IN THE SUPREME COURT OF NEW ZEALAND SC 13/2015

[2015] NZSC Trans 22

BETWEEN **PROPRIETORS OF WAKATŪ**

First Appellant

RORE PAT STAFFORD

Second Appellant

RORE PAT STAFFORD
PAUL TE POA KARORO MORGAN
WAARI WARD-HOLMES
JAMES DARGAVILLE WHEELER
(SUING AS TRUSTEES OF
TE KĀHUI NGAHURU TRUST)

Third Appellants

AND **THE ATTORNEY-GENERAL**

Respondent

TE RUNANGA O NGĀTI RĀRUA IWI

Intervener

Hearing: 12-15 October 2015

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: A R Galbraith QC, K S Feint, M S Smith and K C Johnston for the Appellants
D J Goddard QC, J R Gough and J M Prebble for the Respondent
T J Castle and L T I Lovell for the Intervener

CIVIL APPEAL

MR GALBRAITH QC:
If it pleases, I appear with Karen Feint, Matthew Smith and Kerensa Johnston for the appellant.

ELIAS CJ:
Thank you, Mr Galbraith.

MR GODDARD QC:
May it please the Court, I appear with my learned friends Mr Gough and Mr Prebble for the Attorney-General.

ELIAS CJ:
Yes, thank you, Mr Goddard.

MR CASTLE:
May it please the Court, I appear for the iwi intervener, Te Runanga O Ngāti Rārua.

ELIAS CJ:
Yes, thank you, Mr Castle. Mr Castle, did you want to make a preliminary statement?

MR CASTLE:
Yes, I did, thank you, Ma'am. As, indeed, I notified my learned friends for the relevant parties last evening and also the Court this morning, I am obliged to bring to the Court's attention a slight change in the position of the iwi intervener, and it is this. I received instructions last evening to withdraw its resistance to the finding that the

second appellant, Rore Stafford, has standing to bring this claim. The intervener maintains its resistance to the standing of the first and third appellants to do so.

ELIAS CJ:
Yes, thank you.

MR CASTLE:
Thank you, Ma'am. May it please the Court.

ELIAS CJ:
Yes, thank you. Mr Galbraith?

MR GALBRAITH QC:
As the Court will be aware, this appeal follows a lengthy trial before Justice Clifford and as the Court is probably also aware I wasn't counsel at that trial but Ms Feint and Ms Johnston were both counsel at the trial so if there are matters – I've tried to make myself familiar with the trial but if there are matters arising then I'll have to defer to those counsel who were present.

What I am proposing, with the Court's leave, is that I'll make some preliminary comments about the appeal and the scope of the appeal and then what I was proposing was Ms Feint would take the Court through the factual background. She has prepared a schedule which orientates the fact and the documents to which she's proposing to take the Court to particular issues that the Crown has raised so that it's thought or hoped that that will be of most assistance to the Court.

So as the Court is also aware, the events, of course, which form the factual background to this matter took place a long time ago. But as Justice France noted in the Court of Appeal, there is a great deal of documentation, in fact, almost too much documentation in some ways and one has to get it to Court which enables a relatively clear picture to be drawn as to the facts and as the appellants accepted in the Court of Appeal and accept here in their submissions Justice Clifford's judgment is, in almost all respects, a very useful, and an accurate summary at an overview level of what took place at that time.

One point on which there was some disagreement is a little less of an issue as a result of my learned friend's statement that iwi now do not contest Mr Stafford's

standing but, of course, the Crown do and so it's still an issue between Crown and appellants as to Mr Stafford's standing. We address this issue and the issue of the iwi plaintiff's position in paragraphs 3.3 and 3.6 of our written submissions. I don't want to go to that now but that's an issue which I think I agree with the Crown can really be postponed at this stage. It doesn't require to be resolved whether it's hapū and whānau would be the ultimate beneficiaries or whether iwi might be the ultimate beneficiaries, but our submissions certainly at paragraphs 3.3 to 3.6, the footnote references to some of the background material, including Sir Edward Durie's report or memorandum, we would say support the view which we asserted based in the High Court and the Court of Appeal that when it comes to customary title that traditionally vests or rests in the hapū or whānau of the particular district or area.

It's trite to say the facts are important in any case. But when one comes to a case where there's a claim to a fiduciary duty the facts are all-important because it's the factual circumstances from which a Court will decide whether or not there is a duty and if there is a duty the scope of that duty.

So at a sort of an overview level there really isn't much in the way of disagreement about the facts and just take, for example, in fact that Governor Grey decided to abandon the obligations in 1848. But the characterisation of the facts is very much an issue between Crown and appellants and that's one of the reason – or that's the principal reason, of course – that we need to take this Court to the primary facts so that this Court can form its view as to whether the characterisation which was adopted in the Court of Appeal is appropriate and in particular the Court will be aware that in the judgment of the present Court of Appeal it was that characterisation which at the end of the day tipped the precedent from a situation where the present had recognised the possibility of a fiduciary duty to the decision that there wasn't a fiduciary duty. The judgment of the other two Judges is – the principal judgment is that of the President, perhaps I should put it that way, because the President dealt at some length with that question of the possibility or not of a fiduciary duty existing in the relationship circumstances. So obviously I've got to come back to that.

What, in our submission, is of some interest is that Justice Clifford who was the Judge who heard the many weeks of oral and written evidence or material did himself raise in his judgment the question and I will just, if you wouldn't mind, read it to you. "The more I have thought about it the more it seems to me that the Crown could not have been acting in a vacuum in terms of some form of legal accountability to Māori

during that period and he is talking there about the period 1842 through 1856 and so, in my respectful submission, that is the true question which arises in relation to the factual circumstances which you will hear about. It is hard to escape that doubt or query that Justice Clifford raised, that there must have been some legal responsibility, given the circumstances existing between Crown and Māori at that time. Justice Clifford didn't answer that, his postulation of course because he decided there was no standing in any of the plaintiffs so unfortunately the Judge who had heard all the evidence didn't, we don't have the benefit of his answer to that postulation.

And in our submission the Court of Appeal judgment doesn't really give an answer to that, certainly not a positive answer because while there is a great deal that we would agree with in the judgment of the present, particularly her careful analysis of the possibility of a fiduciary duty arising, although obviously the conclusion we don't accept, the Court of Appeal really dealt with the matter in more of a negative of deciding no fiduciary duty no trust. But it leaves still at large, in my respectful submission, that question which Justice Clifford raised, what he's really saying it seems odd given all the circumstances, that there was no legal responsibility of the Crown to Māori in these circumstances and so there really isn't an answer, a positive answer in any event in the Court of Appeal judgment.

The Crown's answer is of course, well, the Crown was simply acting as Government. The Crown had a lot of interest to balance and so in balancing those interests it shows the way that Governor Gray went in 1848. Part of the Crown's answer also before the Court of Appeal was, well, there were public law possibilities that might have existed for Māori to take to Court. The short though perhaps not legal answer to or response to that of course is that they weren't effective possibilities to Māori in those years, whether they existed theoretically and whether they could have provided an effective response, the writ of, and I probably won't pronounce this correctly, scire facias was referred to in the Court of Appeal but I doubt that that was something that was much in the mind of Māori at the time as an opportunity or a possibility for them. It's our case that Māori were resting on an expectation that the Crown, through all its dealings, was going to protect their interests as it had stated on a number of occasions, including the 1845 grant, and they were entitled, we would say, to rest on that expectation.

So it's that issue which is the issue before this Court and the issue to which the factual submissions which my learned friend, Ms Feint, will make is directed.

ELIAS CJ:
Are you about to pass over to Ms Feint?

MR GALBRAITH QC:
No I was going to just go through and hopefully just describe the essence of the case for the appellants.

ELIAS CJ:
Well, yes, because it's not clear to me what you're position is on, for example, express trust and so some road map of the legal position contended for by the appellants would be very helpful.

MR GALBRAITH QC:
Right, now this may be a – this is a mix of fact and law that I'm just going to go through, Your Honour. I mean in this Court, as you will have seen from the written submissions, we've put at the forefront the fiduciary duty claim. We haven't abandoned express trust. The appellants ran into difficulties both in the High Court and the Court of Appeal on express trusts. I think my position in the Court of Appeal was that it could be an express trust, it goes very close to that but the elements which take it at least close to an express trust are the elements which, in my respectful submission, bring it within the compass of circumstances where a fiduciary duty can appropriately be declared by the Court.

ELIAS CJ:
But it has huge follow-on implications if it's an express trust –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– as opposed to breach of fiduciary duty particularly in terms of limitations.

MR GALBRAITH QC:

Yes it does and it's more difficult in, well, it's more difficult in some ways for the appellants as an express trust in terms of limitation than it may be in respect of fiduciary duty.

ELIAS CJ:

I was surprised by the submission.

MR GALBRAITH QC:

Well certainly the Crown would argue that and does I think. I think I'm right in saying that? Oh, perhaps not, no Mr Goddard doesn't.

ELIAS CJ:

But he's very confident it's not an express trust, if it were he'd be in trouble with limitations.

MR GALBRAITH QC:

Yes, well that's possibly true but we've cast the weight of our case on fiduciary duty. We may not – I'm saying we're not abandoning express trust as a possibility and –

GLAZEBROOK J:

I'd actually quite like to hear argument on express trust.

MR GALBRAITH QC:

Certainly, well –

GLAZEBROOK J:

And on limitation issues arising from that.

MR GALBRAITH QC:

Yes, well I'll take that up but if I can outline because I think it applies to either, for the reason I said a moment ago, that if it narrowly fails being an express trust, just say that for a moment, then it has a significant life I would say as potentially of fiduciary duty so if I can just deal in my outline with the possibilities or the matters which we say are relevant to either/or.

The first and the fundamental aspect of the appellant's case is of course that Māori held pre-existing customary title in these lands, indeed, all the lands in New Zealand and that is accepted by the Crown. It differentiates this case from some other cases but it is the core issue upon which we rest, be it a fiduciary duty or be it an express trust claim.

The second is that those rights were explicitly recognised by the Crown, not only obviously in the Treaty of Waitangi but as Ms Feint will take you through, both in Colonial Office communications and directions to the Governor in other statements, so always the Crown was consistent that those rights were both recognised and to be protected.

Thirdly, those rights could only be terminated by free consent of by specific legislative enactment, and again I don't think there's any disagreement between ourselves and the Crown on that.

ELIAS CJ:
And only to the Crown?

MR GALBRAITH QC:
And only to the Crown, that's right. Fourthly, there's the 1840 agreement between the New Zealand Company and I suppose one could say the Crown or the Colonial Office in which the Crown recognise that it would have to itself take responsibility for ensuring that the New Zealand Company's intentions in relation to reserves would be met, and again Ms Feint will take you to that document and surrounding documents.

ELIAS CJ:
As a matter of legal entitlement, because we are going to have to look at that –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
Is the – I understand the argument about the 1845 grant and the 1848 grant but is the history before those of anything other than contextual importance? In other words –

MR GALBRAITH QC:

No, I understand. No, I think the answer is, yes or no, I think Your Honour is correct, it is contextual but it's, of course, fundamental to how you approach the 1845 grant, for example.

ELIAS CJ:

Yes, yes. Well it explains the terms of the 1845 grant.

MR GALBRAITH QC:

Yes, yes.

ELIAS CJ:

And you would have to argue it also informs the content of the reservation in the 1848 grant if it's necessary to go to that.

MR GALBRAITH QC:

Yes, and it also obviously, as contextual, it informs the, if I use this term at the moment, commitment of the Crown to protect Māori interests and the proprietary interests which Māori had in its land. So it is contextual but it's important too in argument about fiduciary duty.

