IN THE COURT OF APPEAL OF NEW ZEALAND

CA519/2008
[2009] NZCA 584

	BETWEEN	JOHN HANITA PAKI, TORIWAI ROTARANGI, TAUHOPA TE WANO HEPI, MATIU MAMAE PITIROI AND GEORGE MONGAMONGA RAWHITI Appellants
	AND	ATTORNEY-GENERAL OF NEW ZEALAND FOR AND ON BEHALF OF THE CROWN Respondent

Hearing: 1-3 September 2009

Court: Hammond, Robertson and Arnold JJ

Counsel: I R Millard QC and M P Armstrong for Appellants
V L Hardy, A C Beck and D A Ward for Respondent

Judgment: 11 December 2009 at 11 am

Reissued: 17 February 2010: see Minute of 17 February 2010

Effective date of judgment: 11 December 2009

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There will be no order for costs.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] The Pouakani hapu have historical connections to five blocks of land near the town of Mangakino and adjoining approximately 20 miles of the west bank of the Waikato River. They have a longstanding grievance relating to the ownership of the riverbed over that 20 mile stretch. Their claim is not to the river water itself or any backed up dam water. They say that, over a century ago, the Crown wrongfully dispossessed them of a common law interest in the length of the riverbed abutting their lands to the midpoint of the river.

[2] Titles to the Pouakani blocks of lands were individualised by the Native Land Court in 1887, and then progressively acquired by the Crown between 1887 and 1899. Nearly a century later, the Pouakani people sought to advance their concerns as to the alienation of their land (which were wider than mere ownership of the riverbed) through the Waitangi Tribunal, the Māori Land Court and the High Court. Ultimately, the Crown agreed to settle the Pouakani claims on terms embodied in a Deed of Settlement. The Parliament of New Zealand then passed the Pouakani Claims Settlement Act 2000 ("the Settlement Act") to give effect to those terms. These included an apology from the Crown, payment of monetary compensation, return of lands and an acknowledgement that the Crown was released and discharged from liability for the Pouakani claims.

[3] Despite these formal legislative measures, certain representatives of the Pouakani people thereafter commenced the proceeding which is now before this Court. The representatives' claim they had a beneficial interest in the length of the riverbed adjoining their former land to the midpoint of the river. They maintain that the Crown was in a fiduciary relationship with the original Māori owners. It is said that, as part of that duty, the Crown owed an obligation to advise those owners before acquiring their land of *usque ad medium filum aquae* (the riparian principle that legal title to the land ran to the riverbed's midpoint). It is said that the Crown's failure to obtain informed consent to the transactions resulted in a breach of fiduciary duty.

[4] The precise relief claimed is:

> A Declaration that, to the extent the Crown has claimed ownership of the riverbed of the Waikato River adjacent to the Blocks formerly known as Pouakani 1, Pouakani B8, Pouakani C3, Pouakani B10 and Pouakani B6A under the principle of *ad medium filum*, the Crown holds such riverbed of the Waikato River as constructive trustee for the Pouakani people (being all the persons accepted by the Māori Land Court as being a descendant of the original owners of the Pouakani Block).

[5] The Crown says, first, that the claim is not justiciable given the terms of the Settlement Act.

[6] Secondly, the Crown notes that s 14 of the Coal Mines Amendment Act 1903 ("CMAA 1903") provided that the beds of all navigable rivers in New Zealand "shall be deemed to have always been vested in the Crown". The Crown argues that the Waikato River was a navigable river in 1903, and that any claim the representatives may have had to the riverbed is therefore extinguished. For the representatives, Mr Millard QC responsibly accepted that their claim must fail if the Waikato River was navigable in 1903.

[7] Thirdly, the Crown denies the existence of a fiduciary relationship between the Crown and the Pouakani people, or a breach of an obligation to advise in the circumstances of the case.

[8] Fourthly, the Crown asserted that the representatives had no standing to pursue the claim. In addition to this process defence, the Crown raised affirmative defences of limitation, laches and acquiescence. In short, the Crown says that either the representatives cannot bring their claim or it is too late for them to do so.

[9] Harrison J heard and rejected the representatives' claims, on all the grounds advanced by the Crown: [2009] 1 NZLR 72 (HC). The representatives' appeal to this Court places all the matters in contention in the High Court before us.

[10] The logical place to start is with the legislation. If Parliament has passed legislation which determines the outcome of the claim – either by settling it, or by determining the status of the riverbed – that is the end of the case, as Mr Millard rightly acknowledges. In other words, consideration of the Pouakani representatives' allegation of breach of fiduciary duty and the defences raised by the Crown depend on the effect of the Settlement Act and the CMAA 1903.

Is the claim barred by the Pouakani Claims Settlement Act 2000?

[11] In its statement of defence before the High Court, the Crown pleaded that to the extent the representatives' claims arise from or relate to Pouakani historical claims or Pouakani boundary claims within the definition in the Settlement Act, these claims are settled by the Act.

[12] The way in which Ms Aikman QC for the Crown put the issue in the High Court was somewhat different. Harrison J said (at [32]):

> In substance, Ms Aikman says, this claim seeks a remedy for a breach of the Treaty of Waitangi and is suitable for resolution as a Treaty claim, but the issues are consequently non-justiciable when pursued in this jurisdiction.

[13] The same line was pursued by Ms Hardy for the Crown before us: that if this claim belongs anywhere, it is in the Waitangi Tribunal and not in the courts of general jurisdiction.

[14] Harrison J dealt with the issue in a manner consistent with the earlier Crown pleading. He considered that the Settlement Act argument was "a more fundamental objection to the justiciability of the representatives' claim": at [33].

[15] The Settlement Act records that the settlement is final and releases and discharges the Crown "from any obligations, liabilities and duties in respect of [the Pouakani boundary or historical claims]": s 12(1). The Settlement Act also bars a court, judicial body or tribunal from inquiring into or making a finding or recommendation in respect of any Pouakani boundary or historical claims: s 12(3)(a).

[16] Section 10 of the Settlement Act defines "Pouakani historical claims":

> **10. Meaning of Pouakani historical claims**
>
> (1) In this Act, Pouakani historical claims means –
>
> (a) all claims (whether or not researched, registered, or notified) made at any time by a Pouakani claimant and –
>
> (i) *founded on rights arising from the Treaty of Waitangi*, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), *fiduciary duty*, or otherwise; and
>
> (ii) arising from or relating to acts or omissions before 21 September 1992 –
>
> (A) by or on behalf of the Crown; or
>
> (B) by or under legislation; and

(b) all of the claims referred to in the Wai 33 and Wai 405 claims to the Waitangi Tribunal, including –

(i) the claims of 27 March 1987; and

(ii) the amended statement of claim of 23 October 1987 referred to in Appendix 2 of the Waitangi Tribunal Report 1993 (The Pouakani Report 1993 (Wai 33)); and

(iii) the addendum to the amended statement of claim dated 27 April 1989 and referred to in Appendix 2 of the Waitangi Tribunal Report 1993; and

(iv) the claims of 21 October 1993.

(2) In this Act, Pouakani historical claims does not include any claim by a Pouakani claimant to the Waikato River.

(Emphasis added.)

[17] Harrison J regarded the representatives' claim as falling within both limbs of s 10(1). The claim was founded solely upon breaches of a fiduciary duty and the Crown's alleged omissions occurred well before 21 September 1992: at [36]. Significantly, Harrison J construed the s 10(2) Waikato River exclusion as limited to claims "within the unique jurisdiction of the [Waitangi] Tribunal for relief relating to the river other than for a compensatory or proprietary right for loss of the bed": at [44].

[18] This issue is of real importance in the negotiation of Treaty of Waitangi settlements: as we understand it, a number of settlement agreements have exclusion clauses similar to s 10(2) in them.

