I think it's the 28 April 2008 evidence which is his brief from the High Court at case volume 2, I think tab 14.

ELIAS CJ:

Thank you.

CHAMBERS J:

Do we have that statute?

ELIAS CJ:

The Wairarapa vesting?

CHAMBERS J:

Yes. I just wondered how it described the land. Does it provide anything of assistance to us in terms of what the boundaries were of the land transferred?

MS HARDY:

The statute is in our authorities but it doesn't solve any issues –

CHAMBERS J:

It doesn't. Right.

MS HARDY:

- about the river inclusion or not inclusion.

CHAMBERS J:

Right. Right.

ELIAS CJ:

Well, do you know, can you remember how it describes the boundaries? Is it – does it say something like, "bounded" or does it just describe the block numbers?

MS HARDY:

My recollection is it just describes the block –

ELIAS CJ:

Yes. Thank you.

MS HARDY:

- but I'll check. So Mr Ward advises me that it's described by reference to a plan in the, an SO plan. Perhaps we could come back to –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

What's the statute called?

MS HARDY:

It's tab 13 in our volume 1, of the Crown's authorities and it's the Reserves and Other Lands Disposal and Public Bodies Empowering Act of 1914.

GLAZEBROOK J:

Sorry, I've now lost the tab again.

MS HARDY:

Tab 13.

CHAMBERS J:

Which section?

MS HARDY:

Over the page, on section 57(3) it says, "The land to be vested in the Māori of aforesaid pursuant to this section is delineated in a plan deposited and edged red."

GLAZEBROOK J:

Well it probably just picks up the same sort of plan, one would imagine?

MS HARDY:

It's the same conveyancing survey practice of delineation red abutting –

ELIAS CJ:

Sorry, I didn't look it up. Do you say volume 2?

MS HARDY:

Volume 1, tab 13.

ELIAS CJ:

Yes, thank you.

CHAMBERS J:

Now what I haven't followed is, that explains that in 1914 or 15, we then have the power station built in 1918. Did you say that that led to a public works taking of part of Pouakani B8?

MS HARDY:

So the Public Works Act taking was in the '60s and that was to deal with –

CHAMBERS J:

Oh, I thought you said there was a taking for the dam, for the Waipapa Power Station?

MS HARDY:

I did Your Honour, I correct that, it followed the taking – followed the construction of the dam.

ELIAS CJ:

The dam was set up and then, in the '60s, they took the land, is that what you mean?

MS HARDY:

I think in the '60s it was necessary for the flooding that occurred in that area for the land to be taken.

McGRATH J:

And it's just a small riparian strip, is it?

MS HARDY:

I'm not sure of the width Your Honour.

CHAMBERS J:

I'm a bit confused because surely the dam was created when the power station was built?

MS HARDY:

My understanding from the experts is that the flooding of the dam actually occurred later but I'll follow that up Your Honour, in the break.

CHAMBERS J:

I see. Well the point I'm really interested in is, was part of Pouakani B8 taken, part of that taken under the Public Works Act?

MS HARDY:

Yes, it was.

CHAMBERS J:

So was a new title created showing that?

MS HARDY:

It's recorded in the *Gazette* taking in the references on the appendix.

CHAMBERS J:

So which one, the –

ELIAS CJ:

Sixty three?

CHAMBERS J:

The 63 one.

MS HARDY:

Sixty three taking. So the *Gazette* notice for that taking is in your materials and it's at tab 26 of volume 1 and on the right-hand side, at the bottom of that *Gazette* notice, is the reference to the part Pouakani takings.

CHAMBERS J:

So was all of B8 taken under that public works taking?

ELIAS CJ:

No.

MS HARDY:

No Your Honour, that description doesn't relate to the entire block.

ELIAS CJ:

It's just the part coloured sepia –

CHAMBERS J:

So we're –

MS HARDY:

A sufficiency for the hydro purposes. I'm not sure what actual width that was.

ELIAS CJ:

All of these –

CHAMBERS J:

But presumably that would have led to new titles. What I'm trying to find out is, does that mean that the Crown –

MS HARDY:

The land is simply set aside as Crown land rather than a new title being raised.

CHAMBERS J:

I see.

MS HARDY:

So it's the *Gazette* notice in the plans that delineate and describe the taking, rather than then generating a fresh certificate of title, as one might expect in an orthodox transaction.

McGRATH J:

When the *Gazette* notice refers to “a part coloured sepia”, do you see that reference?

MS HARDY:
Yes.

McGRATH J:
Does that relate to the marked strip on your appendix 2? In other words, coming back to my question, was there just a riparian strip being taken here?

MS HARDY:
That coloured sepia doesn’t relate to – this is a plan –

McGRATH J:
Totally different?

MS HARDY:
– that was checked – that was made up for the purposes of a pictorial description, rather than something that reflects actual survey issues, yes.

McGRATH J:
Fine but what I’m interested to know is how much of Pouakani B8 was then taken in 1963, looking at it visually –

WILLIAM YOUNG J:
I think it’s tab 42, is the plan.

ELIAS CJ:
Yes, okay.

McGRATH J:
Tab 42, thank you.

WILLIAM YOUNG J:
I think that’s the plan.

MS HARDY:

Yes, that shows the – thank you Your Honour, the Public Works Act takings on both sides of the river.

McGRATH J:
Okay, thank you. So it's what is shown on this plan, mmm. No doubt that will be clearer when I look at it more closely.

ELIAS CJ:
No, no, it won't be. They're impossible these plans.

McGRATH J:
But that would indicate, wouldn't it, that it was still a strip of land of some size that was being taken which I think would be consistent with your indication of why it was being taken.

MS HARDY:
That's right.

McGRATH J:
Thank you.

MS HARDY:
So a strip of land appropriate for the hydro schemes and then the same arrangement really with the red line that follows down through Pouakani C3 and Pouakani number 1 and then the green line that goes to the end of the block at the Waipapa Stream is existing, it's Crown land so there wasn't a necessity for a Public Works Act taking, it hadn't be sold since the Crown's acquisition, so that too is available for the hydro flooding.

I want to move from that configuration material to the vestings that occurred in the 19th century and the purpose for running through the blocks in this way is to identify issues that are relevant to the identification of the owners and their successors in terms of the trust remedy being sought.

So to start with, Pouakani number 1, Pouakani number 1 was directly vested in the Crown in 1887, rather than going by way of determination of Native Land Court

owners. So if Your Honours were to look at the orders and title bundle which is the very big document that Your Honours requested for the Paki number 1 hearing.

GLAZEBROOK J:
And which tab, sorry?

MS HARDY:
And tab 1 is the Pouakani number 1 material. So that's the order dated the 24th of September 1887. "So that vested in Her Majesty an absolute estate in the land delineated in the plan," which is over the page. And that's Pouakani number 1. And then can I take Your Honours to volume 5 of the case?

WILLIAM YOUNG J:
So – just pause there. Obviously – well I take it there must've been a power under the Native Land Court Act to vest land directly in the Crown?

MS HARDY:
Yes. In the case on appeal volume 5 at tab 124 there is the record of the application to vest Pouakani number 1 to the Crown for payment of survey and other costs. That's on the first page of that application. And then over the page –

CHAMBERS J:
Sorry, where is that?

McGRATH J:
Can we just be sure we're looking –

CHAMBERS J:
I'm not sure I'm looking at the right –

MS HARDY:
Sorry Your Honours. This is –

CHAMBERS J:
Where – what – where are you reading from?

MS HARDY:

Volume, volume 5 of the case on appeal.

CHAMBERS J:

Yes.

McGRATH J:

Has it got page 395 on the top?

CHAMBERS J:

I'm looking at one with something, 1414 at the bottom.

MS HARDY:

1419 at the bottom. So we're looking at tab – 124. And –

ELIAS CJ:

With page 202 at the top of the reproduced page?

CHAMBERS J:

Yes.

MS HARDY:

And 1419 down the bottom. 1429, sorry.

ELIAS CJ:

No idea what it is. I think it is 1 because the next one seems to be 1420.

GLAZEBROOK J:

It does.

MS HARDY:

Yes. 19, you're right. So this is the, a record of the application that Pouakani number 1 be vested in the Crown. And the listing of the people associated with that block is at 1415. That's the 192 names.

ELIAS CJ:

Now Ms Hardy, can you just remind me why we're going to this? Though it is very interesting, but I'm just losing track of – because nobody is challenging what happened here. This is part of the history and then there is the subsequent sale on

which the appellant's argument relies. What's your purpose in taking us through all of this?

MS HARDY:

The purpose is that the appellants in their synopsis say that the definition of the owners for Pouakani number 1, from whom one would determine successors in title, are the 17 individuals who were paid the excess of the survey cost which Pouakani number 1 was taken by the Crown to meet. And it's my submission that – and the evidence is that there's no evidence as to why those 17 people were paid the money. The prior evidence is that there were 192 individuals named on the order. After that, 17 individuals were paid the excess. And then the entire –

ELIAS CJ:

Sorry, the 192 are named on which order?

MS HARDY:

This is at page 19 –

CHAMBERS J:

1415.

MS HARDY:

1415.

ELIAS CJ:

I see.

McGRATH J:

And following.

ELIAS CJ:

And following.

MS HARDY:

And following. Three pages of names, and then, as part of this inquiry, all of those, if you like, interlocutory orders were quashed because there were complaints that the names were not accurately identified with the blocks. So my simple point is that it

would be unsafe to identify the 17 individuals who received payment for excess costs as being the owners who then determined who the successors might be who would benefit from the trust argued for. And that distinguishes Pouakani number 1 from the other blocks where the Native Land Court actually did ultimately after the further inquiry and rehearings identify individual owners.

ELIAS CJ:
So there was never any reassessment of Pouakani number 1 after the commission and so on?

MS HARDY:
That's correct.

ELIAS CJ:
Right.

GLAZEBROOK J:
Why would Pouakani number 1 be different from the others?

MS HARDY:
Because it was a technique for the Crown being paid for survey costs and surveying out the block.

GLAZEBROOK J:
No, no, I understand that, but why would the ownership be different?

MS HARDY:
Because with the remaining blocks we have a Native Land Court order –

GLAZEBROOK J:
Well no, I understand that, but they're adjoining blocks, so why would this one – there might be a, you might be able to answer this easily, but why would there particularly be a difference in one block out of a whole pile of blocks?

ELIAS CJ:

Well it was probably no longer material because whereas under the other blocks there were continuing issues of ownership, this block had gone and it was just – and payment had been made, and perhaps it would've been consistent to reassess the payment out, but probably was not very worthwhile at that stage. Would that, is that likely to be the reason?

MS HARDY:

That's possible. It was certainly that the – everyone must have accepted that the Crown was due some land to meet payment. That had already been agreed. That was going out of Pouakani hands and the remaining debate, therefore, was how to allocate the property interests over the remaining land.

ELIAS CJ:

It does tend to suggest that this was probably a little suspect to in its identification of names because it's not likely to have been so very different but –

GLAZEBROOK J:

Well that was my point. It so isn't, but...

ELIAS CJ:

But there wasn't a continuing issue of ownership because it had gone to the Crown.

MS HARDY:

And so as a consequence, never resolved.

ELIAS CJ:

Yes.

MS HARDY:

In terms of the remaining blocks, I've already made the point in opening that the blocks are allocated to individuals, in some cases, C3, one person. The historical analysis of that is that that was often done outside of the Court through discussion and where there were very few names on the block it was sometimes a prelude to a prompt sale following determination. But again, the point is from the broader Treaty perspective the notion that, if you like, the happenstance of identification of individual owners with individual blocks producing the, the contemporary allocation of blocks and rights has got an arbitrariness about it and would be the kind of activity that would be critiqued and criticised in the Waitangi Tribunal.

So just to complete the, the picture, as, as Your Honours will have seen from the earlier –

GLAZEBROOK J:
Can I just – well just because that's quite an important point I think, but I'm just wondering, if there were property rights created and individual property rights created, there wouldn't be a suggestion that the Treaty or the Waitangi Tribunal process could override those individual property rights, would there?

MS HARDY:
No, absolutely not.

GLAZEBROOK J:
I mean it – because it would be, it would've been an incomplete process, but nevertheless third property, property rights had been created. So I just was wondering where the submission goes in respect of that because it probably was a very suspect process and it probably, for all of the reasons that those processes were suspect, but if there has been individual property rights, then the Crown – the Waitangi Tribunal would certainly not be overriding those.

MS HARDY:
No, that's right Your Honour. And of course the Waitangi Tribunal can't investigate –

GLAZEBROOK J:
Well exactly.

MS HARDY:
- private property, but it really goes back to that broad framing of the case as a whole. If there are property rights they need to be identified and they are protected, but it's the, the deployment of the broader Treaty good faith arguments –

GLAZEBROOK J:
Just the same point you were making earlier, just...

MS HARDY:

Same point, yes.

GLAZEBROOK J:

Sorry to interrupt. I was just...

MS HARDY:

I was moving geographically along the river and over to the other side. As was seen in the, the map that Your Honours went to earlier when we were looking at the Public Works Act taking, all of the land on the true right-hand side was taken under Public Works Act takings. Its history is that it was investigated by the Native Land Court in the 1880s before the Pouakani block, so it went through the Court, went into individualised hands under the native titled regime, and most were sold by 1884. And some of those people who were the vendors on that side, the evidence shows, this is Mr Loveridge's evidence, were also involved in the Pouakani transactions.

And by way of an aside, this isn't a critical point, but clearly the, the vendors on the right-hand side sold land that they had acquired through the Native Land Court process. They would have been protected by the Native Lands Fraud Prevention Act which Mr Millard referred to yesterday. So in other words, for them, the Commissioner and Court, was to audit those transactions as to their adequacy as to price and other factors. They sold and the Court must have, we can infer, said that the transactions were satisfactory. So those individuals, who really are in very similar a position to the Pouakani people, wouldn't have any sort of claim about their land loss and alienation. And again, this is really just reiterating the same point, the Tribunal can look globally at these kinds of issues and at the Native Land Court as a whole and how it impacted on Māori, but once the, the cause of action becomes the private law property action, there are winners and losers in the process.

ELIAS CJ:

However the answer to that is that we – everything that is privately held is not thrown into the pot for the Waitangi Tribunal. But your submission is really that we need to be careful about recognising legal interests against this background.

MS HARDY:

Yes Your Honour. It's, it's the context.

GLAZEBROOK J:

For example, don't expand the notion of just ordinary private law remedies. Keep the private law remedies to the Courts and the more generic Waitangi Tribunal overlay to the Waitangi Tribunal where the remedies, albeit not enforceable, are able to be looked at more broadly and take all of the interests into account that should be taken into account.

MS HARDY:

Yes, my plan, Your Honour, was to shortly go to the core fiduciary duty argument and what its ingredients application are and how readily it fits into the, the facts here.

ELIAS CJ:

Yes, but your point is more than a demarcation one. It is a submission that the Courts should be very careful about fashioning new legal claims because they will impact upon the Waitangi Tribunal processes.

MS HARDY:

That's right, Your Honour, and I was picking up really a point that Justice Chambers was making yesterday; that we need to look ahead as to where this might lead and broader context and impact.

Just one final comment on the geography to reiterate that there are certificates of title raised under the, the two dams at present, Whakamaru, Maraetai. One held, Maraetai, by Mighty River Power; the one to be transferred under, and is under contract – Mighty River Power, and I'll, I'll leave this to Mr Hodder to expand upon, but Mighty River Power also has easements over the, the area in order to enable the hydro system to operate, so there are layers of property interests there that have accumulated.

WILLIAM YOUNG J:

So just so I understand it, the land under the dams is the subject of certificates of title?

MS HARDY:

Land under the two dams is subject to a certificate of title.