ELIAS CJ:

Who do you say post the grants held the reserved lands, because that does not –

MR GALBRAITH QC:

Well, that's –

ELIAS CJ:

– emerge significantly?

MR GALBRAITH QC:

No. That's a difficult question. Can I just park that for the moment as we go through here?

ELIAS CJ:

Mmm, but it is in fact something that I think we do have to grapple with.

MR GALBRAITH QC:

Yes, well, that was the question, of course, the Court raised –

ELIAS CJ:

Yes.

MR GALBRAITH QC:

– with us all prior to the hearing and we filed a not very short memorandum on the subject and the Crown filed a very short memorandum on the subject. The Crown position, as I understand it, is post-1848 it was the Crown. Our position is that that's not so blindingly obvious and so that's why, if I could just put that to one side for the moment, it takes a bit of talking about.

ELIAS CJ:

Yes. It may depend, it may turn in part on the 1841 Ordinance.

MR GALBRAITH QC:

Yes.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

Yes. It's – well, I certainly haven't found it straightforward, but I certainly will come back to it and I do intend to. And then, well, actually, the fifth point I was just going to make was the 1841 Ordinance, just going through the background material, and the 1841 Ordinance, as the Court's aware, made it clear that anything, any transactions pre-1840 were of no effect and set up a process with the appointment of commissioners for determining what would be equitable in relation to any such purchases and that was to be an exclusive process for the determination of what alienations would be recognised, the ultimate decision being that of the Governor, of course.

ELIAS CJ:

The consequences of the grants actually made after investigation, my understanding is that except in cases where no grants were made the surplus not granted, because

there were, of course, rules as to the extent of the grants, the surplus became demesne lands of the Crown.

MR GALBRAITH QC:
Well, that's one of the issues that arises from the question Your Honour asked me a moment ago.

ELIAS CJ:
Yes, I know, but I'm just trying to be quite pointed about it because –

MR GALBRAITH QC:
Yes, yes, and that's one of the things I'm not entirely certain about. I've read what was said in *Ngāti Apa* and that and I'm just not clear about that because –

ELIAS CJ:
Well, there were quite a lot of –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– contest about this with the old land claim settlers also running rather oddly some similar arguments to the ones that I think you're running here, and they lost in terms of saying that they'd continue to hold the lands under their native title if the Crown didn't want to grant it to them, so – but anyway you'll come onto that –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– but I think it is quite important.

MR GALBRAITH QC:
Yes, I agree with Your Honour. I just haven't found it absolutely simple or clear and I agree there are judicial statements as to that, and I think the Crown itself in its submissions has said, well, there's two views but the better view is that it, I'm not

sure if "vest" is the right, but it vests in the Crown at that time. Is that right? Yes. Mr Goddard's nodded so I've got that right.

WILLIAM YOUNG J:
So this is – just to look at it in terms of the 1845 grant –

MR GALBRAITH QC:
Mhm.

WILLIAM YOUNG J:
– would mean that any land in the Nelson area outside the 151,000 acres awarded would have vested in the Crown?

MR GALBRAITH QC:
Well, that's one of the reasons I –

WILLIAM YOUNG J:
That's not so clear to me.

MR GALBRAITH QC:
– obviously hesitate.

WILLIAM YOUNG J:
That's not so clear to me.

MR GALBRAITH QC:
No, well –

GLAZEBROOK J:
No, me neither.

MR GALBRAITH QC:
– it's not clear to me either, and the 1845 grant, leaping ahead for a moment, what it expressly says, it says it excepts pās, burial grounds, cultivated lands, and it would seem odd if that then meant that the pās, burial grounds and cultivated lands then vested in the Crown free of customary title because the whole purpose of preserving pās, burial grounds and cultivations is so that they were Māori lands that weren't

intended to have been transferred to the New Zealand Company, and we'll go back through the history of that but it was very expressly –

ELIAS CJ:
But this sort of issue arose in other parts of the country.

MR GALBRAITH QC:
Yes, yes, I appreciate that.

ELIAS CJ:
Not just in terms of the New Zealand Company settlements, although the Tenths background was unique there.

MR GALBRAITH QC:
Yes, well, except for Wellington and New Plymouth and that because the Tenths there isn't it?

ELIAS CJ:
Well that's New Zealand Company.

MR GALBRAITH QC:
Oh, sorry, New Zealand Company, yes. I'm sorry. But that, I think, is the Crown's position on that and so again leaping ahead, where we get from the 1845 grant, which was dealing with 151,000 odd acres to the 1848 grant which I think was dealing with 1.7 million acres, something like that –

ARNOLD J:
The original claims were 20 million acres or something. They were huge weren't they?

MR GALBRAITH QC:
Yes, originally.

ELIAS CJ:
Well, I'm just thinking, and it maybe that it's slightly later, but in the north for example, the Crown granted, so treated as itself having obtained surplus lands that had been subject to purchase but not granted through the Spain Commission. So they

certainly, and I had assumed that there's something in the 1841 Land Claims Ordinance that gives that. I meant to check it before I came down but didn't.

MR GALBRAITH QC:
Yes, well we'll have to come back to that –

ELIAS CJ:
Yes.

MR GALBRAITH QC:
– Your Honour because obviously it is significant when we start talking about the 1845 and the 1848 grants.

GLAZEBROOK J:
It seems an odd result thought doesn't it?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
If you say this say this wasn't a true purchase so we'll grab it. We're not going to grant it to the purchasers but we'll grab it as reserve land –

MR GALBRAITH QC:
We'll have it instead, yes.

GLAZEBROOK J:
– rather than revert it to customary title.

MR GALBRAITH QC:
Well, certainly our argument is in the 1845 grant where powers, et cetera, are accepted, their whole intent was it wouldn't go to the Crown. It would still be in customary title. That is what we would assert.

So the, I think it's the sixth point that we would make is that –

ELIAS CJ:

Sorry, just pause on that.

MR GALBRAITH QC:

Yes.

ELIAS CJ:

The 1840 agreement with the company seems to be a pointer in the other direction doesn't it?

MR GALBRAITH QC:

Well, the 1840, remember the company one has to read in the context of say the 1844 discussions, if you can call them that, between the Government, Fitzroy and the company in which he made it blindingly clear that not one skerrick of power, burial ground or cultivated land was going to go to the company and the Spain Commission wasn't even going to go forward unless Wakefield accepted that. I was muddled but –

ELIAS CJ:

No, but I'm talking about in 1840 –

MR GALBRAITH QC:

Yes, I know what you're talking about, the 18 –

ELIAS CJ:

– the Crown was regarding itself as going to be the trustee of the reserves. That's the effect of that agreement. Now maybe that's all superseded but I'm just –

MR GALBRAITH QC:

Yes. Well, the question – what's not clear, explicitly clear there is this reservation about pās, et cetera, is something which came into sharper focus. I'm not saying it wasn't there at the time but it came into sharper focus subsequently, and so the 1840 agreement is much more about "reserves" and the New Zealand Company's intention to set aside reserves from the land which it acquired.

ELIAS CJ:

You mean the endowment lands if you can call them those –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– rather than the –

MR GALBRAITH QC:
Yes, yes, yes. So actually that was the sixth point I was going to make was that the Crown did specifically recognise a responsibility to protect pā, burial grounds and cultivated lands for what would seem to be very good reasons. And then there's the endowment lands which I think is perhaps a good way of describing which were the reserves which were on top of that if I can put it that way.

The seventh point and, again, it's contextual, although it has got some, in my submission, real resonance in relation either to express trust or fiduciary duty, is the fact that the Crown through its appointees in 1842 actually chose on behalf of Māori in the area the town and accommodation sections and then from 1842 on appointed various persons as described as trustees to administer those lands which they did by in some cases leasing them, receiving rents on them and applying the rents to purposes for Māori in that area and again Ms Feint will take you to that material. Now just pausing there, it would seem very odd if those persons didn't have a legal responsibility to somebody at that stage because if the monies were diverted to some other purpose, certainly in modern thinking one would think that there was obligation of trust or fiduciary obligation owed to apply those monies from those lands, mainly to the benefit of Māori. Because indeed at that stage no question but that customary title remained in those lands, there'd been no Crown grant at all at that stage.

The eighth matter is the 1845 Crown grant and it's that grant which we say created either a fiduciary duty in the Crown to preserve and protect what was allocated or identified for Māori in the 1945 Crown grant or alternatively created a situation of trust. Can I just divert for one moment into a slighter semi-substantive issue about the 1845 grant because the Crown's position is, was in the Court of Appeal that the Crown grant was not effective, legally effective because there had not been, the grant had not been delivered and we had a esoteric argument amount delivery under the deed system and you will see in the Court of Appeal judgment, the judgment of Her Honour Justice France at paragraphs 137 and 138 that she doesn't come to a definitive conclusion on this but she says that she, "Sees merit on the Crown's

argument on this point," at 138. The issue arises just, and again Ms Feint will take you to the facts but just in the shorter summary, the issue arises because when the 1945 grant was entered into by Governor Fitzroy and it was registered, the New Zealand Company were, and it wasn't just in relation to Nelson, there were grants in relation to Wellington also; the New Zealand Company refused to pick up the grant, they picked up a Chinese copy or something and sent them off to London, they didn't like the grants because it didn't give them as much land as they wanted and they believed that the exception for pās et cetera was not particular and so they didn't want to pay the fee which you had to pay when you picked up a grant and they wanted to lobby with the Colonial Office in London about the merits of the grant. And they were successful in their lobbying to the point where the Colonial Office, the Colonial Secretary wrote to the then Governor saying, can you see within your lawful powers what you can do to alleviate the concerns the New Zealand Company has, and as I say the communication quite specifically said within, the words weren't "within your lawful powers" but that's what it certainly came down to.

So the Crown and the Court of Appeal ran this argument that the 1845 grant was a nullity because and of no effect, because of absence of delivery and unfortunately we all got distracted into looking at the texts about deeds and we didn't look at the Halsbury section on, on the constitutional section and when you look in the Halsbury constitutional volume you find and we've got it in tab 153 of the documents in front of you, you'll find in Halsbury that it's expressly stated that a Crown grant does not require delivery, a Crown grant is effective because it is a Crown grant and people don't have a choice of saying we're going to pick it up, not going to pick it up –

WILLIAM YOUNG J:
Why not they have a choice if it contains onerous conditions?

MR GALBRAITH QC:
I'm sorry?

WILLIAM YOUNG J:
Might someone not have a choice if the grant contains onerous conditions?

MR GALBRAITH QC:
Well a person doesn't have to do anything with the grant, they just don't then get what they would like to have.

WILLIAM YOUNG J:
But they're not – well isn't that the same thing –

ELIAS CJ:
Well the grant could be effective for some purposes even if it doesn't convey title to the person who receives the grant, it could be – I don't know. It could be effective for example to distinguish native title?

MR GALBRAITH QC:
Yes but just in terms of the New Zealand Company position and what we're talking about in relation to reserves and that sort of thing or taking it, sorry just taking up with His Honour's point, I'll take you to some cases in a moment but on deeds, because the same thing can happen with deeds Your Honour. Tough if the Crown grant contains conditions you don't like, well too bad then you've got find some way of having the conditions changed subsequently by some lawful means but you can't just say I'm not going to pick up the Crown grant and you haven't granted anything to me, because once the Crown's done that it has granted it.

WILLIAM YOUNG J:
But how would you be subject to those onerous conditions if you don't accept them?

MR GALBRAITH QC:
Well you'll be subject, the onerous conditions can only apply to the terms of the grant obviously.

WILLIAM YOUNG J:
Yes and if you don't accept the grant, you don't accept – you say I'm not prepared to take the land on those terms?

MR GALBRAITH QC:
Well you don't get that choice.