[19] It is hard to see why s 10(2) should be read down in the narrow way indicated by Harrison J. Section 10(1)(b)(iii) refers to the addendum to the statement of claim referred to in Appendix 2 to the Waitangi Tribunal's *Pouakani Report* (Wai 33 1993). Some of the relief sought in that addendum plainly relates to a river claim, although some relates to land adjoining the river. The effect of s 10(2) is to remove from s 10(1)(b)(iii) what might otherwise have been included in it. That is, its purpose is to carve out a specific claim, namely "any claim ... to the Waikato River". And the river must include the riverbed.

[20] On this point therefore we do not agree with the High Court Judge. In our view, the representatives' claim is not barred at the outset by the Settlement Act.

Was the Waikato River navigable in 1903?

The Waikato River

[21] As stated at [6] above, the Crown's argument in the High Court was that the Waikato River was a "navigable river" pursuant to s 14 of the CMAA 1903. Harrison J agreed that s 14 applied, with the effect that the bed of the Waikato River was deemed to have always been vested in the Crown.

[22] The Waikato River is the longest river in New Zealand. It falls from a height of approximately 350 metres above sea level at Lake Taupo and runs some 350 kilometres until it reaches the Tasman Sea at Port Waikato: see Appendix I for a longitudinal profile.

[23] Three preliminary points about the river should be noted. First, for the purposes of assessing navigability, counsel seemed to accept that the Waikato River runs from the outlet at Lake Taupo until it discharges into the Tasman Sea at Port Waikato.

[24] However, s 14(1) of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926 provides:

> The bed of the lake known as Lake Taupo, and the bed of the Waikato River extending from Lake Taupo to and inclusive of the Huka Falls, together with the right to use the respective waters, are hereby declared to be the property of the Crown, freed and discharged from the Māori customary title (if any) or any other Māori freehold title thereto.

[25] Given the express declaration that the bed of the Waikato River extending from Lake Taupo to the Huka Falls is "the property of the Crown", it is hard to see how the bed above the Huka Falls could now, in any event, be the subject of a claim by anybody, whether Māori or Pakeha.

[26] For completeness, we note that under a Deed of Settlement between the Crown and the Tuwharetoa Mäori Trust Board in 2007, the bed of Lake Taupo (inclusive of the Waikato River stretch to Huka Falls) is now held on trust by the Board for hapu who adjoin the river and the common use and benefit of all the people of New Zealand.

[27] Secondly, it will be observed that from Karapiro, which is just outside Cambridge, to Port Waikato, the fall of the river is relatively gentle. Counsel did not dispute that the Waikato River was navigable for that length. The issue is as to the status of the river above Cambridge. Appendix II shows the route of the Waikato River from Lake Taupo to Cambridge, and the location of the Pouakani blocks.

[28] Thirdly, there is no claim to the water in the river itself or any backed up dam water over the relevant stretch. The representatives' claim is to the riverbed to its midpoint on common law principles, for the length of the river abutting their former lands. No claim is made on the basis of native title or indigenous rights.

The common law

[29] It was accepted before us that at common law the owner of land adjoining a non-tidal river owns half the riverbed to its midpoint on the principle of *usque ad medium filum aquae*. This principle is a presumption, rebuttable by evidence of ownership to the contrary, that the boundaries of land on either side of a non-tidal river extend to its midpoint.

[30] Before us, the Pouakani representatives proceeded on the assumption that when the Mäori owners of the Pouakani lands acquired their individuated titles they took the benefit of this principle. Yet when the Crown acquired ownership in the 1880s to 1890s, the representatives contend that Crown ownership of the riverbed was subject to a constructive trust in their favour. As Ms Hardy astutely notes, the representatives want the presumption to have full effect for one purpose (ascertainment of title), but not for another (alienation).

[31] To understand the claim which is before us, it is necessary to say something more about the state of the common law prior to the passage of the CMAA 1903. We will then deal with the CMAA 1903 and the construction of that legislation.

[32] The English common law drew a distinction between tidal and non-tidal rivers. A tidal river was regarded as an extension of the sea and navigable in law to the highest tidal point; the riverbed was deemed to belong to the Crown: *Halsbury's Laws of England* (4ed 2004) vol 49(3) Water at [760]. The presumption of *usque ad medium filum aquae* did not apply for the benefit of riparian owners in the area of tidal ebb and flow, even when passage was suspended because the tide was too low for vessels to float. The public right of navigation over a tidal river was a right of passage, not a right of property: *Ewing v Colquhoun* [1877] 2 AC 839 (HL). It was simply a right to pass, re-pass and remain for a reasonable time. There were incidental rights attached to this right of passage, such as the ability, in the ordinary course of navigation, to anchor, to load and unload over a convenient time, and even to ground a boat.

[33] On the other hand, the principle of *usque ad medium filum aquae* applied to non-tidal rivers. The boundary of the riparian land extended to the midpoint of the river in the absence of evidence to the contrary: Bennion and others *New Zealand Land Law* (2ed 2009) at 20. This Court has confirmed that in the case of non-navigable and non-tidal rivers, the registered proprietor of the adjacent land owns the bed of the river to the middle line: *In re the Bed of the Wanganui River* [1962] NZLR 600 at 609.

[34] One consequence of the *usque ad medium filum aquae* presumption applying to non-tidal rivers was that unauthorised use of the river would be a trespass on the land of the riparian owner. Further, in the absence of legislation, any minerals under the river would be privately owned.

[35] Endeavours to apply the English common law to New Zealand gave rise to real controversy in *Mueller v Taupiri Coal-mines Ltd* (1900) 20 NZLR 89 (CA). In that case, the Crown successfully argued that its grants of land along the Waikato River near Taupiri did not give title to the midpoint of the riverbed, because the

Crown's intent at the time of the grants was that the river be retained as a public highway. At the time of the grant under consideration in *Mueller*, the Waikato River was the principal means of transport in the area and was a vital route for supplying military settlements along its course. In separate judgments, Williams, Edwards and Martin JJ equated the river with a public highway. The importance of that consideration was so great that the Crown could not have intended to grant the riverbed and to lose control of the river. In the result, a majority of this Court considered that the Crown had rebutted the presumption that it intended to part with ownership of the riverbed.

[36] The implications for riparian rights in New Zealand were unclear in the aftermath of *Mueller*. In *R v Joyce* (1906) 25 NZLR 78 (CA), Williams J articulated the principle underlying *Mueller* as follows (at 90-91):

> The principle of [*Mueller*] was that, in order to enable the public right to be exercised to the best advantage, the Crown must retain the soil of the road or the river-bed, so as to be able to exercise such acts of ownership as may be necessary or expedient for the most efficient exercise of the right. To construct roads theretofore laid out only on the map, to alter the levels of the roads, to keep roads in repair, to deal with the soil of a river-bed so as to keep open or improve navigation, are things which in the public interest are necessary to be done either by the Crown or by some body under authority derived from the Crown.

[37] Edwards J dissented strongly (at 95):

> I do not think that the case of [*Mueller*] can be regarded as having decided that the common-law presumption is rebutted in this colony in the case of every navigable river. That case does not appear to me at most to have established more than that the presumption is rebutted if at the time of the grant the river is used as a highway, and is the only practicable highway to the land upon its banks. Further, other special facts in connection with the River Waikato were relied upon in the judgments of the majority of the Court in that case, and serve to distinguish it from other cases in which the facts are not the same. These special features do not apply to many of the navigable rivers of the colony.

[38] There is widespread agreement amongst historians and commentators that the passage of the CMAA 1903 was driven by the decision in *Mueller*. The New Zealand Law Commission has described s 14 as a "sequel" to *Mueller*: *The Treaty of Waitangi and Mäori Fisheries* (NZLC PP9 1989) at 75. Richard Boast has suggested that s 14 was enacted "in response" to *Mueller*: "Mäori Land and other

Statutes" in Boast and others (eds) *Mäori Land Law* (2ed 2004) at 266. Before us, Ms Hardy suggested that the CMAA 1903 was intended to address the issue raised in *Mueller* at a national level, rather than requiring the Crown to rebut the *usque ad medium filum aquae* presumption on a case by case basis. Whether the legislation also had some wider purposes is a matter we will refer to later in this judgment.