WILLIAM YOUNG J:
Yes, and there's – how – what do they – where does – what's the basis for the – was the – were the certificates of title initially issued in favour of the Crown?

MS HARDY:
I believe the Crown raised the certificates of title and then, with Whakamaru –

ELIAS CJ:
Sorry, what do you mean "raised"?

MS HARDY:
Well, rather than just holding the, the land as land at land or without a certificate of title specifically delineating the area under the dams the, the Crown raised title –

ELIAS CJ:
You mean it took certificates of title or it obtained certificates of –

MS HARDY:
It obtained, obtained certificates of title.

ELIAS CJ:
When?

MS HARDY:
I think the Whakamaru certain of title is in our materials, three case at tab 60. And –

GLAZEBROOK J:
At your authorities – sorry, we just seem to have whole piles of different volumes. Is that the authorities or the –

CHAMBERS J:
Case on appeal.

GLAZEBROOK J:

– case on appeal?

MS HARDY:
Case on appeal.

GLAZEBROOK J:
Case on appeal.

ELIAS CJ:
I'm happy for you just to tell us if –

MS HARDY:
Can I just – it might be easier, given the volume of documents. The notes I have at my fingertips are that there was a certificate of title vested in Mighty River Power for the Whakamaru riverbed strip in December of 2003.

ELIAS CJ:
And is that subject to the memorial, section 27 memorial?

MS HARDY:
Sorry, can I just correct that Your Honour? There's a certificate of title vested in the Crown in Whakamaru. That's the one that hasn't been transferred to a red strip.

ELIAS CJ:
Yes. So that's December 2003. That doesn't yet have a memorial because it hasn't moved through the ECNZ MRP transfer, but once the contract is completed it will be memorialised. Then there is the certificate of title January 2005 which is vested in Mighty River Power for the Maraetai Dam site, and that is memorialised and is therefore available for orders from the Tribunal.

WILLIAM YOUNG J:
So this proceeded on, these titles proceeded on the basis that the Waikato River was Crown land under the coal mines legislation? Is it –

MS HARDY:
That was the assumption.

CHAMBERS J:
Under what legislation sorry?

ELIAS CJ:
Coal Mines Act.

WILLIAM YOUNG J:
The navigable river. Is that the case for both of them? It's essentially the assumption on the, on tab 61. It is on both actually.

CHAMBERS J:
Well was it necessarily under that Act or alternatively could it have been just by application of the ad medium filum rule?

ELIAS CJ:
Well that hadn't –

WILLIAM YOUNG J:
No. Well it's noted as –

CHAMBERS J:
Oh, is it?

WILLIAM YOUNG J:
– with the notations on the river saying, "Coal Mines Act, Crown land, by virtue".

CHAMBERS J:
Oh I see. Yes. Yes.

ELIAS CJ:
Oh yes, under the Coal Mines Act. So rectification might be sought?

MS HARDY:
Sorry Your Honour, the – until we had the Courts decision the Crown worked on the assumption that the land was held under the Coal Mines Act Amendment Act and that survey plan records that. Obviously with the, the position now would be that the Crown owns that land ad medium filum, or owned that land ad medium filum.

WILLIAM YOUNG J:

But what's the significance of the land that has been transferred to Mighty River? Does it get an indefeasible title?

ELIAS CJ:

No because it's memorialised.

WILLIAM YOUNG J:

No, that's, but that's memorialised under the Treaty of Waitangi.

CHAMBERS J:

That's only to the Crown.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

I mean indefeasible Land Transfer Act 1952 title. We might get Mr Hodder onto that.

ELIAS CJ:

Yes.

MS HARDY:

Yes, so –

WILLIAM YOUNG J:

And what about the easement, sorry?

ELIAS CJ:

Can I just – sorry, can I just ask this? This title where the Crown says it holds it under the Coal Mines Act. Oh, it's all right, sorry.

McGRATH J:

Yes. Sorry. That's all right.

WILLIAM YOUNG J:

And do the easements – have we got the easily operating easements?

GLAZEBROOK J:

I mean that's probably indefeasible. If they made it, if they hold it some other way it doesn't matter.

ELIAS CJ:

No.

GLAZEBROOK J:

It's still an indefeasible title I would've thought.

WILLIAM YOUNG J:

But even if they don't it may be indefeasible.

GLAZEBROOK J:

Even if they don't it might be.

ELIAS CJ:

Subject to the rectification provisions.

MS HARDY:

The –

GLAZEBROOK J:

Yes.

MS HARDY:

The Crown filed two affidavits towards the end of last year which were Mr White's and Mr Parker. Those affidavits were an effort to update the Court but they, Your Honours, they haven't been admitted into evidence. The Court determined that it would consider admitting that if necessary, but they are the ones that include the reference to Mighty River Power's interest and the easements that exist. So they're relevant if one were to get to the question of third party interests.

WILLIAM YOUNG J:
So are the easements registered?

MS HARDY:
I understand they are.

WILLIAM YOUNG J:
So they must presuppose a Crown title to the river?

MS HARDY:
They're, they're resting on a Crown title to the river assumption, yes.

WILLIAM YOUNG J:
Does that mean that there is a title in existence for this stretch of the river, and not just the bits under the dams?

ELIAS CJ:
Probably not.

WILLIAM YOUNG J:
Well how would – what would it be registered against if it's not –

GLAZEBROOK J:
Against the riparian land, presumably.

WILLIAM YOUNG J:
Do you know whether it's registered against the riparian – have we got the easements?

MS HARDY:
The – I think the easements are in the –

WILLIAM YOUNG J:
Mr White's affidavit, are they?

MS HARDY:

Yes, they're –

GLAZEBROOK J:

Because it's just access easements isn't it? So presumably they're on the land –

WILLIAM YOUNG J:

No, I think it's operating, operates a river for the purpose of power. That's what I took the description –

GLAZEBROOK J:

Oh, I thought it was the flooding. Oh, well I might've got it wrong sorry.

MS HARDY:

It's the operating of the, of the power, the hydro dams.

GLAZEBROOK J:

Well so it's access, is what I would've thought.

MS HARDY:

So the easements to enable that to happen.

WILLIAM YOUNG J:

But it's – yes. All right. Well it's...

GLAZEBROOK J:

Well if that's – it's probably...

MS HARDY:

But the short point is that there are other interests that have been layered in since the - since the 19th century. So the, the return of –

ELIAS CJ:

Well only Crown interests and Mighty River – and SOE interests, aren't they?

MS HARDY:

That's right. That's right.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

I would quite like to see the easements.

MS HARDY:

Well I can revive my application, Your Honour, for –

WILLIAM YOUNG J:

Well are they in here? Are they actually in this affidavit?

ELIAS CJ:

Have you got the affidavit?

WILLIAM YOUNG J:

Yes.

MS HARDY:

We've got two, two –

CHAMBERS J:

Which affidavit is it we should look at? Is it Mr Kelly's?

MS HARDY:

Two affidavits that haven't been admitted: Mr Parker and Mr White. And Mr Parker, this is 22 November 2012, has, at tab 4, for example, a deed of grant of easement over Lake Waipapa.

CHAMBERS J:

I've found them. Sorry, which ones should I be looking at?

MS HARDY:

Affidavit of Mr Parker dated the 22nd of November. And at tab 4 is an example.

ELIAS CJ:

This is the deed. Is that what you were after though?

WILLIAM YOUNG J:
Well I understood it's registered. And I sort of –

ELIAS CJ:
Yes. You want to see how it's registered.

WILLIAM YOUNG J:
Registered against what.

ELIAS CJ:
Against what? It may not be. It's under the Land Act 1948. It's a grant.

MS HARDY:
Mr Ward's just referred to the tab 4, the covering page there which might assist.

ELIAS CJ:
Deed of easement under section 60 Land Act.

MS HARDY:
Mmm.

ELIAS CJ:
I – there's no –

CHAMBERS J:
So which title –

ELIAS CJ:
There's no necessity for there to be a certificate of title for this to be registered against I think is the answer. The Crown simply granted a contractual –

WILLIAM YOUNG J:
But it says it's registered.

CHAMBERS J:

But it's registered under the Land Transfer Act.

WILLIAM YOUNG J:

It says it's registered at the top. "Computer interest registered."

ELIAS CJ:

Oh yes. Maybe they – oh well. Mr Hodder can tell us.

CHAMBERS J:

So...

MS HARDY:

So the land is held by the Crown under the –

GLAZEBROOK J:

They're over the lakes.

MS HARDY:

– Land Act.

WILLIAM YOUNG J:

What?

GLAZEBROOK J:

It says they're over lakes.

WILLIAM YOUNG J:

Yes, but they are lakes now. That's where the river is now.

GLAZEBROOK J:

Well I'm just wondering whether the lakes are within the earlier titles.

WILLIAM YOUNG J:

You see, there's that sort of is your - there's the river.

GLAZEBROOK J:

Yes, they –

ELIAS CJ:

So you're not able to take us to the certificate of title that records this easement? I think that's what Justice Young was asking for.

MS HARDY:

No, my understanding is that there isn't a –

ELIAS CJ:

Yes.

MS HARDY:

– discreet certificate of title. It's land held under legislation and then the easement just granted by the Crown over that Crown land.

ELIAS CJ:

Yes.

GLAZEBROOK J:

So the assumption would be the coal, that it was held under the statute because of being navigable. Is that the...

MS HARDY:

That would be – that was the assumption –

GLAZEBROOK J:

All right.

MS HARDY:

– of Crown ownership at the time.

ELIAS CJ:

And this easement was granted when, in...

CHAMBERS J:

2010.

ELIAS CJ:

2010, after the commencement of this litigation. What's the application of section 27(a) to interests in land? Does it apply or is it – doesn't matter. It's just a loose thread.

MS HARDY:
The memorial system will apply to land and interest in land.

ELIAS CJ:
Yes, it does apply to interest in land. So this is subject to some sort of memorialisation is it?

MS HARDY:
Potentially.

ELIAS CJ:
Well it would have to be actually because it's gone out of Crown ownership.

MS HARDY:
Yes, so the Tribunal would have power to make and order of resumption over the land or interest in land and could determine the terms on which that resumption were ordered.

ELIAS CJ:
Thank you.

MS HARDY:
Now I move on to the structuring of the submissions, starting with the questions that were posed by the Court and beginning with the first question which was question three, about the application of the ad medium filum rule. So the appellants say that the ad medium filum rule applied to their title and to the Crown purchase. So again, that's the framing of this case, relies on the application and this Court in Paki number 1 said, "It would be wrong to depart from the application of the presumption and we were not invited to do so –

ELIAS CJ:
In that hearing?

MS HARDY:
Yes Your Honour.

ELIAS CJ:
And we're not invited to do so in this hearing, it's just that there's something very strange about the Court proceeding on a basis that might be quite wrong. So I think I certainly would like to hear the Crown position on why the presumption applies.

McGRATH J:
Just before you move onto that, what paragraph in decision number 1 were you referring to then?

ELIAS CJ:
It's a stray thing put in by –

MS HARDY:
Paragraph 24 and it's the case simply that that is entirely framed, how the case has been argued, there hasn't been any argument about whether there might be unextinguished customary rights. There hasn't been argument about a rebuttal of the ad medium filum rule, or presumption. So in my submission, the Court would be in a very difficult position assessing whether any alternative approach to the land might be taken, other than that which the appellants have put forward –

ELIAS CJ:
It might be true as a matter of fact but it does rest on a proposition of law, that is that the presumption attaches to Māori land under the – which is passed through the Courts but is held as Māori land rather than general land and that was the question reserved by three Judges in the 1955 *Wanganui River* case. So there is an issue of law as opposed to something that would require inquiry into fact.

MS HARDY:
Your Honour, my core submission is that the pleadings have to be taken as they come and that the Court, as expressed in the first decision, can't properly depart from that but in response to Your Honour's question about the application of ad medium

filum more generally, it was clearly an importation from the English common law. The 1852 English Laws Act is the basis for that importation. It, as we know, applies only where local circumstances make that appropriate. The case law indicates that from an early time ad medium filum was a presumption which applied in New Zealand –

ELIAS CJ:
To general land?

MS HARDY:
To general land and clearly, the *Mueller* case, 1900 which is not so terribly long after the transaction here, made that point –

CHAMBERS J:
Wouldn't the position be, if there is doubt about the principle, the appeal would have to be dismissed because it has been premised upon the application of that principle. Now it may be some future case could be brought but wouldn't this one have to be dismissed because we wouldn't have the necessary facts to do this completely different basis which is not one actually the appellants want to pursue anyway but...

MS HARDY:
No Your Honour, that's exactly the position –

WILLIAM YOUNG J:
You'd need evidence, I mean, you would probably want evidence as to how the situation was viewed by the owners of the lands in 1840, or perhaps in the 1800s because, in the *Wanganui Riverbed* case the focus was, I think, pretty much on that river and their wares and so on and it might be different in relation to a river of a very different character, as this portion of the Waikato River is.

MS HARDY:
And Your Honour, I think the point about the ad medium filum presumption is that it is only that, a presumption, it's rebuttable on the facts. So in the *Wanganui River* cases, the 1955 Court thought it didn't have sufficient evidence before it to make an assessment about whether the presumption applied in that circumstance or not. Thus there was the obtaining of advice from the Māori Appellate Court which made

the link between riverbed interests and the riparian hapū ownership and that led to the 1962 decision which applied the presumption.

So in texture, it's a different legal proposition from what arose in *90 Mile Beach* which was where it was assumed that once – or at least, it was determined by the Courts that once land had gone through the Native Land Court then there could be no title to the foreshore –

ELIAS CJ:
But that's effectively what was decided in the *'62* case, in respect of the *Wanganui River* and based on, as you say, the advice from the Māori Appellate Court, then a very different body than it is today and my recollection of that advice was that it was wholly unsatisfactory as indeed, the Waitangi Tribunal found in the *Wanganui* case. So it does seem to me that the reasoning in the *'62* case is on all fours with the – except that it had some factual determinations but, in terms of the propositions of laws, on all fours with the *90 Mile Beach* case.

MS HARDY:
Well Your Honour, except and it's the point made by Justice Young, what the Courts were doing was looking at riverbed on a case by case basis –

ELIAS CJ:
Yes, yes, I accept that –

MS HARDY:
– exploring the facts and determining –

ELIAS CJ:
– yes.

MS HARDY:
– and at that time, the investigation and the advice was that it wasn't rebutted but that doesn't mean that in another situation –

ELIAS CJ:

Well no, no, I don't think it was that it wasn't rebutted. Wasn't it that it was just too late because of the subdivision of land along the banks of the river? I might be wrong about that but that's my recollection of it.

MS HARDY:

My recollection of the case Your Honour, is that having obtained the advice from the Māori Appellate Court which endorsed, I think, Judge Brown's analysis in the Māori Land Court –

ELIAS CJ:

Yes.

MS HARDY:

– he said, quite broadly, that if it ever came before him that a ownership of riverbed was distinct from that ownership which is claimed to the riparian land and on that basis, without any powerful information from the Court's point of view for a rebuttal, they applied the ad medium filum rule.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Was Judge Brown and were the Judges of the Māori Land Appellate Court, were they saying the ad medium filum rule applies, or were they saying that in accordance with Māori custom the riparian owners are in effect the owners of the river?

MS HARDY:

They frame – well, the *'62* Court frames the case as an ad medium filum question of rebuttal or otherwise.

WILLIAM YOUNG J:

But what were the – what was Judge Brown and the other – how were they framed, were they saying well – because I mean, from what I can remember of what was cited from Judge Brown, he wasn't doing that, he was saying well, it just so happens, I think he was saying, it just happens that Māori custom, without necessarily going into the detail of ad medium filum but is just the riparian owners who effectively have

rights equivalent to ownership of passage and fishing and collecting rocks and whatever.