ELIAS CJ:
I don't think that that's right. I think there are examples of cases where people didn't pick up grants but that may well have meant, the consequence may well have been that the land was Crown ground, able to be granted by it again or something like that so I think describing it as a nullity was a pretty bold submission.

MR GALBRAITH QC:

Yes, yes sure.

ELIAS CJ:

But I'm not sure that the New Zealand Company was bound until it accepted the grant was it – or are you going to take us to authorities that you suggested?

MR GALBRAITH QC:

Well certainly the, insofar as the Crown's exercise of or what would be a prerogative if it was the true Crown or the powers under the charter –

ELIAS CJ:

Well it was the prerogative anyway, it's all prerogative –

MR GALBRAITH QC:

No, no, no.

ELIAS CJ:

– because we're under Crown Colony Government at that stage.

MR GALBRAITH QC:

Yes, yes. Then the Crown has exercised – it's done what it has to do to grant whatever it is, the land to that person. Now that person, Your Honours maybe correct, can –

ELIAS CJ:

It may be an effective declaration of trust for the purposes of an express trust Mr Galbraith?

MR GALBRAITH QC:

Yes, yes it maybe.

ELIAS CJ:

But it may not be sufficient to impose the trust on the New Zealand Company.

MR GALBRAITH QC:

Yes, no – on the New Zealand Company, no I can accept that, I can see the sense of that.

ARNOLD J:

There is something 1847 Loans Act section 14 which talks about grants that have been made and it talks about grants made and which have been or shall hereafter be accepted by the company and so that legislation certainly envisages an acceptance by the Company of the grant –

MR GALBRAITH QC:

Right.

ARNOLD J:

– I'm not entirely sure that it ultimately matters.

MR GALBRAITH QC:

No, no I think that's right and I think that is right, I think the point that Her Honour's made to me and I've now finally got round to accepting is correct.

ELIAS CJ:

Well it may matter, it may matter on the legal chain on who was responsible –

MR GALBRAITH QC:

Yes, yes.

ELIAS CJ:

– it may not matter if the Crown holds the lands as demesne lands of the Crown which it's prepared to grant –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– yes and has declared that it is subject to these conditions because that may well be evidence of a trust on which those lands are held.

MR GALBRAITH QC:

Yes. So it –

ELIAS CJ:

But it may matter if you're trying to rely on the Company being subject to those trusts at that date?

MR GALBRAITH QC:

Yes, that's absolutely right. Our reliance is on the Crown, that's where, who we claim, where the fiduciary duty or the express trust rests so, and that seems to – it may not matter but I can accept and I do accept what the Court has put to me that the NZ, New Zealand Company may not have been bound by – though as I will say there are some cases which may suggest the opposite so –

GLAZEBROOK J:

Well is it just the case that if they don't accept the conditions they don't get the grant?

MR GALBRAITH QC:

They certainly don't get the grant.

GLAZEBROOK J:

So it's not a matter of them not accepting the deed, it's just that if they don't accept those conditions well they don't have the grant, so it's up to them –

MR GALBRAITH QC:

That's right.

GLAZEBROOK J:

– it's a bit like a, you get something under a will, if you don't accept it you don't accept it, it doesn't mean that it wasn't made for you in the first place. You just have the right to say no?

MR GALBRAITH QC:

Yes. No that I – that sounds a sensible reconciliation of the position. Can I just – the section I was taking you to was the one in Halsbury which talks about Crown grants. That's also consistent actually –

ELIAS CJ:

Sorry if you're taking us to something you're going to have to give us time to –

MR GALBRAITH QC:

Yes Your Honour.

ELIAS CJ:

– where do we find it? I think it would be useful looking at it because all of this is incredibly obscure.

MR GALBRAITH QC:

It is incredibly obscure. A green joint, I'm sorry I'm going to have to hold these up, my colour scheme's not too great –

ELIAS CJ:

We can't see the greens, they're not numbered.

ARNOLD J:

What volume number?

MR GALBRAITH QC:

Part 3 volume 9, volume 9 of the joint bundle of authorities yes. Behind tab 153.

ELIAS CJ:

153?

MR GALBRAITH QC:

153 you'll see there's a section 10 "Royal Grant", talks about Crown grants, "Communal grants for the Crown are generally void unless under the great seal." One of the things that we say in our written submissions is that the public seal in New Zealand is the, *R v Symonds* (1847) NZPCC 387 (SC) said, "Is the same as the great seal in England," and then across on paragraph 859, operational grants. "Grants under the great seal require no delivery and take effect from the date expressed on the grant but they are – "

WILLIAM YOUNG J:

But this is really a different point, this is where the, it's a deed, it has to be signed, sealed and delivered all –

MR GALBRAITH QC:

Yes, yes. And that was the argument –

ELIAS CJ:

That was the argument.

MR GALBRAITH QC:

– that was the argument in the –

ELIAS CJ:

Which all was forlorn argument one would have thought but however.

MR GALBRAITH QC:

So, but that's the point at 859. It says, "Grants under the great seal don't require deed delivery," but actually staying in that volume if you wouldn't mind for a moment. Just talking about deed delivery because with great respect, the law isn't that which the Crown argued for with deed delivery; if one goes to next tab which is 154 you'll see at paragraph 31, "Delivery of deed." And this – I did make submissions on this to the Court of Appeal, "Delivery of deed, in order to be effective a deed must be delivered as the act and deed of the party expressly bound by it as well as sealed. No special form of observance is necessary for the delivery of a deed and it may be made in words or by conduct. The traditional form of delivering a deed by words was the executing party to say while putting it's finger on the seal and 'I deliver this as my act and deed'. It was not necessarily able to follow this form of executive, fell into disuse, nor is it necessary that the deed should actually be delivered over into the possession of custody. Either of the persons intended to take the benefit of the deed or to a third person et cetera." What the law is that delivery is a concept not an act and the concept is simply that delivery means there's a confirmation of the intention of the grant for and so you find in the cases and we have another small bundle of cases which I won't take you to but –

ELIAS CJ:

Well maybe in reply if anything is made of it.

MR GALBRAITH QC:

Yes all right. But I'll just hear what they say. What the cases say is that it's the intention of the grantor, not as I say a physical act of delivery which is what counts and so in a case called *Xenos v Wickham* (1866) LR 2 HL 296, an insurance policy once signed by the directors of the company, not delivered to the insured because they don't delivery until the premium is paid is still an effective deed of insurance back in the 1800s and so it's not surprising that a Crown grant doesn't require physical delivery although it may have the issue which the Court has raised with me of parties determining not to accept the grant. Well what's a little odd about an argument that the NZ Company didn't accept the grant, they simply didn't physically pick it up, is that they argued in Court, and I think it was about 1846, and relied upon the Wellington grant in any case, as being a grant which they could rely upon as in opposition to another party who was claiming an earlier grant, and *Scott v Grace* was the old case so for the New Zealand Company trying to blow hot and cold to some extent.

O'REGAN J:

Well did they do anything in Nelson though, that indicated that they had accepted the grant and the obligations that are imposed on them?

MR GALBRAITH QC:

Nothing I can point to concretely, Sir, though they certainly, I don't think, went out and told the settlers that, you know, you haven't got and you're not going to get the lands in which, like you are living at the moment, I certainly don't think they did they.

O'REGAN J:

Well they sort of had almost an option, didn't they, because they could have accepted the grant at any time?

MR GALBRAITH QC:

Yes, yes, they could have.

O'REGAN J:

So they knew that was their bottom line –

MR GALBRAITH QC:

It wasn't withdrawn.

O'REGAN J:

– they weren't going to be worse off.

MR GALBRAITH QC:

No that's absolutely fair.

GLAZEBROOK J:

And the trust obligation arose from them anyway if you go back to what they intended to do.

MR GALBRAITH QC:

Well if they had picked up the grant then –

GLAZEBROOK J:

No, no, their earlier promise –

MR GALBRAITH QC:

Oh, yes.

GLAZEBROOK J:

– was to have this, so it wasn't that that was the sticking point –

MR GALBRAITH QC:

No, no.

GLAZEBROOK J:

– because they had always intended that –

MR GALBRAITH QC:

No that wasn't –

GLAZEBROOK J:

– which is quite clear from the history so it wasn't something that was imposed on them that they hadn't already accepted?

MR GALBRAITH QC:

No, no, that's true. So the 1845 grant to us is the time when the Crown's position crystallised in relation to the obligations which we say it accepted and had confirmed in the contextual period, if I can put it that way, and that was both in relation to the pā burial grounds and cultivator, that's the areas which were being actively used at the time by Māori and also the 15,100 acres which were identified for reserves.

So if the – and Crown's case, as I understood it in the Court of Appeal, was that the 1845 grant was ineffective. The grant which was effective was the 1848 grant for two reasons, one, saying the 1845 grant was ineffective and, secondly, saying that the Crown Grants Amendment Act if 1867 which said, because there'd obviously been a deal of muddlement in the – and I don't mean that critically – but in the establishment of the colony, that the latest grant in time will be the effective grant. So if you have a number of grants in relation to the same land then the 1867 Act said that it's the latest in time which is the effective one and the earlier grants shall be void and of no effect, and so the Crown's argument in the Court of Appeal was, well, that means you just ignore the 1845 grant, and Her Honour The President, in my respectful submission, correctly said, "Well that may be true in terms of land title but that doesn't mean that the 1845 grant and the declaration by the Crown in the 1845 grant couldn't be the foundation for a fiduciary duty relationship or potentially a trust relationship".

So the from the appellant's point of view it's what effectively happened between 1845 and 1856 which is an issue because in that period between 1845 and 1848, 47 town sections got taken off, if I can use that expression, Māori. The 10,000 acres of rural reserve wasn't selected and so that disappeared out of the 1848 grant. The 1848 grant only had 53 town sections as against 100 in the 1845, it didn't have the 10,000 acres of rural reserve and there was some –

ELIAS CJ:

Your position on that is it's irrelevant to the obligation presumably?

MR GALBRAITH QC:

Yes. The obligation arose in 1845 and –

ELIAS CJ:

Yes.

MR GALBRAITH QC:
– and what happened later was only what, were only, were all breaches.

ELIAS CJ:
Well the adjustments for the purposes of the New Zealand Company didn't affect the obligation, you say, to the vendors?

MR GALBRAITH QC:
Absolutely. So that's our position and of course the Crown's position is, well, the 1848 grant was valid and it is what it is and the Crown would argue there were no breaches subsequent to 1848 though we would point to one or two things that happened between 1848 and 1856.

So I think that actually identifies the essence of what the positions are between the two parties and it does revolve around, first, the context to interpret what happened in 1845 and then it revolves around a contest between the 1845 grant and the 1848 grant and I think that's – Mr Goddard looks sceptical but –

ARNOLD J:
In relation to the 1845 grant and the various matters that the New Zealand Company took objection to, the only, if you like, new matter, well tell me if I'm wrong about this, but the only new matter was the process a dealing with the old claims. That is the claims by people who said they've purchased pre-New Zealand Company and the 1840 –

ELIAS CJ:
Of the European claims?

ARNOLD J:
Sorry?

ELIAS CJ:
Of the European claims?

ARNOLD J:
Yes, and so the 1845 grant was subject to claims that could be made by those people and I got the impression that that was the main reason that the New Zealand

Company were concerned about it because if you could have other titles emerging out of the woodwork you could see that it would be very disruptive.

MR GALBRAITH QC:

I think that's generally right but – that's certainly right, but that that was a new issue and an issue which they were concerned about because of the uncertainty that that gave rise to. They had an issue about the uncertainty that the 1845 grant, well the surveys hadn't all been completed in 1845, so there was a survey-type issue in that until you'd actually done a survey and identified, for example, a power site then you didn't know precisely what area of land was going to be excluded. So there was that generally uncertainty issue, Sir, as well which I do believe the New Zealand Company were concerned about.