The Coal Mines Amendment Act 1903

[39] The legislation which has been enacted in New Zealand abrogating the common law principles is the CMAA 1903.

[40] Section 14 of the CMAA 1903 provides:

> **14. Bed of river deemed vested in Crown** –
>
> (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.
>
> (2) For the purpose of this section –
>
> "Bed" means the space of land which waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or for the public for the purposes of navigation by boats, barges, punts or rafts …

[41] Section 14 was re-enacted without change in s 3 of the Coal Mines Act 1905.

[42] Section 206(2) of the Coal Mines Act 1925 amended the definition of "navigable river" to read "a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts".

[43] The same provision was re-enacted as s 261 of the Coal Mines Act 1979. Its effect is preserved today by s 354(c) of the Resource Management Act 1991.

A "legislative package"?

1. Introduction

[44] An issue of significance to this appeal, which has a distinct bearing on the proper construction of s 14 of CMAA 1903, is whether the wider legislative context assists in the ascertainment of Parliament's intention in passing that provision. There is a further issue, which we will deal with later in this judgment, as to whether it is appropriate to take into account this wider legislative context in construing this abrogating provision.

2. The wider legislative context

[45] To understand the legislative context, it is necessary to say something about the history of economic and social development in New Zealand in the late 1800s to early 1900s. In respect of a claim which traverses matters more than a century old, the parties themselves had to include much historical material in their submissions. We have also found it helpful to refer to Waitangi Tribunal reports and papers and well established works of public history. In *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 a Full Court of this Court clarified the use to which Waitangi Tribunal reports may be put. See also s 129 of the Evidence Act 2006, and for the problems associated with the use of "history", Day "Waitangi Tribunal History: Interpretations and Counter-Facts" (2009) 15 Auckland U L Rev 205.

[46] In *Inland Waterways: Lakes* (1998), a Rangahaua Whanui paper for the Waitangi Tribunal, White links governmental control of waterways and legislative intervention in the following way (at 1):

> Generally the law was the instrument used by the Crown to secure control, and in many cases the ownership, of New Zealand's waterways. From the mid nineteenth century it is apparent that the Crown was attempting to establish itself as the owner of New Zealand's waterways. In pursuing this policy, a pattern is apparent. English common law presumptions were asserted insofar as they could be relied upon to secure rights for the Crown. But if these presumptions could not achieve this objective, common law was

> modified by legislative intervention. Such interventions initially saw the Crown assuming the right to manage and control waterways. But later confiscatory measures were initiated to vest exclusive rights in the Crown in such riverbeds and all natural waters.

[47] White later turns to general legislation pertaining to waterways in New Zealand (at 9):

> The history of legislation pertaining to inland waterways in New Zealand clearly evidences the Crown's assumption that it had the right to control rivers, streams and lakes. This assumption was in effect a tacit assertion of ownership ... [A]t common law such rights were not vested in the Crown. In light of this, it seems that from the mid-1800s successive governments pursued a policy whereby the rights of Mäori in waterways were gradually displaced, and the Crown was established as being the owners of such. In the context of land drainage the Crown was guided by the presumption that it had the right to take private property for public purposes in exchange for compensation. Less tangible usufructary rights associated with waterways were typically not compensated.
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> The Land Claims Ordinance of 1841 declared all "unappropriated" land to be Crown Land, subject to the "rightful and necessary occupation and use thereof by the aboriginal inhabitants". The problem for Mäori though was that rivers and lakes were rarely considered by colonial officers to be subject to such "rightful" or "necessary" occupation.

[48] The Public Works Act 1876 vested strong powers over waterways in the Crown. Under that Act, any natural watercourse in which fluvial action occurred could be declared a "public drain". Section 165 defined a drain as being "every passage or channel above or on the ground through which water flows, except a navigable river". In other words, every river that was not navigable could be a public drain within the meaning of the Act. There was no provision for compensation in that Act.

[49] The Railways and Construction Act 1881 vested powers in companies engaged in building railways to alter the course or level of any river, stream or other waterway: s 34(4). For White, this Act "further evince[d] the displacement of the rights of Mäori in New Zealand's waterways", vesting such rights in private companies that were deemed to be "engaged in enterprises that were in the national interest": at 12.

[50] By the Public Works Act 1894, rivers could be brought under the "control" of local authorities. However, in *Taranaki Borough Council v Brough* (1901) 4 GLR

160 at 161 (SC), Conolly J held that such control of rivers could not deny "ownership which at common law extends to the centre of the river bed in non-navigable rivers".

[51] From the early 1890s, Richard Seddon, the then Minister of Mines and Public Works, was disappointed that more use was not being made of New Zealand's water resources: Martin (ed) *People, Politics and Power Stations: Electric Power Generation in New Zealand 1880-1990* (1991) at 29. We note that this authoritative work was prepared by professional historians and commissioned by the Electricity Division of the Ministry of Energy in 1985 as part of the centennial celebrations of electricity in New Zealand.

[52] According to Martin, New Zealand's first large-scale hydro-electric project was on the Waipori River near Dunedin: at 33. The first plans to develop that river had come in 1900, at a time when more than a dozen gold-mining dredges were operating on it. In a chapter entitled "Enter the Government", Martin notes (at 37):

> The Waipori scheme provided the spur for government action. Developments up to that time had been at the initiative of private companies and local authorities, with central government's only role being the regulation of supply. By the turn of the century the government was beginning to look more closely at the possibility of becoming involved in electric-power generation by undertaking larger-scale hydro-electric projects. In the United States private enterprise had played a key role, whilein Britain local municipal authorities had been crucial. In New Zealand the government became the key participant once it was decided that the generation of electricity could not be left in the hands of private enterprise.
>
> ...
>
> As early as the 1860s and 1870s the government had moved towards firm control of water rights ... the clear implication was that the development of hydro-electric schemes was to be by central and local government rather than by private enterprise. When the potential for large-scale hydro-electric generation of electricity from central plants became apparent at the end of the century, matters came rapidly to a head.

[53] As always, the endeavours of individuals should not be overlooked in forcing the government's hand. Martin's thesis is that it was the activities of JC Firth, the Auckland speculator and large estate owner, who "forced the government to take action" in relation to the Waikato River (at 38):

> A man of restless energy, he turned his attention to the needs of mining and saw the potential of the Waikato River for electricity generation. He arranged for a survey by Professor George Forbes, who had been the chief consulting engineer and designer for the original Niagra Fall station, a landmark in hydro-electric development. Forbes' report selected the Huka Falls as a suitable site for a station. British financiers were apparently prepared to find 1 million pounds if a long term right to use the Waikato was granted. However, Firth was unable to convince the government that it should grant this, since it was argued that this would create a private monopoly akin to that exerted over the Niagra Falls.
>
> Seddon, who had once been a miner and was undoubtedly familiar with the crucial issue of water rights, acted rapidly to remove the possibility that this private development might be permitted by loopholes in existing Acts. With considerable haste he introduced the Electrical Motive-power Bill. In the Legislative Council, W Downie Stewart, warning of the danger of North Island mines closing for lack of power, unsuccessfully moved an amendment that would have granted Firth the Waikato water rights. *The short but extremely powerful Electrical Motive-power Act 1896 stipulated that any generation or use of electricity for motive power required permission from central government; no local authority could grant this right. This was a logical extension of the principle of government control established by previous legislation. In reaction to Firth's moves, the Act also authorised the government to make its own investigations into the feasibility of supplying electrical power to the goldfields using waterways.*
>
> (Emphasis added.)

[54] It was in this context that Parliament enacted the Water-power Act 1903. The Long Title was "[a]n Act to provide for the Vesting in the Crown of Waters for Electrical Purposes and for the Utilising of such Waters for those Purposes". Section 1 provided that the Act was to "form part of and be read together with" the Public Works Act 1894. Section 2(1) provided "subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty".