MS HARDY:

Yes, so the Courts would have referred to the Māori Land Court questions of fact rather than the questions of law, so they obtained the factual analysis from the Court and then made their determination about ad medium filum, I presume on that basis –

ELIAS CJ:

Well I think we may need to look at this but I thought Judge Brown simply said it hadn't ever come up as a claim, in all the claims he'd heard, nobody had asserted a separate claim for the river. I think that is the way he framed it but, for my part, I would like to look at that and it may be that you would like to have a look at it over the luncheon adjournment.

MS HARDY:

Can I also take you to another case that is on this topic then which is *Hotene v Morrinsville Town Board* [1917] NZLR 936 (SC) and that's in the Crown bundle at volume 3 and at tab 74. So Your Honours, this is a case, 1917 and it is a case about the application of the presumption and it applies to what is called land owned by the natives and in this instance, applying the presumption, it was found to be rebutted. So again, it's an indicator that the English common law –

ELIAS CJ:

But this is, I think, the only example, apart from Justice Edwards in the 1955 case and three of the other Judges in the *1955* case, thought that the point was not established by authority, despite this. So I – this case is cited in our number 1 decision –

MS HARDY:

Yes, it is Your Honour –

ELIAS CJ:

– as being contrary to the view expressed by those three Judges in the 1955 case but I suppose the point that was being flagged there, is that this issue really isn't resolved by authority.

MS HARDY:

Well Your Honour, I would submit and you've asked that I take you to the –

ELIAS CJ:

Yes.

MS HARDY:

– both the 1955 and the 1962 cases –

ELIAS CJ:

And the Māori Appellate Court determination.

MS HARDY:

– and I'll do that perhaps –

ELIAS CJ:

Yes.

MS HARDY:

– after the break –

ELIAS CJ:

Yes.

MS HARDY:

– but again, to reiterate, in the 1962 case there clearly was an application of the ad medium filum rule –

ELIAS CJ:

Yes.

MS HARDY:

– and it was based on the then advice from the Māori Land Court, as to how custom reconciled, or did not reconcile, with the ad medium filum presumption and –

ELIAS CJ:

Yes.

MS HARDY:

– in that case, on those facts, the Court was prepared to say that the presumption applied, leaving it open of course for other facts, for a rebuttal to take place and that could have been the framing of the case here but –

ELIAS CJ:

Well it couldn't have been really because of the nature of the claim.

MS HARDY:

Well it really goes to that core, discord between the claim for title in the first place, having the presumption apply and then having to argue against the presumption on the subsequent sale.

ELIAS CJ:

Yes. Thank you.

MS HARDY:

Move on to the fiduciary relationship argument and to identify the way this is characterised by the appellants. They say in their synopsis that there was a duty that preceded the actual sale. They say that the Crown owed a fiduciary duty not to enter into a less than a fair bargain and they say that that is the foundation of the duty that's enforceable here and, in my submission, what's clear about that is that it's not an orthodox fiduciary duty which delivers the remedies of rescission and discordment, it's more a broad good faith obligation and the cases are well rehearsed which focus on the notion of undivided loyalty owed by the fiduciary to his or her principle.

"If a fiduciary acts to the detriment of the beneficiary, no matter who benefits, the fiduciary duty has been breached. The function isn't to mediate interests, it is to act solely in the interests of the fiduciary." So Your Honours, those are cases referred to in the Crown's written submissions in more detail.

GLAZEBROOK J:

What do you say about the argument that fiduciary duties are different depending upon the context, so the fiduciary duty of a joint venture, or a partner, is probably more limited than say, you act in the best interests of the partnership and you don't hide matters and you don't keep profits but nevertheless, you're acting to a degree as a joint venture and your interests as long as they're not contrary, so that it's not always a fiduciary trust relationship and even if you're looking fiduciaries like solicitors, they're not always acting as fiduciaries?

MS HARDY:
The response here is that those kinds of cases are still far removed from a sale and purchase –

GLAZEBROOK J:
I know, I understand that argument, it's just that I'm not sure – all I was putting to you really is that you're putting the fiduciary at the absolute highest level of fiduciary acting absolutely solely and in fact, there are lots of so-called fiduciary relationships. I mean, personally I don't like the engrafting of fiduciary relationships on to commercial relationships, or into private law that ought to be dealt with by contract and the same applies to tort but that's well gone out of the window in terms of what the law might be now but –

MS HARDY:
There are –

GLAZEBROOK J:
– actually, probably for the sort of reasons you say that you shouldn't actually be engrafting those things because they don't fit very well.

MS HARDY:
Exactly, it starts – and there's been critiques of that development in the law where the analysis suggests that it might have been a more coherent development if the law had the same sorts of disputes worked their way through orthodox contract or other analyses. So yes, acknowledging that those cases are in place, my submission would be that here the facts take us well beyond even that expansion of the fiduciary notion.

ELIAS CJ:

Is that convenient? We'll take the adjournment now, thank you.

COURT ADJOURNS:11.30 AM

COURT RESUMES: 11.52 AM

MS HARDY:

Your Honours, can I correct my chronology. When I was taking you through appendix 2 which is the map and Your Honours were puzzled as to how there was a linkage between the Waipapa power station which I said was constructed in 1918 and the takings in the 1960s depicted there. That was an error, I was thinking of the Arapuni dam which is further downstream and the lake came into this area but that was 1918 and the Waipapa power station was constructed 1961 which reconciles it properly with the Public Works Act taking, so I apologise for that error.

I was beginning the Crown submission on the issue of fiduciary duty and this is covered in my written submissions from around page 17. The duty that the appellants put forward is a broad brush one. The appellants say in their synopsis at paragraph 6.4 that, "The duty doesn't prevent the Crown from acting in its own interests provided the Crown does not act in a less than fair manner." So that's the articulation of the fiduciary duty.

They argue that this is the second category of fiduciary relationship from *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 but that they say that that is in relation to a class of transactions. So putting those two propositions together, if the duty is to act in not less a fair manner and the duty applies to a class of transactions, presumably the class here, at minimum, is sales of Native Land Court title to the Crown, then again in my submission, that's looking very much like a transposition of a Waitangi Tribunal jurisdiction under the Treaty of Waitangi Act into the Courts and the outcome would be the potential for the Courts to be required to investigate a full range of 19th century purchases that followed Native Land Court title determination.

ELIAS CJ:

Isn't the relationship though, the one between the sovereign authority and the indigenous peoples, or the Treaty peoples, perhaps in the New Zealand context, so that's the relationship. As to the duty that follows from that, isn't that context specific? I mean, do you accept that there is a fiduciary relationship, or a relationship in the nature of a fiduciary relationship, you don't, do you?

MS HARDY:

Not of the kind prosecuted in this case –

ELIAS CJ:

Well no, I understand that difference but I'm looking at the prior question of whether the relationship gives rise to – is one of confidence or of a fiduciary nature because I wonder whether that isn't the better way to look at it and then one looks to see whether that gives rise to duty in the particular context which haven't been observed?

MS HARDY:

Well the *Lands* case is I suppose the New Zealand articulation of the relation between Crown and indigenous people and, in that case the language was chosen I'd submit, with some care that it was duty – or arising out of the Treaty was akin to a fiduciary relationship –

ELIAS CJ:

Yes.

MS HARDY:

– but not a fiduciary relationship in the sense being put forward here and that same analysis featured in *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318, [2007] NZAR 569 (CA) [*Te Arawa Settlement*] which is referenced in the submissions which was the Court of Appeal again reiterating that to the extent that one used the language of fiduciary to describe the Treaty relationship, care had to be taken that it was that akin to or analogy with a fiduciary rather than one that produced private law rights so –

McGRATH J:

So that's the 2008 case, is it?

MS HARDY:

That's right.

ELIAS CJ:

I'm just thinking more generally about the equitable concepts in play here which do recognise that certain relationships give rise to special care and I don't quite understand what the position is for the Crown on whether there is a special relationship?

MS HARDY:

Well the Crown would say there is a Treaty relationship which is ongoing, so that's a special relationship but the point that we would make is that that doesn't lead to the kinds of obligations here –

ELIAS CJ:

I understand that, yes.

McGRATH J:

Doesn't give rise then to legally enforceable obligations but if you assess the matter according to a standard of Treaty principles there is such a duty, is that your position?

MS HARDY:

That's right.

McGRATH J:

And such a duty would include a duty to act in good faith which is really what I suppose The President in the *Lands* case was saying?

MS HARDY:

That's correct.

McGRATH J:

And then in saying it's akin to a fiduciary duty would you say that describes its nature in respect of the legal duty that would arise in private law if you like, where there is a fiduciary duty that's enforceable?

MS HARDY:

The fiduciary discussion is clearly by analogy not –

McGRATH J:

Yes.

MS HARDY:

Yes.

McGRATH J:

Yes.

MS HARDY:

Moving on to paragraph 91 of the written submissions and I think this is a point that Your Honour Justice Glazebrook was making that yes, there are cases that do extend beyond the pure notion of absolute loyalty but there's a caution here about maintaining a principle line through the notion of fiduciary duty and this is a quotation from *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1; [1997] 2 WLR 436, [1996] All ER 698, that there are particular legal consequences produced out of a fiduciary analysis and care should be taken in applying that broadly. The Court said, "Unless the expression is so limited it is lacking in practical utility." Then –

GLAZEBROOK J:

What about just the concept here, all that's said here is that if the Crown is going to have relied on a principle it should have explained it, so that if it's going to buy something from persons who are vulnerable in the sense of not legally advised, not expected to have understood the intricacies of the common law which actually probably applies to most lay people more generally but the particular issues in relation to an indigenous people against the background of the Treaty. So the only content is the duty they're saying at the moment, as far as I can see, is just a fully informed consent. If you're going to buy something then you don't put plans up that don't indicate that's what you're buying and if you are buying something more then you tell them that.

MS HARDY:

Mmm. Two points, the synopsis actually does seem to expand beyond fully informed consent and talk about an obligation more broadly in terms of good faith, so for example, there is criticism of the price paid for land and all of those things that are –

GLAZEBROOK J:

No, I understand but it morphs slightly throughout the submissions –

ELIAS CJ:

Good faith though is almost the lowest threshold for a fiduciary, isn't it? I'm sorry, that might not have been what the discussion was about but when you say it "morphs" into those sorts of areas, it doesn't seem to me to be as – it seems to be at quite a low level, good faith.

MS HARDY:

Mmm. My point was the duty isn't articulated as limited only to an obligation to obtain fully informed consent, they're elsewhere in the submissions. There's the proposition that the Crown's duty, fiduciary duty, is to act in good faith. So it's a broader concept of the duty.

ELIAS CJ:

Well I'm just putting to you that in fact good faith is a pretty low duty to hold a fiduciary too because after all, in the United States good faith is a requirement of contracting parties, so I don't see that it's a particularly onerous obligation to expect of somebody who is in some special relationship with another.

MS HARDY:

Well it's again the mismatch between the notion of good faith obligations that we're familiar with in the Treaty setting, with a fiduciary relation which does have much more powerful requirements once you find a fiduciary relationship and that's particularised by the obligation to act only, you know, at its core, solely for the interests of the beneficiary. So it's my submission that there is a confusion here –

ELIAS CJ:

Isn't that a trust relationship and isn't a fiduciary relationship slightly more tailored and slightly more nuanced? I think we probably need to go back to basic equitable principle in this.

MS HARDY:

Well the – just looking at page 18 of the submission which is the *Mothew* analysis –

ELIAS CJ:

Never much liked it.

MS HARDY:

The proposition there is that the distinguishing obligation of a fiduciary is the obligation of loyalty, single minded loyalty of the fiduciary and then of course the trust ingredient comes in, depending on the circumstances as some mechanism for remedying the breach of the fiduciary duty and –

McGRATH J:
Looking at that passage Ms Hardy, when you say "and further", just looking at the footnote, you're now picking up this article by Sarah Worthington, are you?

MS HARDY:
Yes.

McGRATH J:
Should that, the final sentence of that first paragraph, "This *Mothew* analysis was approved by the Court in *Chirnside v Fay*." should that be just part of your submissions, rather than the –

MS HARDY:
Yes Your Honour, that should be a separate proposition from my submission –

McGRATH J:
Fine. So it's a point that is not part of the quote and it's in between the quotes.

MS HARDY:
No.

McGRATH J:
Thanks.

MS HARDY:
To respond to Justice Glazebrook's question, why not – to paraphrase Your Honour, wouldn't it make sense to have a basic obligation in this kind of situation of fully explaining the terms of the purchase arrangement and my response to that would be there are again, orthodox legal responses to the question of either unconscionable bargain or mistake about the contract and they are the appropriate principled responses to a kind of allegation made here and, in my submission, it's because of

the constraints on demonstrating those causes of action and the time limitations that apply to them for good reason, that the rather elastic approach to fiduciary duty is being deployed here as an alternative.

GLAZEBROOK J:

I suppose the other argument though, is having actually to see somebody in the sense of not getting fully informed consent, that the fraud provisions of the Limitation Act aren't in fact really tailored to dealing with those sorts of situations that happen in relation to indigenous people and especially where the ability to claim has actually been taken away for such a long time? In terms of the attitude of the Crown, I mean, the answer to that may be well, that's why the Waitangi Tribunal process was set up and that's the more appropriate mechanism for dealing with those more systemic issues?

MS HARDY:

That's the broad Crown response –

GLAZEBROOK J:

That's the submission –

MS HARDY:

– that there is another forum, yes.

GLAZEBROOK J:

I mean, you've probably gathered, I have a certain amount of sympathy for the view that those types of things can be accommodated within the private law context, that they're in fact dealt with without engrafting something further on. It's just that, it seems to me that it's rather difficult for the Crown to say well, we shouldn't have had that duty, doesn't matter where it's characterised but to say well, we shouldn't have just the simple duty to tell people what it is, especially being the Crown, to tell people what it is that we're purchasing and not hiding it, whether on purpose or not in this context because I suspect maybe the Crown wasn't really thinking it was purchasing the river at that stage because it probably wasn't thinking there was much use to the river?

MS HARDY:

Yes, certainly there –

GLAZEBROOK J:
Until later, the uses were made clear in terms of the hydro uses.

MS HARDY:
So we've got no allegation here of –

GLAZEBROOK J:
Bad faith, mmm.

MS HARDY:
– bad faith which is the ingredient one might expect to overcome issues of limitation –

GLAZEBROOK J:
So that's the trouble really in terms of – because it's not necessarily a bad faith issue, it's just a failure to inform.

MS HARDY:
And of course we haven't got particular evidence that goes to the core of that point either.

GLAZEBROOK J:
No.

MS HARDY:
The submissions traverse the Canadian cases that the appellants rely on, and this is on page 19 of the written submissions.

I don't propose to go through all of the detail of those cases which Your Honours may well be familiar with but I wanted to make a more conceptual point about their framing, and perhaps *Guerin* is really the starting point for the Canadian jurisprudence on this topic. And my submission is that, again, great care has to be taken in importing that Canadian framework into the New Zealand framework.

Guerin and the cases generally which follow, are about a specific regime in Canada based on the Indian Act and *Guerin* itself is about reserve land. So in that case, which is at the appellant's volume 1, tab 22 –

ELIAS CJ:
Where is the text of the section 35 in this? I'd just quite like to have a look at it.

GLAZEBROOK J:
Sorry I missed the volume number.

MS HARDY:
Volume 1 of the Crown authorities and tab 22.

GLAZEBROOK J:
You said the appellant's.

ELIAS CJ:
No, it is the appellant's authorities.