WILLIAM YOUNG J:

Then there was also the tenths and the elevenths issue?

MR GALBRAITH QC:

Yes, well they wanted, they also wanted more land. Their proposal at that stage was based on 200 and something thousand, yes, 200 and something thousand acres, not 151,000 so they wanted more land as well so I think there were the three things really which –

WILLIAM YOUNG J:

Well though there was the tenths and elevenths issue too.

MR GALBRAITH QC:

That was also, yes, because what they'd gone to market on was that –

WILLIAM YOUNG J:

The eleventh.

MR GALBRAITH QC:

It was an eleventh based on the total area which was going to be dealt with under the grant whereas the way that the Crown and Lord Stanley had always looked at it was a tenth of whatever was being granted to the New Zealand Company so there were those issues.

That's, I think, an appropriate time for Ms Feint to –

ELIAS CJ:

Who's going to take us through the statutory framework and the instructions? Ms Feint is going to do that?

MR GALBRAITH QC:

Yes, yes.

ELIAS CJ:

Can you just tell me, the legislation under which land ultimately came to be vested in the occupiers, the occupied lands, when was that enacted?

MR GALBRAITH QC:

When you say "the occupied" do you mean occupied by settlers or –

ELIAS CJ:

No, occupied by Māori, because the original 1845 grant didn't distinguish between those who were occupying particular blocks and the endowment lands which were for the benefit of the lot but later on, as I understand it, it was accepted that those who were occupying specific land had, were recognised as the beneficial owners of that land. What was the under, what legislation was that under?

MR GALBRAITH QC:

Legislation – Ms Feint might be best on that but what did happen much later on – 1856 the tenths, the residue of the tenths came under the Native Reserves Act 1873 and commission.

ELIAS CJ:

Yes, no I'm not talking about that, I'm talking about –

MR GALBRAITH QC:

No I know but quite a deal later on, it might have been the 1880s, there were a number of allocations –

ELIAS CJ:

It may have been in the 1960s as part of the setting up of the Māori Land – the Native Land Court.

MR GALBRAITH QC:

Well I think it was later than, I think in practice what happened was people settled on but somewhere, and I think it was the 1880s but we'll check this, there was a decision made by the Court actually allocating some sections to specific families who'd been living on them for a deal of time.

ELIAS CJ:

Yes, the query I had was under what legislation was that?

MR GALBRAITH QC:

Yes, yes I understand. I will have to check.

ELIAS CJ:

Yes, that's all right, thank you. What are you seeking, by the way, it's still not clear to me?

MR GALBRAITH QC:

Where are we? Well a declaration is –

ELIAS CJ:

Just so that we know where we're going when we listen to the further submissions.

MR GALBRAITH QC:

Yes, well the primary relief we're seeking is a declaration. If we obtain, if the Court is persuaded as to the declaration then in determining what other relief maybe appropriate it's going to require a reference back to the High Court because there hasn't been, while we would say there has been identification of some property, there hasn't been a comprehensive identification of property and it may require also a reference by the High Court to identify, well we would say, it's the customary, or descendants of the customary owners identified in 1892, there may be a necessity for, because of the iwi position, for example, of a reference to the Māori Appellate Court for determining who the persons are who are entitled to interest in the properties.

ELIAS CJ:

So what are the terms of the declaration you're seeking?

MR GALBRAITH QC:

Can I come –

GLAZEBROOK J:

And all that is subject to the limitation and other defences –

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

– and the Settlement Act issue?

MR GALBRAITH QC:

All of those, yes, all of those.

GLAZEBROOK J:

So, but the declaration may not be subject to the Settlement Act.

MR GALBRAITH QC:

Because the declaration, yes, because it doesn't, of itself, imply a remedy in any particular party and it is semi-constitutional.

GLAZEBROOK J:

And it may be a declaration in the past anyway in a constitutional sense.

MR GALBRAITH QC:

Yes, yes. Can I come back to the wording of it, Your Honour, I just haven't got it in front of me at the moment.

ELIAS CJ:

All right, thank you.

MS FEINT:
(Māori greeting 10:58:12)

I just wanted to start by talking about why we're here. The people who brought this claim are the descendants of the chiefs who met with the New Zealand Company on the beach at Kaiteriteri in October 1841 and the oral traditions of what happened at that hui have been passed down each generation and I would just like to start by reading to you the evidence that Ropata Taylor gave about the oral history that he had learned and I will read it to you rather than taking you to it because he gave this orally on the stand.

ELIAS CJ:
Just for us to take a note, where is it to be found?

MS FEINT:
It's tab 17, page 692 in the second volume of the case on appeal. And he was talking about Wi Parana who's his tūpuna and he said when he was asked about the oral traditions that he had learned, he said, "I can tell you about Wi Parana because that's my ancestor and we have intergenerational traditions about him. We can tell you what he was wearing on the day, we still have that cloak in our family. We know essentially there were, and I know this because I teach this to younger generations of our family often and have heard this often talked about on our marae, there were four main elements to what we understood the Kaiteriteri hui to be about. The first one was we were in favour of Europeans coming to settle amongst us. That was something that we supported and the hui was where our tūpuna would let them know where they're allowed to live and where they were not, that was the first part.

The second part, the second thing that I know about that hui was that following on from there and talking to other people that they were really keen to talk to us, that's what we remember. And that they poignantly for us, the Kateriteri hui is the place where we received a whole lot of blankets and beads and that is something that is seared into my memory. I've known all my life that that's where that happened. Certainly that's where Wi Parana was given those gifts. Our story about that, we understand we received those because the Wakefield whānau wanted to legitimise what they'd been doing with others, so that the gifts was the second part.

The third thing about the Kaiteriteri hui was really the Pākehā oratory. Our tūpuna they put a lot of, they put a lot of store of regard in spoken word and what's said, we said the proverb he tangata ki tahi which is person of their word. And there was a lot of pakeha oratory that we recount about that, that there was an attractive proposition put to our ancestors in that essentially they would not be disadvantaged by Pākehā coming to live amongst us and that we would, through the arrival, have the opportunity, we would have the opportunity to participate and benefit from a new egalitarian society that would emerge. That was the proposition that they talked about at that hui. The final thing was about our sites of cultural significance, and that was that our tūpuna were adamant that there were certain areas that were expressly excluded from any arrangements with them. I will just explain, Te Maatu is something that we raise every generation. Every generation of our people talk about the importance of Te Maatu. It is quite pivotal to the Kaiteriteri hui when the Pākehā were not allowed to live or occupy any of those lands because that was going to be the viable way in which we would establish sustainable trade with the settlers when they arrived. We were going to provide for that new community and for ourselves as part of that new community because that was the deal we were getting ourselves into and that's why we agreed that the Europeans could come and live amongst us.

And Mr Taylor went on to speak about how the Tenths has become part of the history of their hapū and that the Tenths feature in the Tukutuku panels on Te Awhina Marae in Motueka and talking about that he went onto say that the patterns that are displayed there, one of them is called Maturuturu, it is the short tears of the albatross and in the context of this pattern it conveys to us the sense of loss about what's taken place on our land.

ELIAS CJ:
That's rather nice.

GLAZEBROOK J:
At least it's not something inappropriate.

ELIAS CJ:
Is that part of the evidence? Yes I think it must have been part of the evidence. It was quite well timed.

MS FEINT:

Yes indeed. So I wanted to start with the oral traditions because when we come to go through the facts you almost can go right through the narrative without even talking about the tangata whenua and that's because they largely weren't involved in the decisions that were made, the Crown came in and took control, said it was going to protect their interest and it's not even clear to what extent they knew what was happening. But the other part of the oral tradition that you will have read in the evidence was from Paul Morgan who's the chairman of Wakatū and we had said in our submissions that his knowledge of the traditions was that it was embedded in our collective memory that a full one-tenth of the land was not reserved for us as promised and I just wanted to finish by saying he closed his evidence this way at paragraph 100 of his evidence which is tab 14, "I would like to conclude by saying that it has always been instilled into me that it is part of the legacy of each new generation to take responsibility for trying to right the wrongs of the past. I have been actively involved in this struggle since I was a teenager. My people believe very strongly, we have an obligation to our tūpuna and to their descendants to continue to seek resolution until justice is achieved," and that's a very Māori sentiment, that if this tauki is not resolved in this generation then it falls to the next generation to pick up the baton and carry on with. And we say that it hasn't been resolved because the land has not been returned, the Crown still owns former Tenths' properties that are of significance to the Tenths' whānau –

ELIAS CJ:

Do we have any accessible schedule of that, of the lands that are said to be owned by the Crown still?

MS FEINT:

Yes that's in the evidence of Mike Ingram –

ELIAS CJ:

You don't need to take time to take us there, I just wanted to know whether there was something?

MS FEINT:

Yes there's a schedule to his evidence so Michael Ingram is his name.

ELIAS CJ:

Yes.

GLAZEBROOK J:

And I don't suppose you have the reference for that off the top of your head?

MS FEINT:

I don't sorry.

ELIAS CJ:

That's all right –

MS FEINT:

Tab 19, volume 3 of the evidence. So the properties are, one significant property is Auckland Point which was a pā called Matangi Awhio and that's, was on the beach at Nelson and that was a pā there, was a place of seasonal trading and people came to fish there and trade with other hapū. That pā was reserved, those were the first five selections that Henry Thompson picked when he chose the Tenths because he knew that that was a significant pā. Some of that land is still in Wakatū ownership but other parts were taken by the Crown for a school under the Public Works Act and that is still Crown owned. There are a handful of other Crown owned properties which were part of the 47 town sections that –

GLAZEBROOK J:

And that's still a school is it or is it –

MS FEINT:

It is still a school, it's called the Auckland Point School. There are also a couple of schools.

ELIAS CJ:

And whose ownership was it in when taken under the Public Works Act do you know?

MS FEINT:

It was Tenths.

ELIAS CJ:

It was in the Tenths Trust?

MS FEINT:

Yes it was.

ELIAS CJ:

The public trustee or whatever –

MS FEINT:

And it was taken in the 1930s.

MR GODDARD:

1934.

MS FEINT:

There are a couple of schools in Motueka which are still in Crown ownership and there are some pieces of untitled land in both Nelson and Motueka and some of those pieces of land, I understand, are former pā sites.

WILLIAM YOUNG J:

Sorry I missed the last word?

MS FEINT:

Some of those pieces of untitled land I'm instructed are believed to be former pā sites.

ELIAS CJ:

What do you mean "untitled land"?

MS FEINT:

I mean land that's not in Crown – well it doesn't have a title that's been registered in the Torrens system.

O'REGAN J:

So is the claim not so much in relation to land that has been in the Crown's ownership throughout but rather land that has come into the Crown's ownership since the 1850s?

MS FEINT:

It might be both of those things so there's some land that was never put in the Tenths that my clients say should have been in the Tenths and if it's been in Crown ownership ever since my clients say it could be part of the shortfall that could be returned to them to make up for the shortfall that was never reserved in the first place, but then the second category is the properties that were allocated as Tenths and then were taken out of Tenths ownership for one reason or another. From what we can tell most of those properties were acquired by the Crown at a later date. So, for instance, when the 47 town sections were reallocated the reason they did that was because they wanted to redistribute those sections to settlers and those sections were all purchased by settlers but then some of them ended up in Crown ownership later on. For instance, they were sold for schools and acquired for public purposes.

ELIAS CJ:

So this would be part of a claim to restoration of the trust body?