[55] Section 6 provides that nothing contained in the Act "shall be deemed to invalidate or restrict any rights or privileges conferred by any existing Act". But while the Act was before Parliament, Hone Heke, the Member for Northern Mäori, remarked ((1903) 125 NZPD 798):

> It would not be proper for a Bill like this to take away from Mäori owners the use of water-power on their lands. There is no telling what use even the Mäoris may desire to put such water-power for themselves ... the sweeping provision of subsection (1) is going too far ... It is an attempt to take away active rights.

[56] Martin discussed the passage of the Water-power Act as follows (at 38):

> ... in the early 1900s, with the support of the long-standing Minister of Public Works (1896-1908) and enthusiast for hydro-electricity, William Hall-Jones, Public Works Department officers collected a massive amount of hydrological data throughout the country. This information convinced the government to go further. In 1903, a Water-power Act was passed with almost unanimous support in both Houses. ... Private enterprise was now completely excluded from public supply, except through local authorities. The example of Waipori bothered the government and led to it jealously guarding water assets. There a private company had obtained free water rights, which subsequently had to be purchased by the Dunedin City Council.

[57] Cooke P charted the progeny of the Water-Power Act in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 25 (CA):

> That provision was carried in later years into the Public Works Act 1908, s 267, and the Public Works Act 1928, s 306. The Water and Soil Conservation Act 1967, s 21, subject to express exceptions, vested the sole right to dam any river or stream in the Crown, a right now continued by the Resource Management Act 1991, s 354. The Electricity Act 1968, s 25, prohibited the use of water for the generation of electricity except as expressly authorised by or under any other Act or with the consent of the minister ...
>
> The exception in s 2(1) of the 1903 Act "Subject to any rights lawfully held" appears from the language of that Act to be directed to circumstances where a right to generate or store electricity or other power existed, or where the generation right of the Crown could not be exercised without infringing other rights vested in other persons ... the uniform tenor of all the contributions to the debates is inconsistent with any suggestion of a sense that general customary native rights extended to electricity generation. It would not have occurred to the legislators in 1903. The Treaty of Waitangi is to be construed as a living instrument, but even so it could not sensibly be regarded today as meant to safeguard rights to generate electricity.

[58] In his report to the Waitangi Tribunal entitled *Hydro-Electricity Issues: The Waikato River Hydro Scheme* (2005), Walzl concisely noted that the Water-power Act "allowed for a long term view of capital investment and encouraged the development of centralised planning and standardisation": at 9. And in *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200 2008), the Waitangi Tribunal noted (at 1175):

> The potential for hydro development was quickly recognised by the Crown. It also saw the need to ensure that such power generation was readily and equitably available to assist development and economic growth. It was recognised that the effective provision of such power would require effective

> planning and investment, and this was seen as part of the Crown's responsibility for a young and developing economy. The Crown, therefore, began to assert powers to control both the industry and the natural resources it was likely to require. It then commenced the development of the power generation infrastructure it had identified as necessary for national economic development.

[59] Bolstering the notion that the CMAA 1903 formed part of an overall legislative imperative, Martin notes that "the year 1904 was a turning point in the government's interest in hydro-electric development": at 40. He goes on (at 40 – 41):

> The general surveys on 'New Zealand Waterpowers' attached to the annual Public Works statement of that year formed the foundation for a national development plan. ... Hall-Jones had invited LM Hancock [Superintendent of the Transmission Department of the California Gas and Electric Company] ... to report on the hydro-electric potential of New Zealand's waterways ... Hancock visited New Zealand between October and December 1903 and was accompanied on his arduous journey around the country by PS Hay, the Superintending Engineer of the Public Works Department. They began at Wairua Falls in the north and finished at Lake Monowai in the south. Hancock's report considered 43 sites with a potential capacity for 2.2 million hp, much of it in the South Island, and made recommendations for possible initial projects, in particular Lake Coleridge.
>
> Hay's more detailed report has become a classic ... Hay concluded that "*there seems to be every reason to suppose that the gradual development of water-power would accelerate the general industrial progress of the colony by providing a supply of cheap power, much cheaper than steam or other motive power, and in a form to easily meet many varying conditions of service*" ... Hay reported in 1906 on completed investigations, which favoured the Huka Falls, the Hutt River and Lake Coleridge projects.
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> (Emphasis added.)

[60] The Public Works Act 1908 incorporated the Water-power Act and the Electrical Motive-power Act. It consolidated the control of hydro-electric development by both central and local government. According to Martin, "government policy was crystallised into *a comprehensive legislative framework* that ensured the state's key role. The explicit role of the Crown in the construction of stations, generation, and the supply and sale of electricity was stated formally for the first time": at 41 (emphasis added).

[61] To complete the overall picture, the Waikato River today has a series of eight dams with backed up water over extensive beds, and nine hydroelectric power

stations that generate electricity for the national grid. These were all constructed between 1929 and 1979 to meet the growing demand for electricity. Somewhere under those dams is the old river line and beds.

[62] The purpose of this admittedly truncated traverse of a very important aspect of late nineteenth and early twentieth century New Zealand history is to demonstrate more fully that there was a distinct legislative context for the CMAA 1903, as Ms Hardy maintained. The colonial government assumed the right to manage and control waterways, and then vested exclusive ownership of the riverbeds in the Crown by legislation. This was for reasons of economic and social development.

3. Extinguishment

[63] It is convenient to note here a problem which we do not have to resolve, because it was not in issue before us. The representatives' claim is based on displacement of common law ownership interests by Crown purchase. The claim has *not* been put on the basis of aboriginal title or unextinguished customary rights. That cannot be stressed too strongly.

[64] We are aware of the ongoing dispute about the interaction between s 14 and underlying customary rights. Indeed, the Waitangi Tribunal has heavily criticised the expropriatory ramifications of an affirmative navigability finding. In the *Mohaka River Report* (Wai 119 1992), the Tribunal said that if it were argued that the Mohaka was a navigable river deemed to have always been vested in the Crown, this would have been a clear breach of Article 2 of the Treaty of Waitangi, because ownership would have been appropriated without the consent of Ngati Pahuwera and without compensation. The Tribunal agreed with Ms Elias, who argued that the provision in the CMAA 1903 was expropriatory and inconsistent with the principles of the Treaty. And in the *Whanganui River Report* (Wai 167 1999) and the *Te Ika Whenua Rivers Report* (Wai 212 1998), the Tribunal also found that the presumption that the ownership of the banks of a river in its non-tidal stretches included ownership of the riverbed to its midpoint was rebutted in New Zealand by the prior Mäori interest in rivers.

[65] Given the differences of opinion which have been expressed on the extinguishment issue, it is easy to appreciate why the present claim was advanced on a common law ownership footing. We mention this extinguishment problem only to emphasise that it is not before us. We express no view on the proper resolution of that issue in relation to the present case.

The High Court decision

[66] The way the arguments were run in the High Court are fully set out in Harrison J's reported judgment and they need only be briefly summarised here. The argument in the High Court as to navigability was dominated by Mr Millard's "divisibility" test: at [71] – [79]. Mr Millard contended that the issue of navigability had to be approached by considering divisible parts or a part of the river in isolation. For the Crown, it was submitted that the character of the river as a whole is decisive. Given these lines of argument, the case for the Pouakani representatives rested on evidence of physical obstacles upstream of Cambridge and the absence of evidence of any public use in particular areas in or before 1903.

[67] Harrison J did not accept Mr Millard's divisibility premise. As to the construction of s 14, he noted the reference in s 14(2) to "*a* navigable river" and the reference in s 14(1) to "*the* bed of such river": at [72]. The Judge said that a river is either navigable or it is not, and its bed either belongs to the Crown or it does not. He held that the river is not defined as a "navigable river in whole or in part" or "a navigable river to the point where it meets an obstacle to navigation". The Judge agreed with the Crown that a construction of s 14 which allowed for a "patchwork of private *ad medium filum* and public ownership along the Waikato River would defeat the purpose and policy of s 14": at [73].