MS HARDY:
I beg your pardon, Your Honours.

So this case, and many of the Canadian cases, are about reserve land that is held by the Crown on behalf of Indian bands and if you look, Your Honours, at page 348 of the *Guerin* case, it reproduces –

ELIAS CJ:
Sorry, page 3...

MS HARDY:
348 on the left-hand side. It reproduces section 18 of the Indian Act which says, "Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart and subject to this Act and to the terms of any treaty or surrender, the governor may determine whether any purpose for which lands in a reserve are used, or to be used, is for the use and benefit of the band," and as Your Honours are probably familiar, what happened in *Guerin* was that the Crown entered into a lease of the reserve land for a

golf club on terms which were not favourable to the Indian band and which did not follow the instructions of the Indian band. So the apparent discretion in that statutory provision was read by the Court as importing fiduciary obligations to act in the best interests of the Indian band.

But the structure, therefore, of the Canadian arrangement is land held by the Crown on behalf of the band, and in my submission, that's far away from the sale and purchase arrangements of the Crown in this circumstance were –

ELIAS CJ:
Isn't the basis of the fiduciary relationship – your argument is that the fiduciary relationship there arose out of the fact that the Crown held the reserve lands for the benefits of Indians is it? But isn't the fiduciary relationship in New Zealand circumstances not one arising out of reservation of land because that wasn't the path followed in New Zealand but arising out of the session of sovereignty in return for the guarantee of protection? Isn't that the – so it's not exactly the same but why is it not equivalent?

MS HARDY:
The bargain, if you like, that underpins the sovereignty point is the Treaty and, in my submission again, one goes back to the principles in the *Lands* case which is that this does provide an important underpinning, founding document for New Zealand, that sets up a relation between indigenous Māori and the Crown.

ELIAS CJ:
Yes.

MS HARDY:
But one needs more than that to find a fiduciary duty of the kind being prosecuted here to produce private law obligations and remedy.

McGRATH J:
And did that additional element come out of section 18 of the Indian Act?

MS HARDY:

Yes, well it's 18 which reflects the Crown holdings, specific land on specific terms for an Indian band and then acting against the interests of the band –

McGRATH J:

But what I'm wondering is whether that means that *Guerin* and you're coming to *Sparrow* which is a different provision but we say with *Guerin*, can be compared more directly with the *Lands* case, the *SOE*s case, where again, there was a statutory principle that had to be applied and the good faith duty came out of that statute, the words "Treaty principles", whereas in this case we have no statutes being applied.

MS HARDY:

That's right, the statutory backdrop, Your Honour, for this case is the Native Land Court legislation which, in fact, is the mechanism to interpose between crown and Māori and provide an independent, albeit flawed in the Tribunal's view, mechanism for title determine to then allow sales. So it's a very different framework.

McGRATH J:

But there is a statutory backdrop do you accept?

MS HARDY:

Not a statutory backdrop for the Crown's fiduciary obligation.

McGRATH J:

Right, yes, okay, I understand your submission.

GLAZEBROOK J:

Well if you don't have the Tribunal then, this means that the Crown is entitled to act without informed consent. I mean I just have difficulty because all – well, leaving aside the other claims, what's actually the claim here is that the people who sold this land didn't know they were selling the riverbed and they didn't know they were selling the riverbed because nothing what so ever in any of the contractual documents, all the certificates of title or anything, including the discussion the Native Land Court area for a million years indicated that they were selling the riverbed. And all that's being contended for is that in transactions of that kind against the background of a Treaty guarantee of property and an indication that the Crown is interposing itself in order to protect Māori from inappropriate purchases and that's where the right of pre-

emption comes in. Then there is – and if it was part of the right of pre-emption, then the whole purpose of that was to protect Māori against other people as against to – so one would have thought that the framework, if you are looking at pre-emption, was actually fairly similar to the *Guerin* framework that's all.

MS HARDY:
Well on a factual point, the pre-emption didn't apply to the bulk of the sales here and, in fact, the fundamental purpose behind the creation of the Native Land Court was to open out into the pre-market land transactions away from what would have been previously the Crown's sole prerogative right to acquire customary title.

In terms of is the Court left, in a case like this, with a lacuna as to any remedy for an injustice, there are a few points to make there. The Tribunal clearly but, in addition, there would have been remedies for the appellants to have taken, again, in terms of orthodox law relating to purchaser and vendor. So they would have had the same, and Article 3 of the Treaty guarantees the same rights and protections to Māori as to other New Zealanders, so there would have been a capacity had the facts in fact demonstrated it, which we don't have, causes of action relating to unconscionable bargain or mistake. So, in my submission, it's not the question of there being just a lacuna here in terms of – and the law needing to expand –

ELIAS CJ:
Sorry, is that that there were contractual remedies at the time you're saying?

CHAMBERS J:
Yes.

MS HARDY:
Yes.

ELIAS CJ:
Yes.

MS HARDY:
And my understanding is they would have related to the time at which the fraud or the non-disclosure was unearthed, understood.

WILLIAM YOUNG J:

Well if the vendors were in a position of particular disadvantage to the knowledge of the Court and the Crown engaged in overreaching behaviour that would engage the jurisdiction to set aside a bargain as unconscionable.

MS HARDY:

That's right –

WILLIAM YOUNG J:

You don't need to worry about fiduciaries or anything else.

ELIAS CJ:

But those categories are that bleed into each other. The relationships that establish the basis for a finding of unconscionability or undue influence or anything else like that, I'm not sure that equity is as rigid in terms of analysing these. It responds to disadvantage where advantage has been taken.

MS HARDY:

But the counter-veiling point is that it also, when dealing with property and the need for certainty about property delineation, that the equitable principles need to reflect a clear line of principle rather than being a broad brush response to what's perceived as an injustice and then working back from that to look for a remedy.

ELIAS CJ:

Yes, no I understand that, yes.

GLAZEBROOK J:

I suppose the only point I was making is that this is, if you take it in its absolute narrowest sense of an informed consent duty, then it's actually very narrow. It's not broad brushed.

WILLIAM YOUNG J:

It's got to be pretty broad brushed if you've got to try and establish consent 130 years later.

GLAZEBROOK J:

Well that might be a lache or a limitation type argument. It doesn't detract from the duty does it?

MS HARDY:

But my question would be, is there a necessity to supplement existing causes of action and those which would have existed back in the 19th century, which would have allowed the contract to have been quashed if it was –

GLAZEBROOK J:

Well I suppose the question is would it have been a pure contractual remedy or would there have been equitable remedies that were attached to that well?

WILLIAM YOUNG J:

It was an equitable remedy.

GLAZEBROOK J:

Well exactly and, therefore, how does the Limitation Act apply because it's an equitable remedy?

WILLIAM YOUNG J:

No it was an application to rescind a contract which may be – it may not be subject, well it will be subject one way or another to either limitation or laches.

GLAZEBROOK J:

But that's not purely contractual but your main point is that there are those remedies. You don't need to craft something different in terms of fiduciary remedy but, in fact, if you're just looking at informed consent, then you may just be in normal course of events in terms of an equitable remedy for unconscionable behaviour.

MS HARDY:

Correct.

GLAZEBROOK J:

And then it's, then you're actually just looking at the normal issues of disadvantage 100 years down the track. Oh, sorry, not the normal issues because it would be an unusual case in the Courts, but you say keep it to the traditional legal categories. Is that...

MS HARDY:
That's the submission.

ELIAS CJ:
I suppose that concentrating on the contract in a way begs the question of what it included, because if it was not apparent that the river was included at the time, it's a bit difficult to know how that loss could have been asserted, and one could look at it in terms of the other ability to actually apply for title to the river, but that would not have been available, at least from 1909, against the Crown as I understand it, and maybe not before. Am I right in thinking that it might've been from earlier that Māori could not run customary title claims against the Crown?

WILLIAM YOUNG J:
Well in the *Wanganui Riverbed* '62 case it seems to be accepted, or stated anyway, that it would've been possible to – before 1903, the coal mines legislation, for a claim to have been made for customary ownership of the river.

ELIAS CJ:
Yes, to the Native Land Court.

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
Yes.

MS HARDY:
So property claims to land could be brought in the Courts and be tested. I think it was the prevention of raising title against the Crown. So the Arawa lakes case in Rotorua was a case around that time that involved an application for declaration of title in the, in the lakes. So I don't, I don't think Your Honour, it's entirely precluded.

ELIAS CJ:
Was that a claim to the Native Land Court?

MS HARDY:

That was to the ordinary Courts.

ELIAS CJ:
Which case is that?

MS HARDY:
It's *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA).

GLAZEBROOK J:
So probably you'd only go to claim title though if you wanted to sell presumably, which was why this arose in the first place, wasn't it?

MS HARDY:
The, you mean the, Your Honour, the –

GLAZEBROOK J:
Well it's just it doesn't seem that it would be likely that you would claim title to the, go to the trouble of claiming title to the riverbed and having surveys and whatever else you might have to do to claim title even if you could unless you were wishing or somebody was wishing to sell.

MS HARDY:
Or if you were concerned that your property interest was being encroached upon, which is, according to the appellants, that occurred in the – at least by the 1940s.

GLAZEBROOK J:
Yes, I was probably earlier.

MS HARDY:
I think –

GLAZEBROOK J:
No, no, certainly by – as soon as – I think the point is, probably, but it wasn't apparent, that anybody was wanting this, I suppose, until there were the encroachments.

MS HARDY:

It just appears from the record that there's no evidence about it being an issue one way or the other.

GLAZEBROOK J:

Yes. Exactly.

MS HARDY:

Mmm.

ELIAS CJ:

Which suggests, doesn't it, that your argument about this being time-barred really is one from the time these dams were set up.

MS HARDY:

Well –

WILLIAM YOUNG J:

Well it must be – one thing that – it's of interest to me but I'm not sure of any evidence, is there were quite of lot of islands in this stretch of the river, some of which must have been on the left bank side of the river. Was there any, is there any evidence about their continued usage or what happened to those islands after 1890?

MS HARDY:

Your Honour, none of the evidence that I can recall that's emerged from this case, which was a fairly comprehensive trawl of certainly the documentary evidence, is that there, there isn't evidence of that feature.

WILLIAM YOUNG J:

And –

ELIAS CJ:

And is that right, that there were islands in this stretch?

WILLIAM YOUNG J:

Yes. Yes. And was there any evidence of complaint when those islands were flooded? Were buried by the lakes?

MS HARDY:

No. No evidence of complaint.

GLAZEBROOK J:

Were they used before? Was there evidence that they were used before, was it?

WILLIAM YOUNG J:

They did have some names.

GLAZEBROOK J:

I can understand that.

WILLIAM YOUNG J:

There was loose evidence. As far as I'm aware there's loose evidence.

GLAZEBROOK J:

That they were – I can understand them being named but were they used?

WILLIAM YOUNG J:

The evidence – I'm afraid I haven't got the evidence in my mind as closely – closely enough to answer that.

MS HARDY:

There's very scant evidence about use. There is some minor evidence, as I recall, in Mr Parker's brief which is about consultation about the flooding of an urupā, but I can't recall whether that's on the banks. I think it was on the other side of the, the river, the right-hand side. But other than that, pretty slim evidence of use of the riverbed or any islands. Or any complaint until we have the Waitangi Tribunal inquiry arising.

Your Honours, do – would you like me to run through more of the Canadian cases which really run, in my submission, along the same theme, that there is a distinctive regime there, before going to the discussion on, on the Treaty?

ELIAS CJ:

What you rely – make a similar point about section 35 of the Indian Act. What, in terms of the *Osoyoos Indian Band* case? Is that, is that something you want to take us to? Or can you just tell us, remind us what, I can't remember what the, what section 35...

MS HARDY:
Yes, the, the entire Act is in the bundle, and I'll –

ELIAS CJ:
Oh, that's the affirmation. Is this the Constitution Act provision?

McGRATH J:
Yes. Yes, it is.

ELIAS CJ:
Oh, yes. Yes.

MCGRATH J:
But it's only a few lines. It actually appears in the *Sparrow* judgment of Chief Justice Dickson, doesn't it?

ELIAS CJ:
Yes. Yes.

McGRATH J:
But really what's – that – a lot of that case seems to be proceeding on a discussion of constitutional approach as to interpretation where a provision is affirming the rights of indigenous people. It sounds like the Fisheries Act 1996 sort of, in some respects.

ELIAS CJ:
Yes. Yes.

MS HARDY:
Yes, so it's a repeat of that framework point of legislation and interpretation.

McGRATH J:

But Mr Brown, of course, has picked up the President's, Court of Appeal's development or application and development, if you like, of that principle of – which is of aboriginal title, I think is the – aboriginal title in –

MS HARDY:
Ika Whenua?

McGRATH J:
– in *Sparrow*. Is that right?

MS HARDY:
And the development of that in the *Ika Whenua* case?

McGRATH J:
Yes. Yes.

MS HARDY:
Yes. Well, again, a concept not, not thoroughly developed in that case where, which was about the transfer of dams and the Court then said, "Well perhaps there's an aboriginal title claim available but the – however one reads that, the transfer of the dams can't be seen as being in breach of Treaty principles."

McGRATH J:
Well, I think you're – I think you've said in your – your view is the concept wasn't one that was thoroughly developed.

MS HARDY:
But finally in relation to the Canadian development, the appellants rely on cases like the *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 (SCC) case and that is referred to in paragraph 107 of my submissions. And that development of Canadian law is of interest, I'd submit, in the, the engagement of this Court in the, the place of the Waitangi Tribunal as it relates to this Court's jurisdiction. In *Haida* the case is about undetermined aboriginal title, so again different from here. It was about forestry that was taking place on the island of Haida Gwaii and the Court identified that even though there was not determined native title, because it was a

potential – so again perhaps a little more like our State-Owned Enterprises Act 1986 section 9 issue, because there was potential for proving title there was an intermediate obligation on the Crown to consult with the people of Haida Gwaii before making any final determinations about the issuing of forestry licences. And the language in those cases and the more recent Canadian cases is strongly about relationship and reconciliation, and the point is repeated in the, in the *Williams v British Columbia* (2012) BCCA 285 case that basically even section 35 of the Constitution Act in Canada, which is the, the protection of treaty and aboriginal rights, even the stark language of that, which is perhaps closer to our Article 2 proposition, that involves a balancing of the interests of indigenous people and the rest of the, the community and the Crown. And in, in my observation the Canadian jurisprudence, without its, without having developed a Waitangi Tribunal with specialist statutory jurisdiction, is now moving from its early days of identifying a fiduciary relationship that started to look a little like the private law concept is now trending into the language that's much more familiar in the, in our jurisprudence, which is about rights reconciliation and solutions brokered between the parties, so moving again to that high level where the Crown would acknowledge that's where the Treaty relationship sits.

I address more directly in the submissions around paragraph 23 the material on the Treaty of Waitangi and its status.

McGRATH J:
Page 23.

MS HARDY:
Sorry, page 23, paragraph 118 and following. In my submission there are a couple of points to be made around the Treaty arguments in this case. The first is really a repeat of what I've submitted so far: that when one looks at the Treaty in terms of enforcement for property rights in the Courts, one needs to take a, a broad view of what's being pursued here and ensure that property rights definition does not deploy Treaty principles to produce outcomes unsympathetic to the Treaty framework. And my second point is in relation to the Hoani *Te Heuheu* case where here the, the appellants and the intervener have suggested there might be a necessity for some revision or overturning of that case, and my submission, that's simply not necessary. The, the case from the 1940s did reaffirm, if you like, that the Treaty could not be used to invalidate legislation. That's a proposition that's maintained in New Zealand

through all of the jurisprudence that applies to the Treaty, but, and it's a point that the Chief Justice made yesterday, there has been an enormous evolution since 1940 of the Treaty in New Zealand law, multifarious references in statute, its role in judicial review and it would be, again to use the Court's words, "Too late to turn the clock back should anyone be inclined to," on that development of the law and that has not been concluded by the Hoani *Te Heuheu* case. So rather, my submission is that the focus here is on really interrogating whether a private law action with private law consequences in relation to an ambiguous transaction in the 19th century is the kind of road of development of the law in New Zealand deploying the Treaty in aid and in my submission that can't be so.