MS FEINT:

Yes Your Honour, and because of the significance of land to Māori my clients say that the fact that it hasn't been in continuous Crown ownership since these events shouldn't matter because under the, for instance, the international norms around the declaration of the rights of indigenous people that declaration places significance on restitutionary remedies.

GLAZEBROOK J:

You wouldn't break an express trust anyway by selling it and then getting it back, all you would be doing is reacquiring the trust property subject to the same trust, presumably?

MS FEINT:

Yes Your Honour, yes that's a good point.

GLAZEBROOK J:

If it was an express trust.

MS FEINT:

So can I –

O'REGAN J:

And are these, the claims to particular lots, are they in relation to a particular person or a particular group of persons, or are they in relation to the whole 254 or 285 people or the descendants of those people? I'm just trying to understand whether there is an argument that some of the trusts are for a more restrictive group.

MS FEINT:

That was a good question. When the – in 1892 the Native Land Court investigated the beneficial ownership of the Tenths land and the Judge Alexander Mackay looked at who held customary ownership of the whole 151,000 acres and he found that difficult hapū had interests in different places. So, for example, he said Ngāti Tama and Ngāti Rārua, say, had interests over in Golden Bay, in Motueka it was Ngāti Rārua and Te Ātiawa and, so he identified which hapū had customary ownership where and then he said, "Because it's a general trust we'll put everyone's interests in together," but he allocated the interests according to his assessment of the degree of interest that each hapū had.

In fact, we can look at that now, it might be helpful.

O'REGAN J:

I'm happy for you to leave it if we're jumping the gun.

MS FEINT:

Well since we're there we may as well look at it now. So if you've got the supplementary case on appeal which is –

ELIAS CJ:

Supplementary bundle of documents?

MS FEINT:

Yes, so we had three volumes that we filed last week and if you look at volume 3 and we're in tab 139. I'm sorry, tab 138 and the very last page of that, page 6199.

ELIAS CJ:

Sorry 61?

MS FEINT:

6199.

ELIAS CJ:

Yes.

MS FEINT:

So you can see the table there. He said which hapū have interests where and those are all the locations that were part of the Nelson settlement land and then he's allocated interests according to what he assessed to be their proportionate share.

Now if you're going to assess the mana whenua there'd be another layer to drill down below that because it was particular hāpu and whānau of those groups who have interests in each place and the Mitchell's gave evidence about that. Essentially the pattern of customary ownership was dictated by the way the land had been settled because these people came down in the heke in the 1820s and 1830s and when they arrived they were allocated land amongst themselves and so tuku were made to different chiefs and they ended up having whānau settling at each particular location and there's quite a good table that the Mitchell's have in their evidence where they set out how you might have one chief at one place. His cousin would be at the next bay along and they'd have their whānau with them, so there was a pattern across the land. And so my client's say it's not in iwi interests per sé, it's about the particular hāpu and whānau who settled in each of locations, and that's how you define the customary ownership.

O'REGAN J:

So who does Mr Stafford represent?

MS FEINT:

Well, Mr Stafford is Ngāti Rārua and Ngāti Tama, so he represents, but he has always acted on behalf of the Tenths whānau.

O'REGAN J:

So he's representing all of the claimants in this claim?

MS FEINT:

Yes.

O'REGAN J:

And the two hundred and – I'm not sure if it's 254 or 285, because there seems to be a revision of it later, but let's say 254. Was that an allocation – was that a recognition of a personal interest or an interest held on behalf of their respective whānau or hāpu?

MS FEINT:

Well it was effectively a transmutation of the customary interest. So the customary interest would be held at a collective level, at the hāpu or whānau level but they divided that up and gave each member of those whānau their own personal interest so that – and that was the Crown policy to do that.

ELIAS CJ:

But that was in terms of occupations, cultivations and so on was it not? Did it ex – it didn't extend to the –

O'REGAN J:

No, it's the Tenths as well.

ELIAS CJ:

Oh, it did extend to the Tenths.

MS FEINT:

It did. So this document that we're looking at is the 1892 judgment which only allocated the interest to those members of – the hāpu had an interest in the Nelson settlement lands and it excluded their occupation land. So those were investigated later.

ELIAS CJ:

Yes, that's right, sorry.

MS FEINT:

And allocated to particular whānau.

O'REGAN J:

So were they allocated to those individuals to the exclusion of others from their whānau or were they allocated to them as representatives of the whole whānau?

MS FEINT:

Do you mean the occupation land?

O'REGAN J:

No, the 254 people, were they – was the Māori Land Court saying these people have a personal interest to the exclusion of all others, or was it saying they are the 254 people who represent the customary owners at the time of the New Zealand Company purchases?

MS FEINT:

So what they did was, the question they investigated was who held customary ownership at the time of the New Zealand Company purchases. They identified who those hāpu were and then they asked those hāpu to furnish lists of the people, the members of those hāpu who held ahikā. So who were resident on those lands, and so then, rather than allocating to the hāpu as the customary owners, they gave them all beneficial interests, and this is interests in the trust rather than in the land per sé, because the application that the Public Trustee had made was to ascertain who the beneficial – who were the beneficiaries entitled to receive the income from the Tenths Trust because the Public Trustee at that time was the trustee of the Tenths.

O'REGAN J:

So if they were entitled to receive the returns being generated, they were then the only beneficiaries of the trust to the exclusion of everyone else. Is that the position?

MS FEINT:

Yes, that's right. And it was 285 people who ended up being on the list but for some reason the folklore has always centred around that earlier list. The 254 tūpuna is what you hear people talk about.

O'REGAN J:

Right, so 285 is actually the right number is it?

MS FEINT:

Yes it is.

O'REGAN J:

Right, thank you.

MS FEINT:

And the Mitchell's set that up. Yes, so on tab 139 it says, "The application of the Public Trustee was to investigate the beneficial interests of the persons entitled to participate in the rental accruing on these lands."

GLAZEBROOK J:

Yes, can we just – I've just missed that page number.

MS FEINT:

6221 under tab 139.

ELIAS CJ:

That's the application by the Public Trustee is it?

MS FEINT:

No, this is actually the Court's judgment and so what they say is, "These lands were originally set apart and pursuant with the terms of an agreement made between the Imperial Government and the New Zealand Company that a tenth of the land should be set apart and held in trust for the native vendors."

GLAZEBROOK J:

So this – just so I can catch up properly. So the hāpu was set out in the proportions and then they were asked to furnish lists and that's where the – thank you.

MS FEINT:

That's right.

GLAZEBROOK J:

Just to make sure I had caught up.

MS FEINT:

And Paul Morgan gave evidence about how the Ngāti Rārua lists were composed and what he said is, if you look at those lists, they had an A list, a B list, C, D, E, F and he identified which whānau or hāpu each of those groups were from. So, for instance, he said list A was Ngāti Pareteata or list B was Ngāti Turangapeke which are the Rārua hāpu who have ahika in Motueka. So you can actually use those lists to reverse engineer who the hapū and whānau were who held customary ownership on the Nelson settlement land.

O'REGAN J:

But for present purposes the claim is a collective claim?

MS FEINT:

Yes, it is.

O'REGAN J:

Yes, thank you.

MS FEINT:

And I suppose if there was land that was returned you'd have to decide whether it would go back to the customary owners which, in principle, may not be the whole group, and when the Whakarewa lands were returned in Motueka that was the land that had been granted to the church by Governor Grey in 1852 and that was returned to the ahikā, so it was to Ngāti Rārua and Te Ātiawa ki Motueka, and a trust was set up. They used the 1892 list to work out who the ahikā were and then they said the descendants of those people are beneficiaries of the trust and the trust – no, actually the statute also had a process that allowed anyone who claimed they'd been wrongly left out to go and apply and argue either before the Waitangi Tribunal or the Māori Land Court or the High Court that they'd been wrongly missed out and if they had then they could be added to the list as well. So that's how it was done. So that was done under the Ngāti Rārua Te Ātiawa Iwi Trust Act, I think it's called, Empowering Act, which will be in the casebook somewhere.

ELIAS CJ:

What year are we talking about? 2004 or so, was it, or…

MS FEINT:

1993.

ELIAS CJ:

Right, okay.

MS FEINT:

I can take Your Honours there if you'd like to look at that.

ELIAS CJ:

No, no, that's fine at the moment, thank you. You're referring to that as a precedent for the sort of process that could be followed, are you?

MS FEINT:

Exactly, Your Honour.

ELIAS CJ:

Yes.

MS FEINT:

And, I suppose, the point about that precedent is that the land was returned to the people who held mana whenua and in terms of tikanga my clients say, "Well, that's the way you should do it." If you returned it, under current Crown policy, if you returned it to the iwi as a whole, my clients would say well that's not the people who hold mana whenua because that's a wider group who have interests across the whole top of the South Island and so that would entitle people who don't have a customary interest in that land.

So if we go back to the beginning. Do Your Honours have the outline of facts that was handed up earlier? There was also a timeline handed up that looks like this. We had that in the High Court, I just thought that was interesting because we've got some pictures of what Nelson looked like in 1842 and 1843 and 1844. You see the middle one there is Auckland Point which we were just talking about before. And there are buildings on it, I think, because when the Bishop was the trustee of the

tenths he loaned, he borrowed some money for the trust and he built a hostel so that Māori who come into Nelson for training could stay there.

The other page that was handed up, was just that single page, and that is a transcript of a document that's in the casebook in volume 7 and it should be tab 64, the case on appeal.

WILLIAM YOUNG J:
Volume 7, tab 64?

MS FEINT:
Yes. So I wanted to start back at the beginning and say from a big picture point of view the facts here are simple. The New Zealand Company purchase was allowed by the Crown on the basis that a tenth would be reserved for Māori, and that their homes and means of sustenance would be excluded, because they had not been sold, and it's pretty much common ground between the parties that that simply didn't happen, and the only unresolved issue is whether the Crown should be held to account for those failures and when Mr Galbraith started this morning he referred you to Justice Clifford's comments about the vacuum in the period between 1845 and 1856. I wanted to start by filling that vacuum with the constitutional and legal framework during that period.

ELIAS CJ:
You'll address what you mean, what "excluded" means, will you?

MS FEINT:
In terms of the –

ELIAS CJ:
Yes.

MS FEINT:
– power and cultivation –

ELIAS CJ:
Yes, what you've said remained in customary ownership or something, because it had been excluded, I have to say I have a question mark about that.

MS FEINT:

Well the rationale was that because those lands had not been sold, they remained in customary title.

ELIAS CJ:

Well I understand that argument as a matter of logic, but I'd like to be taken to any legislative framework that has that consequence, and also any comparable treatment of exclusions in other areas, because you're talking about an area of European and Māori settlement, in close association, and it's not clear to me that there mightn't have had to have been other provisions made in that context. Anyway, if you could address that, I don't know whether the legislation does cover it.

MS FEINT:

Yes, we'll address that in due course as we get to there. I wanted to start, and this is paragraph 1 of my outline of facts, by looking at the legal framework as established when New Zealand was colonised and the context from the 1830s was that in the early 1830s slavery had been abolished, there was quite a powerful humanitarian lobby, which had significant influence, and after slavery had been abolished that lobby group turned their attention to the plight of indigenous people, both in North America and Australia and other countries that had been colonised by Britain, and during that time there was a select committee report in 1837 which looked at the position of Britain in relation to indigenous peoples and it made recommendations on how it thought that they should be treated.

ELIAS CJ:

What's the submission you want to make on this? It maybe that others would like you to go through this material but I'm quite familiar with it and I wonder the extent to which, I'm just trying to understand what you're taking from it that we need to take into account here?

MS FEINT:

What I'm taking from it is simply the proposition which is the first recommendation the select committee made, that the protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the executive Government as administered either in this country, as an imperial Government, or by the Governors of the respective colonies. So it was –

ELIAS CJ:

And then Normanby's instructions carried that out.