[68] The Judge also drew some support for his conclusions from the decision of the Supreme Court of Canada in *R v Nikal* [1996] 1 SCR 1013. That case concerned the common law meaning of a navigable river in Canada. The context was one of determining whether or not indigenous Indians were entitled to fish without a licence in the Bulkley River, a well known Canadian steelhead trout river which runs into the much larger Skeena River. Physically, the Bulkley River is rather more like the

Tongariro River than an English tidal river. In that case, Cory J rejected references to English tidal conditions (at [82]):

> The correct test for an assessment of navigability is to consider the entire length of the river. A section of the river which is non-navigable in fact does not necessarily render either the river as a whole or that section non-navigable in law if it is found to be substantially navigable throughout. The Bulkley River is navigable both above and below the Moricetown Canyon, and is therefore a navigable river.

[69] In the result, Harrison J said:

> [86] In summary, I am satisfied that determination of the meaning of the phrase "navigable river" in s 14 requires a factual inquiry into whether the river as a whole is navigable. Its general characteristic is decisive and does not allow for Mr Millard's piecemeal approach: navigability is not to be assessed either according to a moving scale from the mouth of the river to the point where continuous navigability actually ceases or by reference above that point to a segment defined by its abutment to the riparian land in question.
>
> [87] The terms of the statutory definition found in s 14 are unique to New Zealand, and do not attempt to replicate existing common law. The word "navigation" in this context means, in my judgment, the carriage by water transport of people or goods from one point to another. A "navigable river" is one capable of navigation. While its common law meaning of a public highway is preserved by the express reference to public use, the meaning of "navigable river" is significantly extended relevantly to this case.

[70] After considering the considerable volume of detailed evidence before him, the Judge found that:

> [104] I am satisfied that the Waikato River as a whole or a unit in 1903 was a navigable river. Mr Parker's table shows that about 156 miles or 76.8 per cent of the river was actually used or navigated then (representing about 75 miles or 60 per cent of the 120-mile stretch above Cambridge). His table was based on documented travel (no doubt other journeys were taken but not recorded) and does not take into account the river's susceptibility for future use.
>
> [105] The decisive factors in establishing that the river was navigable in 1903 are that:
>
> (1) the river was navigable continuously for two-fifths of its length (from its mouth to Cambridge);
>
> (2) most parts of well-defined sections above Cambridge were used before 1903; and

(3) there was greater use in those same areas after 1903, proving the river's susceptibility of future beneficial use for navigation.

[106] The existence of 10 or 12 substantial physical obstructions in the river's upper reaches does not derogate from this conclusion, given that the statutory definition does not require proof of a continuous access channel throughout the length of the river. Both Messrs Parker and Stirling opined on whether or not it was possible to circumvent these obstacles by portage. They were apparently working against the contingency of a court requiring evidence that physical obstacles or impediments could be circumvented even if proof of continuous or uninterrupted passage was not necessary. I do not think, however, that the existence of occasional natural physical interruptions to an otherwise navigable river changes its navigable status (see *Nikal* at pp 1050 – 1051).

Discussion

1. The textual argument

[71] New Zealand law has long espoused the proposition that legislation must not be interpreted solely in a pinched and literal mode. It must be interpreted both according to its text, and having regard to the purposes of the legislation. We take first the textual elements.

[72] The definition in s 14(2) provides that a river, to be navigable, must be "continuously or periodically of sufficient width and depth to be susceptible of *actual* or *future* beneficial use to the residents, actual or future, on its banks, or for the public for the purposes of navigation by boats, barges, punts or rafts" (emphasis added). "Actual" and "future" connotes a split in both uses and categories of users: the people present or future who live along the banks of the river and carry out activities there, *or* those members of the public who wish to navigate it.

[73] It will also be noted that the s 14(2) definition specifically refers to the river being "continuously or periodically" of sufficient width and depth. This could have a temporal meaning, in that some rivers are seasonably "full" and passable. Or it could have a spatial meaning, in that some stretches of the river are permanently passable but some are not. For example, the interruption of a river by falls, impassable gorges, or dams. The qualifier that a river only needs to be

"periodically" of sufficient width and depth to be navigable demonstrates that interruptions to a continuous river journey were contemplated.

[74] On a purely textual analysis, we think s 14 must contemplate that occasional natural obstacles, such as those in the upper reaches of the Waikato River, do not preclude the river being classified as navigable. Section 14 could be approached broadly in this way, as allowing for the hydro-electric developments that were clearly in Parliamentary contemplation, or narrowly, which would not allow for the breaking up of passage by obstacles. Even on the text alone, we incline to the broader view. The provision was prospective and did not rest on a static view of the river. Parliament had in mind future changes which would themselves change the character of the river in places.

2. Purpose

[75] How far can this Court have regard to the broader legislative package to which we have earlier referred?

[76] The answer must be that because all Acts of Parliament must fit into the body of the law as a whole, it is permissible in interpreting one Act to have regard to other statutory law. In *Statute Law in New Zealand* (4ed 2009), Burrows and Carter suggest (at 248):

> If several Acts form a comprehensive statutory scheme ... a perusal of all of them may assist in the better understanding of one of them ... Even if there is no statutory scheme as such, a study of analogous provisions in other statutes may sometimes help to reveal a legislative policy that can assist with the interpretation of the provision in hand.

[77] Burrows and Carter cite the "extreme example" of *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC). In that case, Chilwell J held that in determining whether to grant a water right under the Water and Soil Conservation Act 1967 the spiritual values and cultural relationship of the Mäori people to the waters of the region were proper matters to be considered. Although the Water and Soil Conservation Act made no express reference to such considerations the Town and Country Planning Act 1977 did. Since the two Acts

could be seen as part of a statutory scheme it was proper to import those same considerations into the Water and Soil Conservation Act.

[78] In addition to considering other Acts of Parliament, it is undoubtedly permissible to consider the social and economic factors that existed at the time an Act was passed. See Burrows and Carter at 253:

> Such an examination may clarify the "mischief" that the Act was passed to remedy. It may sometimes also immediately clarify the meaning of a provision to see the circumstance that the framers of the Act had in mind when they prepared the legislation: the abstract words of legislation can often take on a new clarity when one discovers the exact situation that the legislators were addressing. As Lord Simon has said [in *Maunsell v Olins* [1975] AC 373 at 391 (HL)], a court should put itself in the place of the drafter and of the other framers subject to whose direction and control the drafter acted, and determine meaning in the light of the circumstances known to the drafter and to those other framers.

[79] To like effect, in *Bennion on Statutory Interpretation* (5ed 2008), Bennion discusses the informed interpretation rule in the following way (at 588):

> For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the other provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts *in para materia*, and all facts constituting or concerning the subject-matter of the Act.

[80] In other words, the interpreter of a statute should read the express words of an enactment as illuminated by its context or setting.

[81] We think that the appropriateness of the broader textual view we have identified (at [74] above) is put beyond doubt by the developmental and legislative context which we set out earlier in this judgment. What has happened to the Waikato River is exactly what Parliament had in contemplation at the time of the passage of the CMAA 1903. It was a prospective view that extensive development was likely to take place, and that securing the bed of the river to the Crown was essential to the development of New Zealand.

[82] We agree with Harrison J that the divisibility argument run by the representatives is quite inimical to the purpose of the CMAA 1903, as seen in the

larger legislative context in which it ought properly to be seen. We consider the question of legislative purpose to be of overwhelming importance in this case.

[83] The only real argument to be made against this proposition is that the effect of the CMAA 1903 was confiscatory, in that it took away existing common law rights. Boast has trenchantly described s 14 as "one of the most expropriatory enactments in New Zealand legal history and a startling example of statutory overkill": at 266. Normally, if there was ambiguity, one would read such legislation down. That said, the legislative purpose is paramount. There is no doubt that Parliament can legislate in an expropriatory fashion if it wishes to, even though New Zealand law does not have a constitutional "takings" provision such as is found in the United States Constitution. It is worth observing that the confiscation effected by the CMAA 1903 was not discriminatory. It applied to Mäori and Pakeha equally and, where applicable, it overrode the common law rights of all New Zealanders.

[84] In the result, we think Harrison J was right to hold that, in 1903 and now, the Waikato River was and is navigable within the meaning of s 14 of the CMAA 1903.