I want to touch briefly on the vulnerability point. Mr -

GLAZEBROOK J:
If you're moving on to another point, can I just ask why if the Treaty can be used to inform the interpretation of legislation which I think is accepted even if it's not specifically mentioned, why can't it inform executive action?

MS HARDY:
Well, it has potential to inform review of public law powers and that's also an available approach.

ELIAS CJ:
I understood that to be what you were saying when you said, "In administrative law."

GLAZEBROOK J:
All right so –

ELIAS CJ:
So you accept that it can be used in determining whether executive action is reasonable or...

MS HARDY:
It may in circumstances be a relevant consideration to be weighed by a decision maker.

ELIAS CJ:

Yes.

McGRATH J:
But not universally?

ELIAS CJ:
No.

MS HARDY:
But not universally depending on context.

McGRATH J:
Yes. I was thinking of the legal aid case, the Court of Appeal judgment, although it went to the Privy Council in *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA) legal aid case. I think you looked at that.

GLAZEBROOK J:
Well why couldn't it inform the Crown approach this purchaser in this case then? Is that just your argument that there are private law remedies in respect of it rather that in informing Crown actions and duties?

MS HARDY:
Yes, well my submission would be that the Treaty operates as it's only by analogy, the fiduciary. It deals with exe –

GLAZEBROOK J:
Well, not that's – just take it down to the absolute, the only thing that you do is when you are dealing with an indigenous people, you deal with them by, especially if you're purchasing, to get informed consent.

MS HARDY:
So the question is whether the Treaty, Your Honour, whether the Treaty is the –

GLAZEBROOK J:
Well, it informs executive action or can inform the duties that the executive might have when dealing with an indigenous people, because if it can inform executive

action why can't it be used to inform executive action in this context as against other contexts?

MS HARDY:
Well context in terms of informing the obligations of parties –

GLAZEBROOK J:
Of Crown as purchaser?

MS HARDY:
Yes. It could well be in making an assessment as to whether a bargain was unconscionable, the context would be relevant, including the Crown's role as purchaser and to the extent that that relates to a Treaty position. It might be relevant there. But that's in the abstract.

Here the Crown's argument is that there was a sale and purchase arrangement with the Native Land Court interposed, which creates a different relation as being vendor and purchaser than otherwise be the case.

GLAZEBROOK J:
Well that might be so and that might mean that there can't be an inquiry into the Native Land Court process that actually gave them title in the first place, but the Crown isn't actually relying on the Native Land Court title here. It's relying on a presumption isn't it?

MS HARDY:
It's relying –

GLAZEBROOK J:
So just because the Native Land Court has created a title rather than it being a customary title, I can't quite see why that creates such a disconnect between the Crown as purchaser and any duties that might be informed by our treaty obligations to act whatever that means in accordance with the Treaty, but let's put it to its absolute narrowest to obtain informed consent to sales.

MS HARDY:

Well the Native Land Court determined the title which, according to the appellants, included the ad medium filum stretch. The Crown purchased that from willing vendors, according to their evidence, and purchased the title that they possessed. So in my submission it would be inappropriate to identify a further duty on the Crown to explain the content of that bargain in a way that goes beyond a broad treaty obligation of good faith that might be looked at in hindsight now by the Tribunal and see it as an enforceable private law obligation that produces a return of property or rescission and an accounting for profits.

GLAZEBROOK J:

But I understood you to accept that in any ordinary bargain where you were looking at unconscionability, you could take into account treaty principle. What I don't understand is why, just because we interpose the Native Land Court, you can't look at treaty principles when looking at whether there's an unconscionable bargain, or did I misunderstand what you – the answer you gave, because I think you said, well, looking at whether a bargain was unconscionable, you could look at treaty principles and it could inform the unconscionability of a bargain or not but then I thought you said but because the Native Land Court was interposed here, no that doesn't apply, and I just can't see why that would be the case. I mean it doesn't mean that you would land up with a remedy or that the informing of it would lead to any different result but...

MS HARDY:

Well, my point is that if there were an unconscionable bargain, then the appellants would need to demonstrate the usual requirements for unconscionable bargain. To what extent the Treaty is relevant to that is actually difficult to identify because at the point of the transaction, the Crown is acting as, through its prerogative powers, it's acting as a purchaser. If the bargain is unconscionable, it's unconscionable and that may have to do with vulnerabilities that are demonstrated on the part of the vendor in orthodox terms, but in my submission a Treaty layer to that isn't particularly apposite.

GLAZEBROOK J:

So the Treaty only applies when they're acting under prerogative, not if they're purchasing under a contract or the Treaty can only inform under circumstances where it's a prerogative now they're exercising, the Crown's exercising? Is that the submission?

WILLIAM YOUNG J:

Well, you're saying it's not really relevant to private law claims –

MS HARDY:

That's right, it's –

WILLIAM YOUNG J:

– and that the debt of private law claim here and, well, that's the argument. We have to make a decision on it, I guess isn't it?

GLAZEBROOK J:

Would there be a private law claim if t was a customary law claim wouldn't it?

MS HARDY:

Well if it was a customary law claim about extinguishment of customary title, that would be a review of the Crown's prerogative to –

GLAZEBROOK J:

But that's what I said.

MS HARDY:

Yes.

GLAZEBROOK J:

You say it's only the prerogative that it applies to?

MS HARDY:

Well I don't – Your Honour, I don't put it as starkly as that. It's about relevance of the Treaty in terms of identifying is it relevant to what is here, an arm's length purchase arrangement between vendor and purchaser with the Native Land Court interposed, and my submission is it's not. It doesn't add anything that a cause of action for unconscionable bargain would fill that space and that's different from a lens that might apply using the Treaty which is, for example, was the accumulation of sales, irrespective of their terms, prejudicial to Māori. So it's really the deployment in the private law contractual setting that, in my submission, is problematic.

ELIAS CJ:

Ms Hardy, I'm sorry because this is harking back a little bit to the facts but when did the Crown first assert that it purchased the land ad medium filum? Was it in response to this claim? I'm just trying to work out –

GLAZEBROOK J:
When it found it didn't own it under the Coal Mines Act.

ELIAS CJ:
Well, yes, but it was always a fallback position –

GLAZEBROOK J:
Yes I understand that.

ELIAS CJ:
– but in this claim I'm just – it may not be relevant but, particularly if we get into questions of delay I suppose, particularly when you're talking about a presumption, a conveyancing presumption, it may be that it's not reasonable to expect that a claim against the Crown would have eventuated until the Crown asserted title.

Now it clearly asserted title on the basis of the Coal Mines Act but when did it first say, "Well, in any event and by way of boot straps, we purchased it?" There's probably no indication of it taking that line until there was some doubt about the Coal Mines Act was there?

MS HARDY:
Well I don't recall, from the evidence filed, any clear assertions of ad medium filum. There were pastoral leases that were granted about the Pouakani B6 area which may have raised issues about access to the riverbed. I'm not sure about that, Your Honour, but obviously by 1903 with the Coal Mines Act Amendment Act, it was assumed that there was a Crown ownership, so not a need to resort to the ad medium filum issue and –

ELIAS CJ:
Well, it wasn't really probably – well the *Mueller* case sort of indicates that there were arguments both ways when this first popped and, indeed, the majority view was that it would all have to be looked at on a case by case basis, which is really why the Coal Mines Act solution seems to have been hurriedly put into place, or one of the reasons

why it was hurriedly – the other being the coal that was being extracted. So I'm just really wondering how realistic it is to say that people should have taken steps to challenge the Crown's purchase if there's nothing really to indicate that the Crown did assert that it had purchased –

WILLIAM YOUNG J:
It was asserting ownership of course.

CHAMBERS J:
Yes.

WILLIAM YOUNG J:
For instance, by flooding the whole jolly river system –

CHAMBERS J:
That's all that matters.

WILLIAM YOUNG J:
– and I suppose in spending quite a lot of money in doing so.

ELIAS CJ:
No but this is all post –

WILLIAM YOUNG J:
Oh, yes, of course.

ELIAS CJ:
– 1903 and the Coal Mines Act. I'm just thinking about this argument. The Coal Mines Act having been cleared away in respect of this.

WILLIAM YOUNG J:
The trouble is the corollary of the appellant's case that they acquired title ad medium filum would carry, you would think, perhaps arguably, a corollary that they disposed of it when they sold. So it's – there's this sort of contradiction at the heart of the case that may bear on the point the Chief Justice has put to you.

ELIAS CJ:

Yes, but one wonders whether that that isn't a late realisation too. All right, thank you.

MS HARDY:

I was at page 27 of the written submission and dealing very briefly with the issue of vulnerability. Two points, again the orthodox case law is that one doesn't generate out of a circumstance of vulnerability at fiduciary duty and, secondly, the evidence about vulnerability is contested. There is the brief of evidence in the bundles from Mr Stirling, who gave evidence for the appellants in the High Court. There is evidence from Dr Loveridge for the Crown, and just to rehearse that detail.

Much of the detail contended by the appellants is contested. That goes to issues of were their lawyers present? What were the mechanisms of the Native Land Court in terms of translation and so forth but the core point is probably this reinforces the complication for the Court looking back over a hundred years ago as to try to determine the circumstances beyond the broad brush of the Māori/Crown relation.

GLAZEBROOK J:

Well, the simple point, though, in terms of the informed consent isn't it, is that if this was explained, then one would have expected that it would have been documented somewhere and it doesn't seem to have been documented anywhere. In fact all of the documentation would suggest that what was being sold in terms of what it had explained to it had been sold was the land, to the riverbed. If you're looking at the diagrams, the descriptions, nobody mentioned it at all in the whole of the course of the hearings. So it's not actually very difficult to infer from that, that it was never mentioned is it? And one can understand, backed up by the fact that probably nobody was thinking about it either.

MS HARDY:

That's a possible inference. The other aspect to weigh with that is that the Court records don't disclose the considerable discussions and arrangements that were made standardly, out of Court that involved discussion amongst Māori and between Māori and Crown officials.

So Your Honour's correct. We don't have information. One might make an inference, but it's on the basis of an absence of critical information that might have resolved the issue.

GLAZEBROOK J:
Well it might have done but one would have expected if that had been the result of it and it was important, that it would have been mentioned in the official aspects as well wouldn't it?

MS HARDY:
But perhaps a point, if it was important, while now from a Treaty perspective, the argument is that it's inconceivable, there might have been an agreed transfer of riverbed. I'd suggest there's an aspect of that which is reading back intention and observation as well.

What happened in reality was a sale of riparian land, much of the land not particularly profitable for pastoral farming or other activity, pumice land, a move into the interior timbered land. So was a stretch of the riverbed important at that point? And the answer to that might be not in those terms of who owned it, and that's – I say that without wanting to underplay the kind of relation groups might have with the river but that's not the same as an important intention about a half strip of a riverbed, alongside land that has been sold and, presumably, access to that riverbed, impaired.

And what did those vendors think that the purchasers and leaseholders' rights would be in relation to the river?

Again the questions can be posed but not readily answered.

COURT ADJOURNS:1.01 PM

COURT RESUMES: 2.19 PM

ELIAS CJ:
Yes, Ms Hardy.

MS HARDY:
Members of the Court, I'm at page 27 of the written submissions and a brief discussion at paragraph 127 about pre-emption which the appellants rely on broadly as part of the fabric of generating the duties claimed and argue it quite broadly in that they say that pre-emption led to a breach of the duties, relating as it did to an unfair price. So I wanted to take Your Honours to the pleading in the statement of claim which is at the case number 1, volume 1 of the case at tab 3 and the duty is articulated through page 13 and concludes at paragraph 27(f), "Because of the Crown's right of pre-emption, such sales and taking of land had to be to the Crown –

ELIAS CJ:
Sorry, the case on appeal, volume?

MS HARDY:
Volume 1, tab 3.

ELIAS CJ:
I don't have tabs on my volume. Did you say page 13?

MS HARDY:
Page 22.

ELIAS CJ:
Yes.

MS HARDY:
So the point here is simply that the pleading of the case is a very broad one, "Because of the Crown's right of pre-emption, sales and takings of land had to be to the Crown and resulted in sales at less than full value." Two points about that pleading, one being the factual one that, as discussed earlier, pre-emption didn't apply to any of the purchases except B6 and secondly, this reference to the terms of

sale including price is, in the Crown's submission, a relitigation of the claims that were settled in the Pouakani Claims Settlement Act of 2000.

On to page 29 which addresses the issue of aboriginal title. The contention of the appellants is that although what we have here is a Native Land Court determination and then a purchase of the title so determined, the broad statements that apply to extinguishment of aboriginal title ought to apply and, in my submission, that's not appropriate for the reasons canvassed earlier today that what we're talking about here, or at least what the appellants are claiming, is that private law obligation with private law remedies and it's a powerful point I think from a Treaty perspective that the appellants, if they were relying on a customary title, would actually find themselves potentially in competition with a range of other iwi hapū as to the proper customary title that might apply to a riverbed.

Again, making the point at paragraph 141, what we have here is interposed the Native Land Court determining title and it's inappropriate to consider, as the appellants imply, that the Court was some sort of Crown agent. That extreme contention has been commented on and reflected on with some detail by Professor Boast in his account of the Native Land Court which is one of the most thorough accounts. That's recorded at footnote 154 which is his critique of the Native Land Court, indicating that it did act essentially independently. It produced, ultimately, some outcomes that were detrimental to Māori but that's not the same as an analysis of each of the transactions, or decisions that the Court made.

So at paragraph 143, the Crown submission is that, "The appellants are, to some extent, rerunning arguments about the deficiencies in the Native Land Court regime which they argued before the Waitangi Tribunal and which were settled in their settlement deed and then recorded in the settlement legislation."

The next aspect of the submissions relates to the construction of the hydro electricity scheme and the taking of land for that scheme under the Public Works Act. So the appellants say that that taking and that construction of the hydro scheme was a breach of the duty. The point made at paragraph 145 is that, "The construction of the dams was authorised by legislation and for the public benefit –

ELIAS CJ:

Ms Hardy, we have read the submissions, so I think really you can just highlight anything, particularly in response to the submissions developed orally, that we could move a little bit faster through this.

MS HARDY:

Certainly, Your Honour. So the point there is simply there is a statutory framework which authorised the takings, the Public Works Act takings were made and they include the ad medium filum strip. So irrespective of the history that preceded the takings, largely in the 1960s, the issue of titles is now resolved by those takings. The kind of remedy that one gets under the Public Works Act for takings is one of compensation under that legislative regime.

The next topic is time and question 5 which the Court has posed, "Has there been a loss of right to enforce obligations –

CHAMBERS J:

Under the Public Works Act, does the riparian owner ever receive compensation for the riverbed adjoining the land taken?

MS HARDY:

The Public Works Act taking would be a compensation for the entire title however that might be determined. So I'm not aware of cases of a discrete payment for riverbed but simply an assessment of taking of the title.

CHAMBERS J:

Yes, I just wondered if there was authority indicating whether the value of the riverbed was taken into account in any situation or case. You don't know?

MS HARDY:

Not that I'm aware Your Honour. One of the key points then, moving to the timeliness question, is that the appellants haven't clearly through this course of this proceeding, articulated what kind of trust remedy they are seeking and therefore it has been difficult to respond in terms of the timeliness question.