MS FEINT:

Yes, that's right.

ELIAS CJ:

And the Treaty reflects it.

MS FEINT:

Yes, exactly. I did want to look at Normanby's instructions though because –

ELIAS CJ:

Sorry, it's the adjournment time so we'll take the morning adjournment now thank you.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.50 AM

MS FEINT:

Your Honours, before the break we were looking at the constitutional framework from the establishment of New Zealand as a Crown colony and I think perhaps a more expeditious way of treating this is to say that there are certain principles that can be derived from taking together Lord Normanby's instructions which of course informed Governor Hobson's negotiation of the Treaty of Waitangi and the 1840 charter and royal instructions that set out the first constitution for New Zealand, and the first important principle was the Britain recognised that Māori had property rights to the country as a pre-existing and independent legal right. Secondly, the Crown recognised that it had a duty to protect those property rights of Māori and, thirdly, the Governor's powers and his prerogative was defined by the 1840 charter and the instructions that were given to him from time to time, and what I wanted to do was to look at the 1840 charter because there are several points that come from that and that is in the volume 1 bundle of authorities, that's the pink one, the legislation bundle and that's at tab 2.

So there are three parts to this document, the first is the covering dispatch from Lord Russell who was the Secretary of State in the Colonial Officer and he's transmitting

the charter which are letters patent in there issued pursuant to the New South Wales Continuance Act of 1840, so as a kind of subordinate legislation. And you can see in his letter he starts off by saying, number 1 legislation, he's proceeding upon the well established principle of law that Her Majesty's subjects settled in a country acquired as New Zealand has been acquired carry with them as their birthright so much of the law of England as is applicable to their altered circumstances. And he says, "That fundamental rule has been qualified in the infancy of the colony by constituting a legislature nominated by the Crown in New Zealand." And the letters patent were necessary to set up an unrepresentative legislative council which was done by the 1840 charter.

If you then turn over to page 13 he has instructions relating to the Aborigines of New Zealand under that paragraph 4 there and he says there that, "There are none whose claims on the protection of the British Crown rest on grounds stronger than those of the New Zealanders. They are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsman; but are people among whom the arts of government have made some progress; who have established by their own customs a division and appropriation of the soil… and their usages have the character and authority of law." He says, "In addition to this, they have been formally recognised by Great Britain as an independent state; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests," and he's referring there of course to the Treaty of Waitangi which was a pre-condition to establishing the colony.

If you then look over at the opposite page, it's page 14 and on the second full paragraph he refers to the official protection of Aborigines that will be committed to one principal officer, and that became the protectorate of Aborigines. The general duty of the protector would be to watch over the execution of laws, in whatever concerned more immediately the rights and interests of the natives; and, to reduce this general principle into a definite form and practical usefulness, it would be necessary that laws should be framed, investing the principal protector and his officers with every power of prompt and decisive interference which it may be found convenient and practicable to confer." So that was the office by which the duty of the Crown to protect the interests of Māori was established.

Over on page 16 there's, under paragraph 5, if you go down, the fourth paragraph there that starts, "When the demesne of the Crown," and this comes back to the point the Chief Justice was making earlier, the demesne of the Crown, "When the demesne of the Crown shall thus have been clearly separated from the lands of private persons, and from those still retained by the Aborigines, the sale and settlement of that demesne will proceed according to the rules laid down in the accompanying instructions." So the demesne land of the Crown was conceived as being land upon which Aboriginal title had been extinguished, which had not yet been appropriated to anyone else.

The charter itself is over on page 17, and we don't need to go through that in full. It sets up the legislative council and the executive council. Over on page 18, about two-thirds of the way down the page, is the power granting the Governor the power to make Crown grants, "Subject nevertheless to such provisions as may be in that respect contained in any instructions," addressed to him from time to time, "under the public seal of our said colony, grants of waste land, to us belonging within the same." And that term "waste land" seemed to be used in the sense of Crown demesne land that was not required by the Crown for public purposes, so it was a category, not the Crown's demesne land. I suppose surplus land is the term we might use today.

There's a really important proviso to this para which is that, "Provided that nothing in these letters patent shall affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any land in the said colony now actually occupied or enjoyed by such natives." So that imposed upon the Governor, as executive, a constitutional obligation to protect the property rights of Māori.

If you then turn the page to page 19, there's the letters patent appointing the Governor and on the top of page 20 it sets out his powers to act according to the several powers and directions granted to or appointed to the Governor, that's within the charter itself, and also the instructions and according to such further powers, instructions and authorities as shall, from time to time, be made to him. So the Governor didn't have the full prerogative powers of the Crown. He was constrained by the powers granted to him by the charter and by the Royal Instructions as those were revised from time to time.

Then coming onto the Royal Instructions, I just ask you to note clause 37 over on page 25, which appears to repeat the power to grant land that we looked at in the charter, and also clause 61 on page 28 which says, "It is our further will and pleasure that you do to the utmost of your power promote the religion and education among the native inhabitants of our said colony," and then it asks him to, "Especially take care to protect them in their persons in the free enjoyment of their possessions and that you do by all lawful means prevent and restrain all violence and injustice which may in any manner be practiced or attempted against them." And then it asks him to, "Convert them to the Christian faith and advance them in civilisation."

So after those instructions were issued my understanding is there was a question raised about the extent to which Māori occupied or enjoyed lands and that was really the big question in this era, in the 1840s because before the colonisation of New Zealand the issue was whether Britain would recognise the property rights of Māori, it had resolved that it would and the question became to what extent they owned land within the country and there were further instructions issued to clarify those instructions of December 1840 and they were issued in January of 1841. Those have been placed in that supplementary bundle of authorities at tab 2 that we handed up this morning.

ELIAS CJ:
This morning.

ARNOLD J:
Which volume of those supplements –

MS FEINT:
There's a supplementary bundle.

ARNOLD J:
There's a new one.

ELIAS CJ:
Is there a new bundle?

MS FEINT:
Yes and –

GLAZEBROOK J:

Volume 1, 2 and 3 or is there another one?

ARNOLD J:

No there's a new one.

MS FEINT:

This is further authority. I'm sorry to pile you with yet more paper.

ELIAS CJ:

So what tab?

MS FEINT:

Tab 2. And I think the context was, to this was that the Aboriginal Protection Society was asking what, to what extent the Māori occupied and enjoyed lands. They were concerned that the language used in the 1840 charter may have been restricted to lands they actually occupied and these instructions were issued to clarify this point. So in clause 1 it says, "Her Majesty has distinctly established the general principle that the territorial rights of the natives, as owners of the soil, must be recognised and respected and that no purchases hereafter to be made from them shall be valid unless such purchase be effected by the Governor of the colony on Her Majesty's behalf. It remains however to be stated that the lands of the Aborigines should be defined with all practicable and necessary precision on the general maps and surveys of the colony." So there was still that question mark about the extent to which Māori property extended. In clause 2 they go on to say–

ELIAS CJ:

Sorry I don't think I'm at the right place, clause 2. Was this tab 2?

MS FEINT:

This was tab 2.

O'REGAN J:

On the second page, 3577.

ELIAS CJ:

Yes.

MS FEINT:

And then in the second clause they go onto point out their understanding that it's the custom of Māori that the lands of each tribe are a species of common property, so referring to their collective ownership. And it refers then to the law that should be enacted declaring the absolute invalidity of any conveyance or contract by any Māori to private person so that was, eventually became what was enacted was the Land Claims Ordinance of 1841 after the New South Wales legislation was replaced.

GLAZEBROOK J:

Are you saying there was an issue as to whether the whole of New Zealand was owned by the indigenous people or whether there were areas that weren't owned?

MS FEINT:

Well it – yes that was an issue of fact so the principle that, to the extent that Māori owned land had been accepted.

GLAZEBROOK J:

But this didn't clarify what that land was – it just clarified that it – nobody could buy it without it, without the Crown pre-emption?

MS FEINT:

It clarifies that, to the extent that Māori are owners of the soil, those property rights will be respected so then it became a debate that actually raged through the 1840s over whether Māori had rights to what were known as the "wastelands" and the New Zealand Company were very enthusiastic proponents of the proposition that Māori only owned land that they actually occupied.

ELIAS CJ:

Well the New Zealand Company really propounded the solution adopted by Chapman who is a New Zealand Company official of course –

MS FEINT:

Yes that's right.

ELIAS CJ:

– *in R v Symonds* didn't it – the American?

MS FEINT:

Yes.

ELIAS CJ:

Johnson v McIntosh 21 U.S. (8 Wheat.) 543 (1823) that it's only an occupation right and that's where a lot of our law arguably went wrong?

MS FEINT:

Yes, yes Your Honour's exactly right. The New Zealand Company was also influential –

ELIAS CJ:

But there was a dispatch, it was – was it in one of the Russell instructions, there was recognition that all of the country was owned at an early stage, is that in one of the –

GLAZEBROOK J:

The earlier instructions do say – that's why I was just, I couldn't quite work out what this clarified, that's was why I asked the question.

MS FEINT:

Well that certainly became the position that it was recognised that all of New Zealand was owned by Māori but there was a later aberration in 1846 when Earl Grey for a period of months indicated that he supported the wastelands theory and he'd been the chairman of the select committee in 1844 that enquired into that question. His –

ELIAS CJ:

No, wrong Grey isn't it, wrong George Grey?

O'REGAN J:

No Earl Grey.

ELIAS CJ:

It's Earl Grey.

MS FEINT:

Earl Grey was Lord Howick and he was the chairman of that 1844 select committee.

ELIAS CJ:

Yes.

MS FEINT:

Yes.

ELIAS CJ:

I'm sorry, I thought you were talking about the Governor?

MS FEINT:

No.

ELIAS CJ:

No all right, thank you.

MS FEINT:

No they, both Greys were there at the same time.

ELIAS CJ:

Yes. Howick was also a member of the New Zealand Company or had been, was associated with them anyway.

MS FEINT:

Was he? Yes I didn't realise that.

O'REGAN J:

Is any of this disputed by the Crown?

MS FEINT:

No.

ELIAS CJ:

And what, where's it going, what's the submission you're making arising out of it Ms Feint? Just that there was continuous recognition of the Crown's obligations to protect Māori in their land, is that the – all that comes of it?

MS FEINT:

That's exactly right and it's also where I wanted to go next was to look at the New Zealand Company's contestation of that principle and the Crown saying to them repeatedly, "We can only grant to you such lands as have been cleared of Aboriginal title."

ELIAS CJ:

But why's it necessary to even go there because that is, that is the fact, that's a historical record but we're beyond all of that?

MS FEINT:

Yes well we are now and I do accept the point the Crown's not contesting that so it was just to give the Court more context how some of those debates do appear in the documentation that's in the case on appeal. And if you read those documents in isolation it just may end up adding to confusion, it doesn't actually doesn't in reality exist.

ELIAS CJ:

No there was a whole contested debate that went on throughout this period and the New Zealand Company pushed the boundaries always but I mean in this litigation is there any need, and I understand the argument about the 1848 grant as opposed to the 1845 grant, but is there any need to go back behind the grants except – as a matter of legal entitlement for the foundation of your claim other than by way of general background?

MS FEINT:

It's part of the context because it frames the relationship between Crown and Māori. So we don't rely – well, we're not saying that relationship by itself gives rise to the fiduciary duty but it is a relationship of a fiduciary nature and the particular obligations that the Crown assumed in the circumstances of this case are what crystallised that duty, so –

ELIAS CJ:

So they assumed those obligations under what do you say? Under the 1845 grant?