Conclusion on navigability

[85] It follows that, on the application of s 14 to the facts of this case, the Waikato River from the foot of the Huka Falls to Port Waikato was a navigable river and vested in the Crown. There is the gloss that from the Huka Falls to the Lake Taupo outlet the bed of the Waikato River is in any event the property of the Crown by virtue of the Mäori Land Amendment and Mäori Land Claims Adjustment Act and is now entrusted to the Tuwharetoa Trust Board: see [23] – [26] above.

Did the Crown owe a fiduciary duty?

Introduction

[86] Given our view on navigability, it is strictly unnecessary for us to deal with the breach of fiduciary duty issue. We have considered whether we should comment

at all. It was not necessary for Harrison J to deal with it either, but he did so. The issue was fully argued before us. There has been a good deal of professional and academic concern as to whether a fiduciary cause of action can be maintained in this context. The literature on whether, and to what extent, fiduciary duties may be asserted with respect to the historic interests of Mäori includes the following. For a general context, see Richardson, Imai & McNeil *Indigenous Peoples & the Law* (2009) and Mainville, "Fiduciary Relationships Between Aboriginal Peoples and the Crown" in *An Overview of Aboriginal & Treaty Rights and Compensation for their Breach* (2001) and, in particular, Frame "The Fiduciary Duties of the Crown to Mäori: Will the Canadian Remedy Travel?" (2005) 13 Waikato LR 71; Palmer, *The Treaty of Waitangi in New Zealand's Law & Constitution* (2008); and the review of that book by Sir Edmund Thomas, "The Treaty of Waitangi" (2009) NZLJ 277, which both distinctly cover the appropriateness or otherwise of the application of fiduciary principles to Mäori. We therefore propose to make some observations.

The basic complaint

[87] The fundamental concern of the Pouakani representatives is that when the Crown acquired the Pouakani blocks in the 1880s and 1890s, they did not understand – and the Crown did not make it apparent to them – that they would lose their interest in the riverbed adjoining their lands. They say this was of the greatest importance to them, because the Waikato River was a taonga and of signal importance to their daily lives and mana.

The claim as pleaded

[88] Because of the interest in these sorts of claims, it is worth setting out the pleading in the statement of claim on which the proceeding went to trial before Harrison J:

> **Duty Owed by the Crown**
>
> 28. Arising out of:
>
> (a) The provisions of the Treaty; and/or

(aa) The very relationship between the Crown and indigenous people at the time relevant to the taking and sales described in paras 16(a) and 19;

(b) The right of pre-emption in favour of the Crown; and/or

(c) The disability of the owners of the Pouakani Lands at the time of the taking and sales described in paras 16(a) and 19, ie. being the disability described in paras 27C to 27F;

The Crown:

(d) As a party to the Treaty has and had a duty to act reasonably and in good faith towards Mäori (with a reciprocal obligation on Mäori);

(e) Has and had fiduciary obligations or at least obligations akin to fiduciary obligations to the Mäori owners of the Pouakani Lands, in its dealings with them.

Particulars of the Fiduciary Obligation

The fiduciary obligations owed by the Crown to the Mäori owners of the Pouakani Lands include the obligation to deal fairly and equitably and further:

(i) To only extinguish native rights (including to the beds of rivers) on fair terms; and

(ii) To ensure that free and informed consent is obtained before extinguishing native rights (including to the beds of rivers); and

(iii) To explain the exact nature of the dealing when dealing with native rights, particularly rights to the river bed when such rights are based on legal concepts that were alien to Mäori (including that the purchase of dry (and visible) land includes land under water and the concept a river can be divided into 2 based on the *medium ad filum* rule, (itself an arcane term unlikely to be known to Mäori at the time));

(iv) To obtain the specific and informed agreement from the Pouakani people to take the bed of the Waikato River to the extent it adjoins the River Land;

(v) To ensure that proper compensation is paid for loss of native rights (including to the beds of rivers).

29. At the time of the loss of land described in paras 16(a) and 19, the Pouakani people had no knowledge of the principle of common law that the land adjoining a non-navigable river took the ownership of and rights up to the middle of the river known as the "*ad medium filum*" principle.

30. The Crown was aware of the operation of the *ad medium filum* principle.

31. The Waikato River (including adjoining the River Land) had deep spiritual and cultural meaning to the Pouakani people.

32. The Pouakani people relied on the Waikato River adjoining the River Land for food and erected devices on and adjacent to the bed of the river for eeling and fishing.

33. The Crown knew or ought to have known at all relevant times up to and when it acquired the land as described in paras 16(a) and 19, that the Pouakani people were unaware of the *ad medium filum* principle.

Particulars

The Crown knew or ought to have known that:

(a) The *ad medium filum* principle is an arcane concept not known to most persons who are not lawyers. Even the name of the principle is a non-English expression;

(b) English is not the first language of the Pouakani people;

(c) The Pouakani people did not have legal assistance;

(d) The concept that the sale of dry (and visible) land would also include the sale of land under water is not an obvious concept;

(e) It is known or ought to be known to the Crown that the Pouakani people had no knowledge of the principles and presumption of English Law and no experience of selling land;

…

34. The Pouakani people lost their ownership of the bed of the Waikato River by virtue of the Crown acquisition of the Pouakani Lands.

35. The Crown in the process of acquiring the Pouakani Lands breached the obligations set out in paragraph 28 above, such breach being perpetrated by the Crown officials who negotiated the acquisition and purchases set out in paras 16(a) and 19 at the time of and immediately before such acquisition and purchases.

…

[Particulars given]

[89] It will be observed that the claim is really put two ways. At [28](d) of the statement of claim the representatives allege that the Crown, as a party to the Treaty,

had a duty to act reasonably and in good faith towards Mäori, and Mäori had a reciprocal obligation to the Crown. In [28](e) they allege that the Crown has fiduciary obligations, or obligations akin to fiduciary obligations, to the Mäori owners of the land in its dealings with them.

[90] In this Court, the alternative of a broad, free-standing duty of good faith seems to have been little developed.

The argument in the High Court

[91] Before Harrison J, Mr Millard ran his case for the existence of a fiduciary relationship on two streams of authority: one generic, based upon recent Treaty of Waitangi jurisprudence; and one specific, relating to the Crown's duty on extinguishment of customary rights. As we have noted above, extinguishment of customary rights is not being asserted in this claim.

[92] In addition to the Treaty jurisprudence, Mr Millard identified a number of indicia pointing to a fiduciary relationship. These included: the imbalance of power between the Crown and Mäori at the time of the sales, illustrated by the Crown's right of preemption; the Pouakani people's vulnerability or disability by reason of their illiteracy, unfamiliarity with European concepts of title and the processes of the Native Land Court, and their lack of legal advice; and the Pouakani people's general state of disadvantage.

[93] The Crown strongly resisted the existence of any such fiduciary duty.

[94] The essence of Harrison J's reasoning was that:

(a) The Crown did not owe a fiduciary duty at large to Mäori. The Treaty of Waitangi did not generate an equitable duty.

(b) The relationship between Mäori and the Crown in relation to the Pouakani blocks was governed by statute. The statutory scheme vested rights in Mäori and recognised their autonomy.

(c) The statutory scheme reveals the absence of an obligation of absolute or single-minded loyalty by the Crown to Mäori vendors. The Crown was not subject to a duty to advise the original landowners about whether to exercise the autonomous power of sale and, if so, on what terms.

[95] It is far from clear to us, as Mr Millard seems to assert, that if there was a fiduciary duty, there was a breach of it here. A fair reading of the High Court judgment suggests to us that a breach of duty was not found by Harrison J. If a duty were established in this case, the question would inevitably arise as to whether the proceeding should be returned to the High Court for determination or whether there is sufficient factual material before this Court to enable it to determine the issue appropriately. For reasons which will become apparent, we do not have to determine that issue and we do not do so.

A general duty of good faith?