The submission at 145 is that the fact that a declaration is sought shouldn't obscure the actual content of the trust being pursued and that trust content is articulated at paragraph 38 of the fifth amended statement of claim again at tab 3 of the case, volume 1.

CHAMBERS J:
It is of course problematic as to exactly whether we are in Limitation Act territory or laches. Assume it is Limitation Act for the moment and we're looking at wrongful activity done in the 1860s but which Limitation Act is the applicable one? In other words, looking at transitional provisions which Act do we have to look at?

MS HARDY:
Our submission is the relevant Act is the 1833 Property Limitation Act which again, is included in the materials, it's at tab 1 of volume 1 of the Crown's authorities.

WILLIAM YOUNG J:
Did the Limitation Act 1950 not extend backwards?

MS HARDY:
No, it maintained limitations that pre-existed.

WILLIAM YOUNG J:
I see.

ELIAS CJ:
Sorry, was it the Crown's bundle or the appellant's bundle?

MS HARDY:
It's the Crown's bundle and Your Honours, there was an error at tab 1 with the incorrect statute but the correct version was provided to the Court yesterday, so you should have a loose copy of the 1833 Act as a substitute.

ELIAS CJ:
There's no way I can find a loose copy at the moment.

WILLIAM YOUNG J:

I saw it but I didn't realise what it was, I'm not going to be able to find it very easily now.

ELIAS CJ:
No.

McGRATH J:
So the one in the volume is out of date?

WILLIAM YOUNG J:
It's the wrong one.

CHAMBERS J:
Do you mean that there's a separate piece of –

MS HARDY:
There's a slightly alarming statute about the rights of dower on inspection.

CHAMBERS J:
It was a separate piece of paper, was it?

WILLIAM YOUNG J:
Not now.

MS HARDY:
Yes, it's approximately four pages.

ELIAS CJ:
Oh, well done.

McGRATH J:
You might find it in your copy of the Pouakani report.

CHAMBERS J:
And in the lower Courts there was no dispute, was there, that this Act was in force in New Zealand, et cetera?

MS HARDY:

The application – the argument in the Court below was based on section 21 issues of the 1950 Act rather than this Act when on our further research we determined that it was this Act that applied.

CHAMBERS J:

Right.

ELIAS CJ:

And does this apply pursuant to what, the English Laws Application Act?

MS HARDY:

Yes and it existed in New Zealand until the 1950 Limitation Act.

WILLIAM YOUNG J:

So what, it's section 2 of that Act that you rely on, is it?

MS HARDY:

Section 2, the 20 year limitation.

WILLIAM YOUNG J:

And you say this is an action to recover land?

MS HARDY:

Yes.

WILLIAM YOUNG J:

And is there authority as to whether this was applied to, I suppose, claims for based on a constructive trust argument, or I suppose, were they not around much before this was replaced?

ELIAS CJ:

No, well they wouldn't have applied.

MS HARDY:

Well there is a provision at section 24 which is a claim for land in equity.

WILLIAM YOUNG J:
Oh I see, yes, okay, thank you.

MS HARDY:
So the parallel is there.

CHAMBERS J:
So do you reply on section 24 then?

MS HARDY:
It makes no difference whether at this juncture it was a legal or equitable claim, both have the same limitation.

CHAMBERS J:
Yes but the point I'm getting at is, if you're right about this statute and it's being preserved by the Limitation Act 1950, we don't even get into laches because the matter is dealt with by statute.

MS HARDY:
That's correct.

ELIAS CJ:
And have you pleaded it?

MS HARDY:
We've pleaded limitations and laches broadly in our statement of defence.

ELIAS CJ:
Well the laches defence is not necessary if this Act applies, is that right?

MS HARDY:
Correct, so the alternatives. To cover the point off, if that were an incorrect application and proposition and the Limitation Act 1950 in fact applied to the 19th century transactions, then the relevant section would be section 21 of the 1950 Act and that Act is at tab 15 of the same volume.

CHAMBERS J:

Which is the section in the 1950 Act which preserved the prior position do you say?

MS HARDY:
Your Honour, section 34 which is at the end of the Act.

CHAMBERS J:
All right, thank you.

WILLIAM YOUNG J:
Okay, so to the extent to which the claims are not – to the extent of any to which the claims are not caught by the 1833 Act, then the 1950 Act applies because the applying of the old provisions is merely to continue a bar on any proceedings already barred?

MS HARDY:
That's right, continues the bar. If we were wrong in that proposition, then we've also made the analysis under section 21.

WILLIAM YOUNG J:
So New Zealand didn't have a Limitation Act before 1950?

MS HARDY:
No, no, Your Honour.

ELIAS CJ:
Is this a claim for recovery of land or for whatever the 1833 Act said it was, the equitable one, how is it phrased?

CHAMBERS J:
To recover the same –

WILLIAM YOUNG J:
"No person claiming the land or rent an equity shall bring a suit to recover the same."

MS HARDY:
And the trust pleaded of course has, as one of its primary ingredients, the return of trust property to the appellants, the land.

ELIAS CJ:

Well the return – yes, I suppose so.

CHAMBERS J:

How were matters left in the High Court and the Court of Appeal, assuming the claim had won in the High Court or succeeded in the Court of Appeal, had the parties discussed how one would move on from there because presumably, there then would have had to have been a further hearing to flesh out the declaration and which land was to be recovered, et cetera. Is that how it was left, or how was it left?

MS HARDY:

Well the appellants have generally argued through the proceeding that what was sought from the Court was a declaration that a duty existed had been breached and there was a trust and then pause for a negotiation between the appellants and the Crown as to how one would deal with that finding.

CHAMBERS J:

Right but if those negotiations did not bear fruit, was it envisaged that you would return to the High Court for the Court to work out the practical effect of the declaration and work out what land was to be returned?

MS HARDY:

That's right Your Honour and it was at that point that the appellants maintained that other parties might be involved in the determination of the – delineation of the trust and the property. So in the High Court proceeding –

CHAMBERS J:

That has always been a concern of mine that the first part of a proceeding has gone ahead and let's say, found such a trust and then third parties might be affected by that finding but...

MS HARDY:

Yes, well it's a point that I'm sure my friend Mr Hodder will identify the points that he wishes to make to the Court. The Crown's application for broader service at the High

Court was declined by the Judge on the basis that all that was being sought was a bare declaration but it does produce the consequences that Your Honour outlines.

Moving then to section 21 of the Limitation Act, this raises the question of what sort of a trust is being sought by the appellants. There's been, in my submission, a lack of clarity about that from the outset. The statement of claim identifies a institutional or remedial trust and of course the limitation saving only applies to a true trust and not a remedial trust –

WILLIAM YOUNG J:
You say that basically the claims caught any which way, it's either a claim to recover land which is what was asserted in the High Court and is therefore caught by the 1833 Act, or it's not, in which case it's caught by the Limitation Act?

MS HARDY:
Correct and the Crown, with respect, endorses the analysis of Justice Harrison in the High Court, that this is a remedial trust, not a true trust of the kind to be protected by section 21. Most recently, in the synopsis filed in these proceedings, the appellants have recharacterised the trust as a result in trust for the first time but, in the Crown's submission and it's covered in the written submissions, that's a mischaracterisation of the trust which really rests on an intention to transfer trust property and then a failure of the transfer to some extent because of issues such as rule against perpetuities or the like and it's a mismatch to argue that that is what is involved here. In the Crown's submissions, it's very clear that what's involved here is the seeking of a remedy over 100 years after the events at issue.

The backup if you like but one that I'd submit the Court need not reach, is the laches and acquiescence point which is covered from page 37 of the written submissions and it's the Crown submission that, even in the most generous calculation of knowledge that might have prompted a claim, that would be at the latest in the 1940s. It's clear that was hydro activity happening at the very beginning of the 20th century and so one might have expected rights to pursued at that point but they weren't and the first pursuit of a property claim of this kind was made in 2004.

Your Honours, at the final pages of the submission at pages 40 and 41, I've transverse the question of who the beneficiaries might be but essentially I've covered that ground in my opening which is what's being sought here are five discrete trusts

attaching to the successors, or at least, it must be the successors, not the descendants of the individual owners and there is a complication that I described at the outset with Pouakani number 1 which of course doesn't have any owners determined by the Native Land Court and would create a requirement on any Court making this determination to join numerous dots so as to identify that 17 individuals in the 1980s who were paid survey costs out of Pouakani number 1 are the true owners and that their successors are the ones entitled to the trust sought.

Your Honours, those are the Crown's submissions.

ELIAS CJ:
Yes, thank you Ms Hardy. Yes, Mr Hodder.

MR HODDER QC:
May it please the Court, I had thought I might help the Court with four points in relation to the limited role that Mighty River Power can contribute to this proceeding and with gratitude for being granted leave to intervene on the basis that we do.

In essence, the Court well knows that Mighty River Power is a state owned enterprise, it's a company, it may or may not become a mixed ownership model company in due course and it runs, among other things, a hydro electric system that runs from Taupō down to the sea but in particular, a series of dams from up near Lake Taupō down through to Karapiro. Where we are concerned, the part of the land that's the subject of the claim is one of the Pouakani people. Effectively, the river translates into three lakes and two dams and that's where our interests are affected.

As the Court heard this morning, there are easements that effectively relate to the three lakes, being the Lakes for Whakamaru, Maraetai and Waipapa. The Waipapa dam is a little downstream from the territory we're concerned about and in then the two dam sites, Whakamaru and then Maraetai and in relation to Maraetai, there is a registered title for that, that's been issued and in relation to Whakamaru, there is not a lease of registered title for Mighty River Power. There is a question mark, at least in our minds, as to whether there is a registered title that the Crown holds in relation to Whakamaru and that became a less certain after the decision of this Court in the first round of this proceeding –

ELIAS CJ:

Well I think we've established that there isn't a registered title.

MR HODDER QC:

That seems to be so, although I have to say that's a matter that requires perhaps further exploration which –

WILLIAM YOUNG J:

I thought we were told there was a registered title?

ELIAS CJ:

Oh, I thought that from what emerged today was that there was not registered title.

GLAZEBROOK J:

There is to one but that's held by Mighty River Power –

MR HODDER QC:

To Maraetai, that's in Mighty River Power's name.

ELIAS CJ:

Yes, yes.

WILLIAM YOUNG J:

But I thought there was a registered title to the other dam but it hadn't been transferred yet?

ELIAS CJ:

The Crown says it owns it but –

MR HODDER QC:

The Crown says it owns it and we believe them.

ELIAS CJ:

Yes.

McGRATH J:

Well the occasion for issue of the title hasn't arisen, is that the –

ELIAS CJ:

Yes.

MR HODDER QC:

Well, I think what's happened in effect, as the Court has probably picked up from our submissions, there has been some pressing, increasingly less gentle from Mighty River Power, for transfer of the title, or a title, in relation to Whakamaru but, as I understand it, at least in the interests of not disturbing this litigation, the Crown has not done so because this litigation was on foot at the time that that particular exercise was engaged –

WILLIAM YOUNG J:

Sorry, can I just take you to appendix 2, to the respondent's submissions, that's the map.

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

And that shows Land Transfer Act title in relation to both the Whakamaru and Maraetai dams.

CHAMBERS J:

Sorry, where does it show that?

ELIAS CJ:

Yes, where does it –

WILLIAM YOUNG J:

Because the blue hatching is riverbed land now held under Land Transfer Act title, that's in the key and then there are the two inserts.

CHAMBERS J:

Oh, I see, yes.

MR HODDER QC:

I don't know that I can take it particularly far Your Honour, my understanding is that in terms of what, at least I would have thought it was a certificate of title, there's nothing obvious to be found by going to the register, there are a series of documents that bear reference to a *Gazette* notice but I'm not sure I've seen something that looks like an ordinary description of a certificate of title.

WILLIAM YOUNG J:

Okay, it might be attached to that evidence that we were taken to this morning.

GLAZEBROOK J:

Well does the Crown know?

MS HARDY:

There are certificates of title in relation to areas directly under the dam but not over the riverbed associated with the dam –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

You were right.

MS HARDY:

– so tab 60 of volume 3 of the case and Mr Ward points to Mr Parker's evidence, case on appeal volume 2 at tab 14, page –

GLAZEBROOK J:

I'm sorry, I haven't got the reference.

MS HARDY:

Mr Parker's evidence, volume 2 of the case on appeal at tab 14 and there's a mapping there of the title at page 508 and a description of what has occurred. So in 2003 the Crown raised title for a section of the riverbed at the dam site and that's Whakamaru –

ELIAS CJ:

Could you just bring the microphone a bit closer, sorry?

MS HARDY:

So at that volume 2 of the case, at page 508, Mr Parker describes and marks out section 6, a survey of his plan which is the piece under the dam and says, "In 2003 the Crown raised that certificate of title for a section of the riverbed at the dam site." So perhaps the point is there are certificates of title raised immediately at the dam site but not beyond into the flooded area of lake.

WILLIAM YOUNG J:

Yes, I understand that because that's the subject of easements.

ELIAS CJ:

Well that's good. There's something to be transferred.

MR HODDER QC:

Perhaps. Then he goes to the primary argument we make, that these are matters that still need further exploration with the assistance of Mighty River Power.

If it please the Court, somewhat prematurely perhaps, the registrar on my behalf distributed a short chronology this morning which includes some green text. Some of the text is in green and some of it is in black. And this largely conveys information that's referred to in more general terms in our written submissions. I'm not advocating this as being evidence itself or based on evidence that's before the Court, although some of it is on the evidence that my learned friend Ms Hardy referred to and took the Court to this morning, that is that was filed by the Crown late last year. But what it's designed to do is to indicate the material and the sequence that we would wish to put to the body that's considering questions of remedy if the Court gets to that point, and we thought it might be helpful to set out the sequence to explain what Mighty River Power's interests are and where they come from. And so while we've put in this document in green some of the generic propositions, including the jurisdiction that gives rise to the Waitangi Tribunal's involvement, the first black text if, with effect from 1 April 1987, which is the day after the old electricity division of the Ministry of Energy expired and the Electricity Corporation of New Zealand came into

play, that is the effective date of the deed that's referred to a couple of dates down on the 31st of March 1988. That is Circa's sale deed, and so for the sum of, it was about $6.3 billion, the assets of the former electricity division were transferred to the Electricity Corporation. They included the assets of the, what was called the northern generation group, which included the Waikato hydro assets, and at that point the Electricity Corporation then acquired an equitable interest in those assets. There was, of course, at the same time going on the matters that led to the Treaty of Waitangi state enterprises legislation following this Court's – the Court of Appeal's decision in *Lands* and similar cases, and then in due course there was a transfer, a re-splitting of or splitting of Electricity Corporation into various bodies including what was then known as Waikato SOE Limited, which is now known as Mighty River Power. And there are various documents through the trail which transfer the rights of Electricity Corporation had at the outset in relation to the Waikato River assets down through to where Mighty River Power is the party with that title. And we've included in that sequence where the original Treaty claim came from and the extension of that claim to include the Waikato River which came in April 1989.

And then over the page we have recorded the Settlement Act at the top of the page. In September 2003 the transfer of the legal title to the Maraetai Dam, in 2004 the commencement of the current litigation, and in 2008 we will see a sequence of correspondences referred to there where Mighty River Power was pressing for title to Whakamaru, and it's at that point that the Crown indicates that, given this litigation was then commenced and underway, it was not minded to do so. And that effectively is where things are at to this point.

In addition to the strict property interest, which of course Mighty River Power is anxious to ensure are not affected, I should mention the easements which are referred to in December 2010. Those are easements in gross, one for each of the three lakes I mentioned earlier, and it's obviously the case that much of the earlier documentation was premised on the idea that there was a relatively simple story about Crown title. Now that's become more complicated in recent times.