MS FEINT:

Under a combination of their acceptance in the 1840 agreement that they were going to act on behalf of Māori in reserving the reserves, the Tenths Reserves that the New Zealand Company had promised, and also their pattern of conduct in actually undertaking that duty and selecting those reserves and holding them and managing them, and then, thirdly, the acceptance of the Spain report and issuing the 1845 grant, which was the final culmination of that inquiry process.

ELIAS CJ:

So is there anything further that you need to take us to before perhaps – did you want to take us to the 1840 agreement? It doesn't seem to be contentious.

MS FEINT:

I don't think we need to go there –

ELIAS CJ:

No.

MS FEINT:

– unless Your Honours have questions about it.

ELIAS CJ:

No.

MS FEINT:

And I should say I'm not planning to go in full through this outline because, of course, we don't have time.

ELIAS CJ:

Well, it's not so much that we don't have time, it's just I'm querying the need.

MS FEINT:

Well, it does go to this, I think. The Crown is placing a lot of emphasis on their power to balance what they say are interests in negotiating this position between the New Zealand Company, the settlers and Māori, and we're saying, well, in a rule of law context Māori had property rights, not interests. The interests of the

New Zealand Company settlers were not rights to the land, they were interests in the form of a contract.

ELIAS CJ:
Well, I don't understand the argument about balancing anyway once you get to the position that the grant is subject to reservations. I would have thought that's the start of the case.

MS FEINT:
Yes, well, I would agree.

ELIAS CJ:
Well, it may be that if you need to develop some of this it can be developed in reply, if the argument about balancing assumes significance.

MS FEINT:
Well, I think –

ELIAS CJ:
But isn't your short argument that the terms of the grant demonstrate the trust?

MS FEINT:
Yes, Your Honour.

If we move now to the Land Claims Ordinance, that is set out in volume 1 of the bundle of authorities. That's the pink one at tab 3, and the relevant clause for our purposes is clause 6, and the Commissioner had a duty to inquire into all claims to grants and would be guided by the real justice and good conscience of the case. It's relevant, I think, to say the purchase itself, as a pre-1840 purchase, can't be legally effective because pre-1840 the law of New Zealand was governed by Māori customary law and Māori customary law didn't recognise a sale.

ELIAS CJ:
But you don't even need to do that, do you, because don't the terms of this Ordinance make any pretended purchases absolutely void?

MS FEINT:

Yes, that's right. So what the Commissioner's inquiring into is whether there is an equitable case for granting land to the claimant, and they do that according to – well, they effectively inquire into whether that's going to be equitable in terms of the purchase of the land as English law would understand it, and that's where we've got to.

Now I did want to take Your Honours to some correspondence in the supplementary bundle of documents that were handed up this morning, volume 1 of 3.

ELIAS CJ:

Can you just remind me, this general 2560 acres limit, that was waived in respect of the New Zealand Company purchases to what extent, or was it?

MS FEINT:

We don't have any direct evidence of that but my submission would be that's implicit from the terms of the 1840 agreement that, and also the close intervention of the Governor and the circumstances of this particular inquiry, that that special authorisation had been given by the Governor because there was –

ELIAS CJ:

Mmm, and presumably one of the principal reasons for departing from the general rule was, what, the scale of the settlements and also the protections that had been built in for Māori.

MS FEINT:

Yes, I think the rationale behind that limit was that they wanted to prevent large areas of land being acquired and so they were trying to encourage small settlement amongst settlers.

ELIAS CJ:

Well, they actually had a very much, well, at the very beginning they had a much more limited view of the scale of settlement except in the New Zealand Company organised settlement territories. Yes.

MS FEINT:

Yes, and they wanted to prevent people buying up large tracts of land and then becoming land sharks, which actually was effectively what the New Zealand Company was but they had –

ELIAS CJ:

They were worse.

MS FEINT:

Yes, I was going to say –

ELIAS CJ:

The Sydney speculators.

MS FEINT:

– Professor Alan Ward referred to them in cross-examination as "arms traders". He said they'd be looked upon very poorly in, if they were operating, say, in Africa today. So the appellant's position is that, yes, it's implicit that that maximum 2560 acre limit was waived by the authority of the Governor given his close involvement in that inquiry process. Perhaps the other point I should touch on is that this Ordinance envisages that there be two Commissioners hearing the case. Now there was a later Ordinance in 1844 that retrospectively validated all claims that had been heard by single Commissioners. So that was the Land Claims Amendment Ordinance of 1844 which is at tab 6. And the reason that whole situation arose was because initially there had been a special Ordinance passed just for the New Zealand Company based on the 1840 agreement, and that was the one of 1842 that was disallowed, and because of the time lapse.

ELIAS CJ:

Well, was that disallowed in London?

MS FEINT:

Yes.

ELIAS CJ:

And was there an explanation given for that in the dispatch that came back with the…

MS FEINT:

Yes there was and that is at tab 11 of volume 1 in that supplementary case on appeal. So you can see the page is headed up 4904 and then it's got the Land Claims Ordinance in that bottom part of the second column.

ELIAS CJ:

Sorry this is part, this is the new supplementary –

O'REGAN J:

Is this the one from today or the one from three or four days ago?

MS FEINT:

No this is the one from three or four days ago.

ELIAS CJ:

What volume?

MS FEINT:

Volume 1, tab 11. Sorry these volumes are actually from the electronic case on appeal so they should be called "the case on appeal" rather than bundle.

O'REGAN J:

Whereabouts is the disallowance referred to?

MS FEINT:

So in that second column at the bottom part of the page you see it says, "Land Claims Ordinance"?

O'REGAN J:

Yes.

MS FEINT:

And then the penultimate paragraph from the bottom says that, "When the British Government undertook to colonise New Zealand it was with the distinct intention not to admit that any titles to land could be valid which were not derived from or expressly confirmed by the authority of Her Majesty. The principle was first laid down in Lord Normanby's instructions," and so on. And then over the page in the second

paragraph there, "I cannot think that it would be prudent in Her Majesty's Government to dispense with the direct and wholesome check upon the undue acquisition of land which the former ordinance had imposed and which from the earliest proclamations the settlers must have been led to expect. I feel therefore that they will be best consulted by reviving the Ordinance of 1841." So the appellants say that the Imperial Government there was concerned to enforce when they made that principle and require all claimants, including the New Zealand Company to prove that they had a good title to land before they could be granted any and the 1842 Ordinance that was disallowed was using the formula of –

ELIAS CJ:

Dealing or something –

MS FEINT:

– well it was the four acres to the pound, or four pounds to the acre – that formula that they had in the 1840 agreement was repeated in the 1842 Ordinance and that's why it was disallowed. So while we're in that volume if you then turn to tab 18 and I chose this exchange of letters between the New Zealand Company and the Crown because it seemed to me a microcosm of the issues between them and the fact it shows how the New Zealand Company was pushing the boundaries constantly and the Government was being very firm in saying, no we're going to enforce the nemo dat principle. So the letter from Mr Somes who was the secretary of the New Zealand Company submits a protest effectively, against him being required to – against the New Zealand Company being required to proceed before the Commissioner of Land Claims. It says in that second paragraph, "The Company maintain that the Commissioner cannot consistently with the past proceedings that the Government exercise any jurisdiction in their case, their tenure is in no way wise dependent upon the validity of the purchase made by their agent from the natives," and their argument there is that they should get a grant as of right under the 1840 agreement –

ELIAS CJ:

This is what provoked the response, it was all contingent on your demonstration that you have a, that you'd fairly purchased the land?

MS FEINT:

Yes that's exactly right. And he goes on at great length to complain about the position that they're put in. He says, "The necessary result has been to shake all confidence and titles derived from the Company whose own title they founded upon a grant from the Crown as subjected by a functionary who cannot consistently with the arrangements made with Her Majesty's Government have any jurisdiction in regard to it, to an investigation upon points altogether irrelevant to it." So the New Zealand Company was under quite a lot of pressure at this stage because they had sold land off the plans before settlers had even left England and before they'd even ostensibly acquired any land at all and they weren't able to give title to their purchases. And he goes on, if you go over the page to 3899, you don't need to read through all of that but effectively their complaint is, well they're saying that Māori don't own land other than the land that they occupy and 99 one-hundredths of New Zealand is covered with native bush that they don't have any rights to and then on the following page on 3900 they come out with a proposition. So on the left-hand side of the page in the bottom half of that last paragraph they say, "The native reserves of which the Government has trusted for the Aborigines afford abundant means for removing all existing embarrassments and that too without alienating any considerable portion of that property which the directors always regarded as the most valuable portion of the consideration given to the natives for their title, whatever it maybe to the wild lands." And a few sentences down, "If then the natives would rather retain possession of their former dwellings and cultivated grounds than remove to occupy the reserves, it would be equitable as well as simple to compensate the settlers who have derived title through the company and who relying upon the goodness of that title has selected spots in the actual enjoyment or occupation of the natives which those parties are now unwilling to give up with an equivalent from the native reserves in regard to which the Aborigines will have given the most unequivocal proof that they regard them as less valuable than that which they prefer to retain." So what they were proposing there was that because there were Māori in Wellington especially who were living on settler titles, that they would swap the Tenths and let them keep the lands they were occupying so effectively paying Māori of their own land and the response back from Mr Hope who was writing on behalf of Lord Stanley says, he says down the bottom of the page there, "Lord Stanley has received this intimation with extreme astonishment." And then over the page he goes onto say, "In that letter Her Majesty distinctly recognised the proprietorship of the soil and the natives and disclaimed alike all territorial rights and all claims of Sovereignty which should not be founded on a free session by them. Lord Stanley cannot allow the Company to plead

ignorance of the document." He's talking here about Lord Normanby's instructions. "Thus formally and authoritatively communicated to the public will permit them to assume that entering into the arrangement with them Her Majesty could contemplate deliberately violating the faith which she had publicly pledged to the natives. In conveying to the Company rights which on behalf of the Crown she had solemnly disclaimed. The agreement with the Company of November 1840 was founded on the assumed correctness of two allegations made by them. First, that acquired by purchase from the natives the proprietary right to about 20 million acres of land and second, that they'd expended in colonisation of parts of the land so purchased large sums of money."

Then the penultimate paragraph down the bottom of that page, "Lord Stanley cannot now permit it to be maintained, either that the natives have no proprietary right in the face of the Company's declaration that they've purchased those very rights or that it is the duty of the Crown either to extinguish those rights or to set them aside in favour of the Company. The fact of the validity or invalidity of the purchase was known to the Company and to them alone. The assumed validity was the basis of the promise grant and if the facts were incorrectly stated at the time or incapable of proof, the Company must wrest an inconvenience and loss resulting from their own misstatement," so it was at their own risk. And then on the opposite column, about half way down that first paragraph the, Lord Stanley recites the nemo dat principle, "The grant by Her Majesty of any land must be taken to be conditional upon the fact asserted by the company, that by the previous arrangements Her Majesty had it in fact to grant. And the investigation of that question has been committed by law with which Lord Stanley cannot interfere, not to Mr Pennington but to a local and legally-constituted tribunal. It is the duty of that tribunal not to suffer native rights which have been recognised by Her Majesty to be set aside in favour of any body of settlers however powerful. And Her Majesty has neither the power nor the desire to influence their decisions."

So that is but one iteration of the nemo dat principle which the appellants say leaves the Crown in difficulties in asserting as they do that the 1848 grant could have acted to extinguish any extant customary title rights as at that point.

ELIAS CJ:

If they were customary rights at that point.

MS FEINT:

Yes, or in the alternative, they could have been equitable property rights if there was a trust.

ELIAS CJ:

Are you going to take us to the status of land not granted but subject to sale pre-Treaty the way that land was treated in other parts of the country?