[96] It is useful, for analytical purposes, to separate out the question of a general duty of good faith from the question of a fiduciary duty at law. At a broad level, there was undoubtedly a duty of good faith between the Crown and Mäori. All the standard references on New Zealand history recite events in support of this proposition from Lord Normanby's instructions, through to the signing of the Treaty of Waitangi, and the broad course of events thereafter. See Adams *Fatal Necessity: British Intervention in New Zealand 1830-1847* (1977) at 238 – 245.

[97] If any judicial authority for an inchoate duty of this kind is required, certain passages from the judgments in the seminal *Lands* case will suffice (*New Zealand Mäori Council v Attorney-General* [1987] 1 NZLR 641 (CA)). Cooke P said (at 664):

> The Treaty signified a partnership between races, and it is in this concept that the answer to the present case had to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Mäori to the Pakeha, was the goal which in the main successive Governments tended to pursue. In 1967 in the debates on the Mäori Affairs Amendment Bill, a measure facilitating the alienation of Mäori land, the responsible Minister, the Hon JR Hanan, saw it as "the most far-reaching and progressive reform of the Mäori land laws this century . . .

based upon the proposition that the Mäori is the equal of the European . . . The Bill removes many of the barriers dividing our two people" (353 *New Zealand Parliamentary Debates* 3657). Another supporter of the Bill expressed the hope that "it will mark the beginning of the end of what still remains of apartheid in New Zealand" (ibid, 3659). Such ideas are no longer in the ascendant, but there is no reason to doubt that in their day the European Treaty partner and indeed many Mäoris entertained them in good faith as the true path to progress for both races. Now the emphasis is much more on the need to preserve Mäoritanga, Mäori land and communal life, a distinctive Mäori identity.

…

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Mäori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Mäori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Mäori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

[98] Richardson J said (at 674):

As Adams, *Fatal Necessity — British Intervention in New Zealand 1830-1847* (1977), in a chapter headed "The Obligations of Good Faith" has observed (p 239): "The acquisition of sovereignty was undertaken from motives both humanitarian and nationalistic, both idealist and pragmatic, both for the benefit of the Mäoris and the benefit of the settlers": and, he added, the two main reasons for British intervention were humanitarian concern to protect the Mäori from the worst consequences of European invasion of their country and to protect British subjects wishing to settle in New Zealand. Indeed the preamble to the Treaty reflects those dual objectives. In relation to land — and it is land with which this case is concerned — the Crown was to be the buffer, the intermediary. The settlers were to obtain land for settlement but only by purchase from the Crown which had the sole right to buy from Mäoris willing to sell. The Mäori people were to be protected in their ownership through the second article's guarantee of protection. As expressed in the English text, the guarantee to the Mäori collectively and individually was of "the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" as long as they wished to retain them. In the Mäori text it is the rangatiratanga, the chieftainship of those lands, which is protected. The third article according "the Natives of New Zealand . . . all the Rights and Privileges of British Subjects" has been the subject of sharply contrasting perspectives: on the one hand it reflected in British eyes the goal of assimilation and eventual submergence of Mäori custom in a superior British civilisation and on the other hand it was seen as providing protection of the

> right of the Mäori people to retain their own culture and heritage just as the British maintained theirs. Common to both perspectives was the recognition that the article provided for Mäoris to be accorded equal status with other British subjects.

[99] Cooke P referred to the relationship between the Treaty parties as creating "responsibilities *analogous* to fiduciary duties": at 664 (emphasis added). Yet he noted that counsel for the applicants (Mr Baragwanath QC, Ms Elias and Mr Dawson) "encountered some difficulty in trying to put such broad propositions into more concrete forms": at 664. To enlarge on that a little, courts have to pass beyond the realm of what might be termed proper indignation and legal imagination into the difficult and technical matters of the construction of concrete causes of action and desired remedies. This is an enduring problem in the law: it is possible, and admirable, for instance, to conceive of circumstances in which ultimate consumers *should* have a remedy directly against manufacturers in tort, but the construction of particular remedies involves lawyering of a different kind.

[100] Accordingly, this strand of our jurisprudence has struggled, doubtless because it requires plaintiffs with wherewithal and stamina for development; it has difficulties for the legal profession in advising with any degree of confidence as to potentially successful outcomes; and it is a largely inchoate cause of action. See generally Ruru (ed) *In Good Faith: Symposium Proceedings Marking the 20th Anniversary of the Lands Case* (2008).

[101] More recently, this Court (William Young P, O'Regan and Robertson JJ) declined to accept that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity: *New Zealand Mäori Council v Attorney-General* [2008] 1 NZLR 318. Leave was granted to appeal to the Supreme Court: [2008] NZSC 49. The appeals were later withdrawn, and a fixture vacated. Astute observers will have noted that the Supreme Court recorded the following in a minute (at [2](b)): "the parties acknowledge that the comments of the High Court and Court of Appeal in their judgments ... concerning the Crown's fiduciary obligations to Mäori under the Treaty of Waitangi are *obiter dicta*."

The practical difficulties with the concept of fiduciary duties

[102] Quite apart from the uncertainty engendered by the latest *New Zealand Mäori Council* decision as to whether the fiduciary concept can now be employed in this area of the law, if employed it carries with it a substantial amount of legal baggage. Traditionally, courts have restricted fiduciary duties either to historically well established categories, or relationships based on special facts: *Coleman v Myers* [1977] 2 NZLR 225 (CA). Those circumstances are quite confined in the case law. Moreover, once a particular relationship is "pigeon-holed" as a fiduciary one, other matters, such as remedies, are largely dictated by that categorisation: *Chirnside v Fay* [2007] 1 NZLR 433 (SC).

[103] There is an unfortunate and visceral downside to the employment of the fiduciary concept in the Crown-Mäori context. A fiduciary standard would impose an obligation on the Crown to act with real selflessness vis-à-vis a disadvantaged party (here, the Mäori). In a real sense, this implies superiority on the part of the Crown and inferiority on the part of Mäori. This is quite at odds both with the historical fact of the Treaty of Waitangi, and what is said about it and the position of Mäori today. This resort to a fiduciary principle carries an unfortunate and erroneous affirmation of a most public kind as to the inferior position of Mäori. This is quite wrong.

[104] Doubtless it was because of considerations such as the above that judges have used words like "analogous" and "akin" to fiduciary duties. But the question nevertheless remains: can a better vehicle be found for the largely inchoate duty of good faith, and would it be appropriate to resort to it? For a discussion of this issue, see the thoughtful review by Sir Edmund Thomas at [86] above.

A relational duty of good faith?

[105] When a new legal obligation comes into being, it usually occasions significant debate as to how it is to be classified and given proper legal content. A classic example, which bears some affinities with the present problem, is the

evolution of the doctrine of breach of confidence. Without closely traversing the history, by the 1700s English courts had begun to enforce what we would regard as obligations of confidence today. For a long period, there was an extended debate in the common law world as to whether an obligation of confidence rested on proprietary notions, contractual notions, equitable notions, or something else. It was not until the second half of the twentieth century that courts held that the action for breach of confidence is *sui generis*. In other words, it depends upon its own principles and is enforceable as such. By focusing on the appropriate bounds of that particular jurisdiction, courts were able to develop principles of distinct importance. For example, there must in fact be a relationship of confidence; the defendant must have used the confidence; the confidence must have been used without just cause or excuse; and the confidence must have been used to the detriment of the person entitled to the benefit of it. (See generally Hammond "The Origins of the Equitable Duty of Confidence" (1979) 8 Anglo-American Law Rev 71.)

[106] The most obvious candidate for doctrinal development with respect to Crown-Mäori relations would lie in the area of relational duties of good faith, at least in particular transactional contexts.

[107] There is nothing radical in such a concept. For instance, relational duties of good faith are at the very heart of employment law today. They exist in large measure even in commercial law. The commercial codes in some jurisdictions (including such industrial power houses as Germany, Japan and the United States) employ a central concept of good faith. In some jurisdictions, relational duties of good faith have been held to apply to distinct subsets of commercial endeavour. For instance, in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 8 TCLR 612 (HC) it was suggested that such a relationship is a necessary and appropriate one as between franchisors and franchisees. On appeal this Court rejected any such notion: [2000] 3 NZLR 169. But then the Privy Council, on the appeal from that decision, whilst restoring the High Court judgment on other grounds, noted that this Court could usefully revisit its views against such a good faith doctrine: [2005] 1 NZLR 145.