So that's, in a very short summary, the –

CHAMBERS J:

Sorry, I don't think I quite follow. What is the purpose or significance or effect of those easements in gross?

MR HODDER QC:
At the moment they were the basis on which Mighty River Power is able to use the water in the dams and manipulate the water in the dams upstream from, upstream from the two dams themselves. Sorry, in the lakes upstream from the two dams.

CHAMBERS J:
It's what permits you to have the lakes, effectively?

MR HODDER QC:
Yes. And to manipulate them.

CHAMBERS J:
I follow.

MR HODDER QC:
Yes.

CHAMBERS J:
So the water permits themselves do not give you that right? No, they wouldn't.

WILLIAM YOUNG J:
Well they give you the right vis-à-vis the Resource Management Act 1991.

MR HODDER QC:
That's right. So there are two, two operating –

CHAMBERS J:
Yes. Yes. You need two.

MR HODDER QC:
– regimes: the easement regime and the resource consent regimes. Yes.

In terms of operations, which are also the interest of the Mighty River Power, its primary interest is in unified and efficient management of the entire Waikato hydro

system on a holistic basis rather than in phases. That's the purpose of the RMA consents and it's also, of course, consistent with its obligation currently under the SOE Act and in any event under the Companies
Act 1993 to be a successful business. To the extent there was a brief reference yesterday to the fact that it's 100% owned by the Crown, and this Court's well aware of possible changes to that, that may be so and is so at the moment, but it's still a separate legal entity in terms of the Companies Act; *Salomon v A Salomon & Co Ltd* (1897) AC 22 and various other matters that have stood the test of time. And it is obviously a substantial company making long-term investments. It has some $5.8 billion of assets on its books and it has substantial debt facilities as well.

So the first point I wanted to say is, what are Mighty River Power's interests? Those are a very brief description, conscious of time and our limited role, as to what those interests are, as the Court knows, our submission is that those interests need to be explored, developed and established properly by the High Court if that issue of remedy becomes relevant following this Court's decision on this appeal.

The next point is, relates to what my learned friend Mr Millard QC said yesterday, and it would be a fair question for the to say, "Well, doesn't the fact my learned friend said, 'We're not making claims against Mighty River Power,' mean that Mighty River Power can go away comforted?" And the answer is, not quite. My learned friend responded to a question from His Honour Justice Chambers. The question was, "Can you confirm that it is in no way intended to interfere with the property rights of others?" And the answer was effectively an agreement with the proposition, "No, it isn't intended to interfere with the property rights of others." But in course, at least it appeared, my perception of it, that this was really equated with the, "We are only seeking a declaration against the Crown," point, which is not the same thing. Because it then has the impact on Mighty River Power of whatever it is the Crown is expected to do. And so, in our respectful submission, we are left in some confusion about where the appellants wish to go with what they have in mind.

If I can ask the Court to return to the pleadings, which you've already seen more than once, and that's volume 1 commencing at page 9 under tab 3 of the case of appeal, the, the duty as pleaded at page 22 and 23 of the case on appeal, paragraph 28, including an obligation at the bottom of, towards the bottom of page 23 or page 14 of the pleading, (v) above 29, "To ensure that proper compensation is paid for loss of native rights," that tends to suggest the case is all about money.

But if we go then to the pleadings about the constructive trust a few pages on, pages 26 and 27 of the case on appeal, the constructive trust is described in paragraph 37 as one that, "arose at the time of acquisition and has been continuing ever since in relation to the relevant part of the bed of the river."

And then on the top of the next page, paragraph 38, "The terms include:" among other things, "access to the river; consultation in relation to the river; receiving any benefit, whether by way of payments or otherwise, that the Crown or anyone claiming through it directly or indirectly," which it's not clear to us whether that includes Mighty River Power, "obtains;" and then being entitled to call for the return of the land.

And so it's that concept of the details of the constructive trust, which are then somewhat compounded over the page as part of paragraph 39 on page 28 at subparagraph (e), where there's talking about failing to account for payments or financial benefits received in respect of the use of the bed, being benefits which commenced as soon as the respective power stations became open and, it may be said, are continuing." Now if one reads that at its broadest then Mighty River Power continuing operations and control of its assets and its business are very much at issue.

So when it is said that, "It is in no way intended to interfere with the property rights of Mighty River Power." That isn't, doesn't sit easily with the pleading, and at the moment it isn't as clear as it might be. So it isn't possible yet for Mighty River Power to be comforted that its property rights or interests will in no way be interfered with as a consequence of the regime which the appellants seek. So, for example, there's no assurance that the appellants are quite content for title to the Whakamaru Dam to be issued by the Crown at this point.

The third point is, why should relief –

McGRATH J:
Just before you leave that point, I see your chronology records that an attempt by the Crown to have you served with the proceeding failed.

MR HODDER QC:

Yes Sir.

McGRATH J:
Is there any – what was the reason for that?

MR HODDER QC:
We touch on that in the written submissions we filed. Effectively the Associate, then-Associate Judge thought it was a purely declaratory remedy and therefore our interests weren't affected. With respect, that was a problematic decision, but that was – it is what it is.

McGRATH J:
But that's another issue. Yes.

MR HODDER QC:
The third point that I wanted to touch on is, why should relief issues be deferred? And that is on an assumption that the Court finds a relevant obligation and a relevant breach and no relevant time defences. Then, in our submission, there remains or there would remain in those circumstances a major difference on whether there are or are not countervailing equities. And part of the purpose of the timetable is to say that if one's looking at the modern timetable then the title and the equitable interest that Mighty River Power depends on goes back to 1988, which predates a claim in the Tribunal by the appellants in relation to the river and certainly predates the current litigation.

And then the final point, which touches on the memorandum that I filed with the Court last week in response to the Wakatū submissions is, "Well, what's wrong with remedial flexibility?" or another phrase that cropped up yesterday, "a parallel universe"? And that goes to the more generic proposition where I'm coming close to exceeding my leave terms, but the general proposition is that from Mighty River Power's perspective it is attempting to comply with all its legal obligations in running a very substantial and wide-ranging business. And it operates in accordance with quite a wide statutory regime, the Resource Management Act, and then hopefully the Land Transfer Act 1952, and not irrelevantly, the Limitation Act, which all go towards securing title, which in turn underpins investment decisions. And so at the moment Mighty River Power is operating on the basis that it actually

owns two dams in this relevant part of the river and that that wouldn't change. But the regime which is being sought could change that, at least if we read the pleading right, and so in a sense what has happened here is, or as Mighty River Power perceives it, is the Court is being invited to establish an additional legal regime which is unconstrained by the Limitation Acts but essentially based on the same considerations as would be advanced in a Waitangi Tribunal claim.

Now Mighty River Power accepts, of course, that its, its Maraetai assets are subject to a memorial. If it gets title to Maraetai, that also would be subject to a memorial. That system is all in place and understood. But the parallel universe that's being proposed is not understood and that is a matter of a concern from a commercial perspective. And I have to say that Mighty River Power, although I haven't briefed them in these terms, wouldn't be comforted by my learned friend Mr Brown saying it's only of *Donoghue v Stevenson* proportions; quite the contrary.

CHAMBERS J:
They were only submissions he would've made though.

MR HODDER QC:
I'd like to think he'd think better of it, had he thought about it further. I agree Sir.

The final point, and again coming close to the boundary of my leave, is that in rereading the Treaty of Waitangi Act and reflecting on the Tribunal's influence over the last 30 years or so, I invite the Court to think that it might fairly be said that the work of establishing that body and the work that it's done have a touch of political genius about them, and if the Court thought there was something in that proposition, then I would submit that was a relevant consideration as you consider various aspects of the appeal.

And so all of those points lead to the proposition about what should the Court do? In our submission if the Court concludes that there is an obligation and there is a breach and there are no delay defences, it should not make the declaration but should remit all questions of relief back to the High Court for further evidence and further submissions.

If the Court pleases, those are the points I was hoping to make. And would have made.

ELIAS CJ:

And did. Thank you. Thank you Mr Hodder.

Yes, Mr Millard.

MR MILLARD QC:

May it please the Court, a number of points need to be addressed. If I could first deal with the issue of ad medium filum, the Crown opportunistically picked up on a point that, if it's not clear that the Māori owners on the Native Land Court record got the bed, then this appeal should fail. And later in her submissions my learned friend stated that the appellants assert title on the AFM principle through to the, through the Native Land Court process. It's important to remember that it was the Crown who asserted that they got title in the alternative from the Coal Minds Amendment Act by reason of ad medium filum. It lies ill in the mouth of the Crown to then say, because that presupposes that the Māori owners had it, that maybe the Māori owners didn't get it, because that undermines the very basis on which the Crown claim title and has, until this Court, run its case. There's never really been any contest between the parties at any stage that the principle potentially applied when title was awarded under the Native Land Court. The issue has been on that basis when the Crown bought, given the alien concept of it to Māori, did the Crown owe some sort of duty to tell Māori that they were acquiring the bed of the river as well as the visible land?

Here the declaration that we seek is limited to the extent that the Crown has title. And my submission that ought to be, in one form or another, and we're obviously open to some fashioning of that, that the, if this remained a real issue, but in one form or another, it should be feasible to come up with a solution that at least parks the issue about the ad medium filum issue, but at least resolves the rights as between Crown and appellants, because that is what this litigation is about. It's a contest between the Crown and the appellants and that the Court should at least rule on that rather than leaving it open because of some other contest that might lurk round in the background and may not.

ELIAS CJ:

But what is a little mindboggling is that there may not be any rights as between Crown and the appellants if the Crown doesn't have ownership.

MR MILLARD QC:

Well at least to the extent that the Crown says, "We got it under ad medium filum," the Court can say, "No you didn't." There may be an issue as to whether the appellants got it under ad medium filum, but as at least between the Crown and the appellants, the Crown did not get it.

ELIAS CJ:

It's a – I think of the looking glass.

MR MILLARD QC:

Well, if I could put it in – take it to, say, an English context. If there was a dispute between two owners of private land, being – in the context where you don't have guaranteed title, you don't have a Torrens system, and the purchaser and vendor were arguing about what passed, the Court would rule on that even if they had some concerns as to what the vendor actually had. They would say, "At least as between the vendor and the purchaser, the vendor conveyed this amount of its estate or that amount of its estate. Whether it had the, had full estate we leave open."

The – and there is some basis on which the Court can take a degree of comfort, because I'm aware that at least some of the principles in *The Bed of the Wanganui* case are doubtful, and I think particularly Justice Turner began on a basis that the Crown has – that the title was derived from the Crown and then worked through but in the 1955 case the majority got to the position where they weren't satisfied on the evidence as to whether title to the river had passed ad medium filum. They suggested that this is a matter that could be referred to the Māori Appellate Court. That required a change of legislation to permit that.

The Māori Appellate Court referred back to the original ruling of Judge Brown at the Māori Land Court level which was couched in very general terms. It was that there'd never been any suggestion in regard to rivers and streams that ownership went other than to the people who had the riparian title, and the Appellate Court said, well, it heard evidence and said, "We have had heard nothing that causes us in the case of the Wanganui River to say that that general proposition of Judge Brown was wrong."

One factor that they did note which I have to mention is that they did note that in some cases, when contending for the riparian title, the owners had pointed to their eeling wares and their fish nets, which is a sort of reverse step. We don't have that

here but, at least we do have some evidence in the Native Land Court that when the title was being argued about back in the 1880s that there was some evidence of where fishing occurred, although it's difficult from the record to pinpoint those spots in context of this particular land. But there was clear evidence given that we fish at such and such a place. It's just that name of the place has rather vanished over time. And Mr Stirling –

WILLIAM YOUNG J:
It might suggest that those fishing rights stopped being exercised.

MR MILLARD QC:
Well, there's simply no evidence because of the lapse of time.

WILLIAM YOUNG J:
But if people have continued to fish in the same spot, then presumably the name would be likely and it would be at least likely to have persisted.

MR MILLARD QC:
Not necessarily and I intend to migrate a bit.

WILLIAM YOUNG J:
Right.

MR MILLARD QC:
There was not any complaint because this land was, of course, the subject of an inquiry by the Waitangi Tribunal that led to the *Pouakani Report* and part of the process was the complaint at that stage about Native Land Court processes and how much land was taken for survey costs, all of which I accept have been settled by the Settlement Act. But there was never any suggestion in the report that there were any major errors in the title that was awarded.

So, in my submission we sort of come to the position that the Tribunal got to in the National Parks Lands Inquiry, that it really accepted that the Crown was exercising ownership and went from there rather than going back and saying well maybe there were some faults at the beginning of the process and, therefore, we need to start there.

As to use and the like, or access, if I could take the Court to the supplementary bundle that was put in by the Crown when it filed its submissions, which is just a relatively thin volume, respondent's supplementary bundle to case on appeal 13 December 2012, and at tab 7 in that little thin volume there was a map put in by Dr Loveridge of the Māori settlements in the Pouakani block and you can see a number of them but the important thing is that if you look, there are a number of dotted lines which indicate cracks that reach the river, then go over to the other side and in my submission it would be unlikely, whatever the subdivision and whatever the ownership, that Māori would have stopped using those tracks.

In terms of island, which was an issue that Your Honour, Justice Young, raised, Mr Stirling did at paragraph 256, page 378, tab 12 of the second volume of the case on appeal, listed a number of islands but said it wasn't clear that those islands were actually on the Pouakani side of the divide half way through the river.

ELIAS CJ:
Can we have the reference again?

MR MILLARD QC:
Tab 12, page 378, paragraph 256. There are some maps put in by Mr Parker which were in volume 4 at tab 77. It was more relevant at the time of the last hearing. If one begins –

CHAMBERS J:
Was there any evidence as to what survey practice was with respect to islands and rivers?

MR MILLARD QC:
They just didn't seem to feature.

CHAMBERS J:
No.

ELIAS CJ:
And indeed, I meant to ask that too. Who gave evidence of survey practice because there was evidence of survey practice, I think, wasn't there, before the Court?

MR MILLARD QC:

Mr Dwyer's evidence about that.

ELIAS CJ:

And did Mr Parker as well?

MR MILLARD QC:

Could have done.

ELIAS CJ:

Thank you. Mr Dwyer?

MR MILLARD QC:

Mr Dwyer.

ELIAS CJ:

Yes.

MR MILLARD QC:

He was more looking at the scope of the river and the like.

ELIAS CJ:

I see.

MR MILLARD QC:

But in the map book you do see some islands. It's a bit difficult there. It begins at page 1093, which is the end of the river, at least as far as Pouakani is concerned, being the Waipapa Stream, which is at the top right-hand corner, and you can see, if you look very closely, and I know it's a bit difficult, but in the box three from the left and three down there's a little island which seems to be very –

GLAZEBROOK J:

I'm sorry, I'm not sure where you are.

MR MILLARD QC:

It's volume 4 –

ELIAS CJ:

Is this of the case?

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Volume 4?

MR MILLARD QC:

Tab 77.

GLAZEBROOK J:

Thank you.

MR MILLARD QC:

It's another of the slim volumes.

GLAZEBROOK J:

Yes.

MR MILLARD QC:

And if you begin at about 1093, which is the bottom of the river, at least as far as we're concerned, and then if you come over three boxes from the left and three down, you'll see an island there and then immediately beside the label box "NZ Public Works" there's another island there, and you can continue through that. You see most of the islands are on the true right-hand side of the river rather than the true left which supports –

WILLIAM YOUNG J:

Sorry, why would that worry you if you thought that you owned the river and you weren't worried about ad medium filum?

MR MILLARD QC:

I was simply – Your Honour raised the issues of islands and I'm simply saying that there wasn't any, there didn't seem to be really any islands close to our side of the

river from which one could infer as to continued access to them, whether or not they had passed at the time of sale.

WILLIAM YOUNG J:
At 1095, is that still dealing with the Pouakani section of the river?

MR MILLARD QC:
I think that might be about the nearest of them, I'm not sure. Yes, I think that was still Pouakani but in any event, the problem with islands on a fast flowing river is to get access to them anyway.

WILLIAM YOUNG J:
This gives a rough idea of the rapids, doesn't it?

MR MILLARD QC:
That's about as far as I can take the island issue. If I could come on to a different one and that was the public works. This afternoon, my learned friend asserted that the Crown got out to the ad medium filum on the basis of public works takings. As I indicated yesterday, that's never been pleaded, it's only been raised for the first time in this Court. In that context, you did actually look at the proclamations a little earlier today. I won't take the Court back to them but the Waitangi Tribunal, in my submission, accurately summarises the position at page 296 of its report which is at tab 90, volume 5, "The land described in such proclamations and relevant plans is that on the banks above the water line and there is no reference to the bed of the river."

So that the Crown would have to rely on a presumption but in a case that is in their casebook at tab 74, the case of *Hotene*, it was found that in that case, "The bed of the river will not be deemed to be included in a proclamation taking the land on both sides of it for public works, where the plan and evidence mistakably show it was not intended to be included," and I emphasise it's the plan and the evidence, given that he was never pleaded, never run, it's too late for the Crown to try to assert some entitlement under ad medium filum based on proclamations.

If I can come then to the issue of the Treaty jurisprudence? The Crown accepts that it is too late in the day to say that the Treaty doesn't have some impact on New Zealand law and by New Zealand law, I take it that they accept that that is the law as

applied in the Courts, rather than trying to confine it to the operations of the Waitangi Tribunal and of course, there's plenty of cases that give some substance to that.

However, the Crown then tries to limit its scope and in particular, to take away in the application of the Treaty to private issues, or private legal issues. Now it's clear that the Treaty can be taken into account when construing statute and of course, when you're construing statute you could be construing rights as between private persons. In *Huakina* it wasn't quite a fully private person case but it certainly wasn't a claim against the Crown that was being sought there.

You then see it being applied as giving background to other disputes, including in relation to adoption and if I can refer to the case about in *Barton-Prescott* which was accepted as authoritative in the *Te Arawa* case at paragraph 74. I'm sorry, I haven't got copies of this but it's – *Barton-Prescott* [1997] 3 NZLR, a decision of Justices Gallen and Goddard, where at page 184 they stated, "Since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and for the purposes of interpretation of statutes that will have direct bearing, whether or not there is a reference to the Treaty in the statute."

Admittedly in dissent, Justice Baragwanath in *Attorney-General v Mair* [2009] NZCA 625, considered that the Treaty of Waitangi extends to the judiciary and says it extends to the Courts, there can be no reason to exclude its application to the Waitangi Tribunal itself and of course, at least in Your Honour the Chief Justice's judgment in *Takamore*, there was a reference to the Treaty there, although the primary focus was more on section 20 of the Bill of Rights.

So we have the Crown accepting that the Treaty can be taken into account when the Courts are considering the actions of the executive in a public duties context but try to exclude its operation in any private law issue but here, the Crown was hardly acting in a purely private capacity. There were three sets of purchases and I use that term advisedly. The first one was in regard to Pouakani 1, where in effect and in substance and of course equity looks at substance, it was a purchase off the 100-odd Māori owners who were listed in the Native Land Court order and my learned friend took you to that, in satisfaction of survey costs, the fact that it was a purchase was reinforced because there was surplus which was paid over but the survey costs arose because of Crown actions in requiring surveys, so that it wasn't just a private

deal. It wasn't as though the Crown said oh, we will survey it and you can pay us, the Crown imposed the requirement of survey, imposed the survey itself and then said, you have to pay back us the cost. So that was an executive action.

The purchase of B6 was when – had to be to the Crown under the pre-emptive provisions the Crown had imposed. So again, it had been imposed by legislation, hardly a private type of transaction. The other three blocks were also purchased by the Crown at the time when Māori, the evidence was, would hardly have thought they could have sold elsewhere but perhaps more importantly, in that context, all of these actions were in the context of the main truck line – if I could just pick up my learned friend's –

At paragraph 130, when referring to B8, C3, B10, the comment is made that they were purchased, when they purchased the Crown pre-emption was not in effect, but in the footnote there's a reference to the North Island Main Trunk Railway Loan Application Act 1886, and that in fact applied to the other purchase as well, so that what it was was the land was purchased in order to derive income for – which income could be put to railway purposes. So again there is a public law flavour to the overall taking which makes it inappropriate to say this was a purely private transaction and therefore the Treaty is irrelevant.

In Canada in a case that is in the Wakatū bundle of documents or at least of cases, tab 7, the case of *Luuxhon v Canada* [1999] 3 CNLR 89, 66 BCLR (3d) 165 (BCSC), the Court there at page 180, paragraph 58, commented, "As well, a duty to bargain in good faith is well established in other areas of the law, such as labour law. Despite that requirement, management and labour conduct tough negotiations and resolve disputes regularly. It would seem inappropriate to hold management to a duty to negotiate in good faith with its labour force, but permit the Crown to abandon its fiduciary relationship with aboriginal peoples in negotiations intended to prescribe forever, in the constitutional sense, the First Nations' relationship with their traditional territories and the sovereignty of the state."

And my submission, it would seem odd in a New Zealand context to say the Crown didn't have to act in good faith when the Crown requires employers and employees to act in good faith.

Incidentally, while I'm on Canadian cases, I should perhaps correct something, a comment I made in answer to a question to Your Honour. There are some treaty situations in Canada, it's just there's no across the board treaty resolution process.

GLAZEBROOK J:
I missed the reference to where that was because I was unfortunately looking in the wrong volume.

MR MILLARD QC:
It's the Wakatū material, tab 7.

ELIAS CJ:
My understanding was that there were a great number of treaties in Canada. That was part of the policy, on the east coast anyway, but it's in the west coast I think that there weren't treaties. I'm sure Mr Ward knows the answer to that.

MR WARD:
The area's quite wide in (inaudible)

ELIAS CJ:
Yes. Thank you. But there are a large number of treaties is what I'm getting at. Thank you.

MR MILLARD QC:
In addition to downplaying the significance of the Treaty, the Crown basically avoids the authority of *Symonds*. The – it didn't really deal with *Symonds*. Whether that's because of its contention that the imposition of the Native Land Court removed the effectiveness of *Symonds*, but in my submission it can't matter when the first dealing between the Crown and the indigenous people is pre or post determination of title by the Native Land Court. The same principles should apply.

Symonds, of course, pointed to a general duty that wasn't based in the Treaty, because Justice Chapman drew upon jurisprudence where there were no treaties. And I've mentioned already that it was cited by the Privy Council as authoritative in *Tamaki v Baker*, in *Mabo*, it's been cited by this Court in *Ngāti Apa*. I didn't

specifically mention it, although it's quite clear, that it was also regarded as authoritative by Sir Robin Cooke, as he then was, as President of the Court of Appeal in, particularly, the *Ika Whenua* decision where I took you to his citation, and I notice it was also cited as authoritative in the first *Bed of Wanganui* case at page 465. And that case stands for the proposition that the indigenous people should not be deprived of their property without free consent, which, as I submitted earlier, must mean full and informed consent.

So that against that background, the step that we're asking this Court to take of saying there was a duty to obtain fully informed consent is hardly a major step. And contrary to what my learned friend contends that we're a bit vague about the scope of the duty, perhaps I should have spelt it out a bit more clearly, but if one looks at paragraph 6.5 and the last sentence at paragraph 6.19 of our submissions, basically what we're saying is the duty was to obtain full and free consent to the alienation of all parts of the property that is taken.

The Crown instead tries to bottle up the claim by saying it should be confined to the old contractual terms or contractual-type remedies of unconscionable bargain, mistake, and the like. In a sense, at least in treaty and indigenous relationship terms, what the Crown is trying to do is put New Zealand back before 1841 and England back before, what was it, 1878, when you had the separation of common law and equity, which were quite different streams.

WILLIAM YOUNG J:

I don't think it – it's just – you mean – it's simply there are private law, there would be private law claims available based on assertions generally along the lines that you make in the statement of claim: that Māori were under a disability and that there is overreaching behaviour by the Crown. I don't think that that's turning the clock before the Judicature Acts were in effect. It's just a fact.

MR MILLARD QC:

Well, with respect, I think the Crown, the Crown said that but seemed to try to exclude any application of Treaty and the Treaty principles or principles dealing with the relationships between Crown and indigenous people when looking at those sorts of remedies.

The – another comment made was that in the *Lands* case the Court had been very careful to use, “akin to a fiduciary duty”, rather than, “fiduciary duty”, and although that was true, that it did use that concept in *Lands*, as I noted in my submissions, by the time of the sort of last three of those cases, including *Muriwhenua*, *Sealords*, *Ika Whenua*, it was simply a reference to, “fiduciary duty”, perhaps because in the meantime some of the Canadian, further Canadian decisions had come out, but it can't have been accidental that the word “akin” slipped out and was, or was dropped off by the time three decisions were released.

The – if it’s accepted that the Treaty does have a general influence on New Zealand law, then it, it doesn't require the remedy to be shuttled back to the Waitangi Tribunal and bottled up there. It is open for this Court to provide an appropriate remedy and it should not also be that the Court ducks that on the basis that Crown policy is resolving disputes by negotiations between iwi and the Crown, nor in this particular case because the Crown has entered into two such agreements in relation to the management of the Waikato River because what the Crown is asserting on relying on is a private law title to the bed of the river so an attack on that purchase should not be defeated by saying a more appropriate remedy is some unenforceable remedy that depends on the goodwill of the Crown, particularly where, as here, the Crown as excluded Pouakani from any of the negotiations.

This case is a fact specific case, it doesn’t follow that if a remedy is allowed here the floodgates are going to be opened, particularly not given that many parts of New Zealand are subject to binding settlements that would not allow that sort of claim to be advanced.

On the issue of limitations, the pleading by the Crown was very specific. If one looks at page 38 in volume 1, it was the Limitation Act 1950 –

WILLIAM YOUNG J:
Well they might rely on the bit in section 21(1), mightn’t they?

MR MILLARD QC:
Oh, they certainly can rely on that –

WILLIAM YOUNG J:

But can't they rely on the bit in the Limitation Act that says that all claims previously barred remain barred?

GLAZEBROOK J:
It's 35, is it?

ELIAS CJ:
24, was it?

WILLIAM YOUNG J:
24, is it? I mean, there is that –

ELIAS CJ:
34.

WILLIAM YOUNG J:
– they can rely on the Limitation Act to bring in the 1833 Act, can't they?

MR MILLARD QC:
Well it would certainly be the first time that that Act has been argued and of course in equity, even when that Act applied, it was still that there was no limitations other than the equivalent of laches and acquiescence and it –

GLAZEBROOK J:
Well section 24 would seem to –

CHAMBERS J:
What is the answer however, if the 1833 Act does apply and can be relied on, we note your pleading point, what is the answer to the reliance on section 2 and section 24?

GLAZEBROOK J:
Because section 24 does seem to apply to equitable claims to land. Well, as far as one can –

ELIAS CJ:
Claims for recovery, is it?

GLAZEBROOK J:
– read the archaic language, to recover land.

ELIAS CJ:
Yes.

MR MILLARD QC:
It is at 20 years, it's unclear when that 20 years starts. It can't be that the title – that the right to bring it – sorry, the limitation period could expire before any acts by the trustee, or the equitable holder, that are contrary to the rights –

WILLIAM YOUNG J:
But wouldn't it start, at the very latest, start as soon as the Crown was, by physical action, asserting ownership of the river and the right to decide what happened to it which will be with the construction of the dams?

MR MILLARD QC:
Which is 1946 –

WILLIAM YOUNG J:
Yes.

MR MILLARD QC:
– so when the Limitation Act 1950 comes into force –

WILLIAM YOUNG J:
Oh, I see, I see, I see, okay, yes, I understand.

MR MILLARD QC:
– the limitation didn't apply.

WILLIAM YOUNG J:
Right.

CHAMBERS J:

Well let's just assume it did apply for the moment, is there any answer to it other than we'd need to check the time at which the period started, just so that we know all possibilities from your point of view?

ELIAS CJ:

Were there not have to be some determination about whether a claim for – that the Crown holds as constructive trustee, is an equitable claim for recovery of land? It may not be.

GLAZEBROOK J:

Actually, you wouldn't think so, if the assertion is that the land is held on trust, it becomes difficult to say it should be returned because in fact it's always held on trust but there is that confusion about whether it's a remedial trust or a true constructive trust, or a resulting trust but then I suppose – well, I –

MR MILLARD QC:

It would certainly – the appellants would say that the Crown should continue to hold it in trust rather than return it because of the problems of survey, et cetera. It's just that they really want, for their mana and other reasons, to be able to say, that was still our land –

WILLIAM YOUNG J:

But don't they want money too?

MR MILLARD QC:

Sir?

WILLIAM YOUNG J:

Wouldn't they like some money too?

MR MILLARD QC:

Oh, indeed.

WILLIAM YOUNG J:

Yes, okay and don't they want that money to encompass the benefits generated by the Crown from the use of the land? I thought that was the pleading.

MR MILLARD QC:
Which could be a one off payment because the evidence is that the, from Mighty River Power, that there was a single purchase price.

WILLIAM YOUNG J:
Of six or 700 hundred million dollars?

ELIAS CJ:
That would be –

MR MILLARD QC:
6.3 billion dollars.

WILLIAM YOUNG J:
What?

ELIAS CJ:
It's not suggested there would be quantification?

MR MILLARD QC:
No, no, definitely –

WILLIAM YOUNG J:
But I mean –

MR MILLARD QC:
– not, that was the whole of ECNZ.

WILLIAM YOUNG J:
Oh, I see but I thought the – I saw somewhere that the Waikato River generating was sold for about 670 million, perhaps I got that wrong.

ELIAS CJ:
That was in Mr Hodder's submissions, I don't know whether it was –

WILLIAM YOUNG J:
I'm not sure, it doesn't really matter, it's probably quite a lot of money anyway.

MR MILLARD QC:
Well it's just a small part of the overall of a system and – because even in the days of ECNZ it was a relatively small part of the generation because most of the generation is in the South Island and in other stations and of course, that also included the transmission network.

A couple of minor points. In relation to the Native Land Court, the reason that the appellants raised that was not to attack the processes as was implied in the Crown's submission but rather to say that the imposition of the Native Land Court did not destroy the duties that were owed by the Court – at least by the Crown, whether under *Symonds* or under the Treaty and just point out that it would be particularly unjust if that were to be so, given that the Native Land Court although not an agent of the Crown, was a machine imposed by the Crown that had the inevitable result of sale.

In terms of the remedy and the points made by my learned friend Mr Hodder, I again emphasise that the appellants are not wanting to attack Mighty River Power. Their interest, their claim, is against the Crown, leaving it for the Crown to deal with Mighty River Power but if the Court comes to the view that there should be remedy, then it may be that rather than automatically referring it back to try and work out what the remedy is, a neater course would be that which I mentioned yesterday, of just adjourning for a period to allow some discussions to take place that might solve complicated issues in that area.

If it please the Court, those are the submissions that I wanted to make in reply.

ELIAS CJ:
Thank you Mr Millard. Thank you counsel for your very helpful and thorough submissions. We will take time to consider our decision.

COURT ADJOURNS: 3.50 PM