[108] The creation of such a duty of good faith would not rest solely on the Treaty, amounting to a (presently impermissible) direct enforcement of it. The Treaty would form simply one element of a well established – and publicly accepted – obligation on the part of the Crown to act reasonably and with good faith in respect to Mäori. An obligation of good faith of this kind, which permits both parties to have regard to their own interests whilst at the same time having proper and due regard to the interests of the others, would simply reflect in this subject area what is done elsewhere in the law. See also Thomas, at [86], 279.

[109] The "straw man" argument against good faith is simply that content cannot be given to it and that it is Chancellor's foot jurisprudence. We think that is to vastly overstate the problem.

[110] "Good faith" in the Crown-Mäori context would require at least three elements:

- A co-operative element to achieve the shared premises (which in contract is the promise itself, and in this area, the principles of the Treaty);

- There has to be honest standards of conduct; and

- Those standards of conduct must be reasonable having regard to the proper interests of the parties.

[111] It may be thought that this is very little distance from the language of the judges in the *Lands* case, albeit turned into a discrete, stand-alone cause of action. The language of fiduciaries would accordingly drop out of the legal lexicon on this approach.

[112] The much more difficult issue which would have to be confronted is whether the development of a relational duty of good faith is the *wise* course in the contemporary circumstances of New Zealand. Since the *Lands* case almost a quarter of a century ago, significant public sector developments have taken place in this country. The Waitangi Tribunal has continued its work and a number of settlements

have been effected. Parliament has itself made reference to the principles of the Treaty of Waitangi in numerous pieces of legislation (approximately 30 statutes) and Treaty clauses have been included in many public sector contracts (for example, contracts relating to the provision of health services). The inclusion of Treaty clauses in legislation and contracts indicates formal acceptance by both Parliament and the Executive of the good faith concept underpinning the Treaty, and is a recognition that the concept can and should be given functional form.

[113] Nevertheless, a significant number of historic grievances remain unresolved. One area of grievance – which has a distinct resonance in this case – is the sense by so many Mäori that they were badly let down by the Native Land Court and the Crown in relation to the pre-emptive purchase of land. See Williams *'Te Kooti Tango Whenua': The Native Land Court 1864-1909* (1999) and Boast *Buying the Land, Selling the Land: Governments and Mäori Land in the North Island 1865-1921* (2008).

[114] From a public policy perspective there are a range of views as to the future direction of legal relations between Mäori and Pakeha. One point of view, espoused by Dr Matthew Palmer in his recent book *The Treaty of Waitangi in New Zealand's Law and Constitution* (2008) at 358, suggests that the present "incoherent" and "inconsistent" status of the Treaty will only be overcome by recognising the reality of the full status and force of the Treaty in New Zealand law. At the other end of the spectrum, there are perspectives, such as Professor Brookfield's in *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (2006), that the Treaty as presently conceived is incapable of carrying the baggage which is sought to be cast upon it and that a republican settlement is required. Such a settlement would, amongst other things, make reparation for historic wrongs but entrench Mäori rights for the future. See also the insights of Sir Stephen Sedley in "*Settlers v Natives*" *London Review of Books* 8 March 2001.

[115] Meanwhile, the courts exist in a difficult no man's land, endeavouring as best they can to advance remedies for manifest injustices. It is useful to recall in this context the sad but insightful question Durie J posed in his 1996 FW Guest Memorial Lecture ("Will the Settlers Settle? Cultural Conciliation and Law" (1996)

8 Otago LR 449 at 462): "[When] will we hone our jurisprudence to one that represents the circumstances of the country and shows that our law comes from two streams?"

[116] That observation contains all the elements that are of the greatest concern. First, our jurisprudence in this area must be that of New Zealand: the solution lies within this country. Secondly, in this area we are light years away from the considerations that dictated English chancery jurisprudence so long ago. If given the content suggested above (at [110]), relational duties could draw on modes of thought highly compatible to both Mäori and Pakeha. Thirdly, at the end of the day, reconciliation of indigenous rights and non-indigenous rights in the judicial forum will always be a rather limited enterprise. Courts are not truth and reconciliation commissions or like vehicles. But if they are to succeed in their modest role of reconciling rights and interests, the persons who resort to the law must be able to be satisfied that at least a measure of justice has been achieved.

[117] The matters canvassed above were arguably within the pleadings (see [88] above) but were not developed in argument. The Crown would rightly expect to be fully heard on them. They cannot be resolved here, and in any event, it is unnecessary to do so given our holdings as to navigability.

[118] Further, at the factual level it is particularly difficult, whether resort is had to a concept of fiduciary duties or to a relational duty of good faith, to ascertain whether there is a sustainable breach in this case. There is simply not the factual material before us to give the matter fair and appropriate determination.

Relief

[119] Even assuming a breach of fiduciary duty or relational duty in this subject area, we do not see how this Court could have imposed a constructive trusteeship on the Crown. There are the accretion of interests which have occurred on the river over the course of a century. And there are difficult and perhaps insurmountable problems of demarcation. For instance, the Court would perforce have to think of a body of land under dams, representing where the riverbed once was, as being the

subject matter of a constructive trusteeship. The concept does not fit well here, by virtue of the particular circumstances of this case, and it is very difficult to see how such an obligation could be enforced.

Other matters

[120] There is no point in further burdening an already lengthy judgment with reference to the process arguments which were advanced, and which we do not need to resolve: see [8] above. We heard extensive argument on the standing issue and we have some reservations about Harrison J's views, but we do not decide that issue here.

Conclusion

[121] The appeal is dismissed.

[122] There will be no order for costs.

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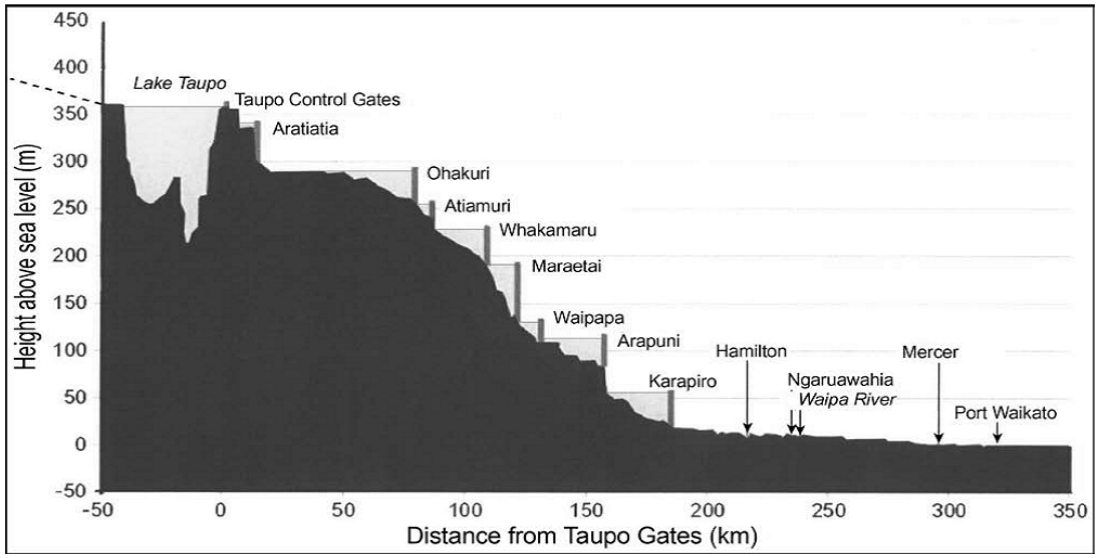
Appendix I: Longitudinal profile of the Waikato River



The cascade of hydro lakes along the Waikato River, from Lake Taupo to the sea. See The Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200 2008) at 1348.

Appendix II: Main Centres, Power Stations and relevant Pouakani blocks