MS FEINT:

You mean in relation to private purchases?

ELIAS CJ:

Well in relation to how the Crown treated that land? Whether it treated it as demesne lands of the Crown because it had been subject to purchase even though for the policy reasons the Crown had adopted the grant didn't extend to the full extent of the purchase? Because this happened in respect of all of the old land claims purchases and it's quite, I would have thought, quite important to the point that I was putting to Mr Galbraith about what status this land had post the investigation and Crown grant. The excepted land I'm talking about.

WILLIAM YOUNG J:

Well just to be more specific, the 1845 grant is 151,000 acres.

MS FEINT:

Mhm.

WILLIAM YOUNG J:

As I understand it, and I may be wrong, the additional land that went into the Nelson settlement came from Wairau –

MS FEINT:

That's right.

WILLIAM YOUNG J:

– which had been specifically acquired. What happened to the land in and around Nelson that wasn't encompassed by the 151,000 grant, 1845 grant? Did the Crown just assume ownership of that or was it separately acquired in some other way?

MS FEINT:

It appears that the Crown assumed ownership but there were mop up purchases made in the 1850s. So the Crown entered into various agreements.

ELIAS CJ:

In the 1850s the Crown took the view that it was easiest to negotiate purchases and that's when Donald McLean comes into the Act and buys up half or most – a lot of the country, but before then this issue had arisen in relation to whether the fact of alienation, even though the Crown grant didn't extend to the full extent of the purported alienation, what happened to the surplus? My impression is that the Crown treated that as demesne lands of the Crown and I don't know whether the ordinance, the 1841 Ordinance gives justification for that, I haven't looked at it with that in mind but I'm pretty sure that that is the way it was dealt with, at least in some cases, and I'm just wondering whether it was a general approach that was taken in other parts of the country. For example, one purchase that I'm familiar with concerns the land on which the highlanders were settled in Waipu Cove and that had been part of a much bigger purchase by James Busby but the Crown obviously thought that it was able to grant those lands, that they were Crown lands after it had gone through the investigation, even though they weren't granted to Busby.

MS FEINT:

I'm not familiar with that but I would have thought in principle that cannot have been right and that's why I said before in the Land Claims Ordinance it is an inquiry into whether the claimant is entitled to a grant of land. The purchasers pre-1840 are not legally effective in themselves.

ELIAS CJ:

Well there’s two points, though, in this process. One is whether the dealings were fair and equitable enough to allow them to be treated as valid alienations and then there is what will the Crown, exercising its sovereign authority, what will the Crown grant? And what is being said, what the Ordinance does is limit that amount. The assumption may well have been that the land, having been cleared by alienation came to the Crown.

MS FEINT:

Yes, and I think that may have been the assumption and you certainly see that in some of the contemporaneous documentation but my point was if it's pre-1840 purchase then it wouldn't be an alienation under tikanga Māori.

ELIAS CJ:

No, I fully understand that. I'm talking about the regime that was then imposed because your claim is a legal claim.

MS FEINT:

Yes and I –

WILLIAM YOUNG J:

It doesn't seem right under the statutory scheme at the time though.

ELIAS CJ:

No it may not have been and it may have been able to have been challenged but that, I think, is the way it was treated by the Crown.

WILLIAM YOUNG J:

But just around Nelson, do you think there were mop up purchases that perhaps retrospectively picked up customary title to land that hadn't been encompassed by the two Crown grounds?

MS FEINT:

Well, there were later because there was quite a wide area outside Wairau purchase and the 151,000 acres that have never had Aboriginal title extinguished. So…

ELIAS CJ:

But that's different isn't it?

WILLIAM YOUNG J:

Sorry, what do you mean by that? That never had Aboriginal – what happened to that land?

MS FEINT:

Well it was included in the 1848 Crown grant but under the Loans Act the Crown had given the New Zealand Company the right of pre-emption and the right to extinguish customary title through purchase. So it's not really clear whether that – whether the New Zealand Company could have done that in respect of that land but after the New Zealand Com – none of it was acquired and after the New Zealand Company collapsed that land was all vested in the Crown as demesne land of the Crown and then the Crown ended up deciding that not all customary title had been extinguished and it entered into a series of mop up purchases and – but they didn't – I haven't looked at this for a while but from memory they didn't actually specify what land they were buying. They just said all land in the South Island that this iwi owned. So that –

ELIAS CJ:

Well, because the South Island had been sold about three times over hadn't it?

MS FEINT:

Yes indeed. Well, about two-thirds of the country had been sold prior to the 1860. So we'll have to look further into that point, Your Honour, because I'm not familiar with those particular purchases but I think there's an issue as to whether that was correct in principle, the approach the Crown – and the Crown certainly thought, with respect to Tenths, that customary title had been extinguished over the Tenths Reserves and that would only be so if you treated that whole 151,000 acres as having been alienated but that wasn't the terms of the grant which accepted and saved those Tenths Reserves.

GLAZEBROOK J:

Well it could've been alienated subject to the trust and the way that the – just actually replicating the 1840 agreement that the New Zealand Company had entered into couldn't it?

MS FEINT:

What do you mean by that?

GLAZEBROOK J:

Well, in a sense that instead of not treating them, it treated them as not having been alienated, treating them as having alienated but subject to the trust which was the very agreement that was entered into by the New Zealand Company.

MS FEINT:

Yes, and that's our alternative argument.

GLAZEBROOK J:

Yes.

MS FEINT:

I wanted to move now to look at the documents that relate to the Crown's conduct in actually acting on behalf of Māori, and as I said before we rely on a combination of circumstances, the 1840 agreement itself whereby the Crown agreed to act in fulfilment of and according to the tenure of the terms of the New Zealand Company's purchases and also what the Crown actually did.

So when Halswell arrived in the country the New Zealand Company had appointed him as the Commissioner of Native Reserves and he was then reappointed by the Government to act for the Government as both the Commissioner of Native Reserves and the Protector of Aborigines and in Nelson Henry Thompson, who was the Police Magistrate and sub-Protector of Aborigines actually selected the town and accommodation Tenths on behalf of Māori. Now it might be a good time to look at the maps. I ask Your Honours to get out the map book.

ELIAS CJ:

What authority was he acting under?

MS FEINT:

Henry Thompson?

ELIAS CJ:

Yes, in selecting the reserves.

MS FEINT:

He was the police magistrate and sub-protector of Aborigines. We don't have evidence of his appointment but when they were going to select the rural Tenths in 1846, Thompson's successor was specifically authorised by the Governor to act on behalf of the Crown in selecting the rural Tenths.

ELIAS CJ:

So it's likely that there was a specific instruction to him was there? It was just the Crown or the Governor.

MS FEINT:

We're surmising that, so can I take – in our volume 1 of the supplementary bundle if you go to tab 64 and 65. So there's a transcript of this letter and this is from the New Zealand Company and he's saying that he's preparing to distribute the rural sections in Golden Bay and he's asking the police magistrate in Nelson whether he holds any authority to select on behalf of the natives, "As was done by my predecessor, Thompson to select the rural Tenths," and he's saying, "If I don't hold any such authority – sorry, this letter's from the police magistrate and he's passing on that he's been asked by the New Zealand Company to ascertain whether he has such authority. He says, "If I hold no such authority," then he wants to know who will exercise the office of selecting the native reserves.

And then if you go over to tab 65, this is the reply to Sinclair, the police magistrate. "I am directed by His Honour, the Superintendent, to inform you that it is His Excellency, the Governor's wish that you should perform this duty and that reasonable travelling expenses will be allowed to you." So that's evidence that his successor was authorised by the Governor to perform that function and it seems likely that the same thing happened with Thompson.

ELIAS CJ:

So that was never done, is that right?

MS FEINT:

No it was never done. So what they ended up doing instead of selecting rural Tenths, they ended up selecting occupation reserves in Golden Bay and then because Governor Grey had by that time abandoned the Tenths scheme, they said they'd select such further reserves as would be needed for the further wants of the natives. So they selected another 500 acres, but we'll go through that in due course. So if I ask you to turn to the map book and we'll start at the back at tab 617.

ELIAS CJ:

Sorry, where do you want to go?

MS FEINT:

Tab 617.

ELIAS CJ:

Sorry, which volume?

MS FEINT:

Of the map book. So this map was done in 1842 once Nelson had been surveyed and this shows all the town section and the green sections are the Tenth sections that were selected by Thompson on behalf of Māori. You can see Auckland Point, those five contiguous sections right on the waterfront at the top of the map there. Then there were yellow sections where the Company's reserves and the red ones were the colonial reserves or Government reserves.

ELIAS CJ:

Sorry, I'm just thinking about some information you just provided us with. I'm just trying to work out in what capacity the Governor, in giving those instructions, could have been acting? It makes, I mean if the Governor or if the Crown is trustee that makes sense that the Crown would be ascertaining. There's no governmental power identified otherwise, is there?

MS FEINT:

No there's not Your Honour.

ELIAS CJ:

Maybe I will just ask Mr Goddard about that later. If the Crown was acting as agent for Māori then that would be in a fiduciary capacity but it doesn't seem as if it was acting in that sense. So it's either acting in a governmental capacity which presumably Mr Goddard will be saying the Governor was or is, or he is acting to fulfil an obligation.

MS FEINT:

When – this was 1842.

ELIAS CJ:

This is going back to the –

MS FEINT:

Yes.

ELIAS CJ:

– to the township one. I was asked about the others.

GLAZEBROOK J:

Maybe we do have to look at the 1840 agreement because it – is it pursuant to that in some way?

ELIAS CJ:

Well that was the understanding under the 1840 agreement and that's accepted that the Crown was going to take responsibility.

GLAZEBROOK J:

And if the Crown was taking responsibility under that then presumably –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– that's why it's allocated somebody to do this.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Does that make sense?

MS FEINT:

But by 1846 the Crown had been, well there'd been four years already during which the Tenths Reserves were being managed, they were being leased, money was being borrowed against them, there was dwellings being constructed on the, so it resembled a trust.

GLAZEBROOK J:

Yes, all I'm saying is that it seems that it might be in accordance with the 1840 agreement that they are doing this?

MS FEINT:

Yes, well that was –

GLAZEBROOK J:

Is that what makes sense to you?

MS FEINT:

Yes it does because the 18 –

GLAZEBROOK J:

So the foundation of the argument might well be the 1840 agreement, the fact that they did act in accordance with that 1840 agreement and then moving onto the 1845 grant, is that part of the argument in why you say that you look at all of that –

MS FEINT:

Yes it is.

GLAZEBROOK J:

– background and all –

ELIAS CJ:

That's what I'd understood your argument to be.

GLAZEBROOK J:

Yes, yes.

MS FEINT:

Yes. It is because clause 13 of the 1840 agreement said that the Crown would make the reserves according to the tenure of the New Zealand Company's deeds and it was always envisaged by the New Zealand Company that the land would be held on trust so that's why the trust was set up effectively. And the lands were treated in that way even though from 1842 to 1845 the land was still Māori land, it was in customary

title. But you had the – so I suppose that's not a strict trust but it is the Crown acting in a fiduciary sort of capacity.

ELIAS CJ:

Well it may be a strict trust. If the Crown takes ownership of the land then I, it doesn't seem to me a big stretch to say that it's an express trust.

MS FEINT:

Well that was certainly the intention, it didn't have legal title in 1842 of course.

ELIAS CJ:

Well I'm not sure that that's right, that's really the point of the questions that I was asking earlier. Some...

MS FEINT:

So is Your Honour's point that the Crown held title subject to the burden of Aboriginal title, is that the conceptual –

ELIAS CJ:

No, but it holds title subject to the terms of a trust which you can discern from things such as the 1840 agreement and the way the grant was raised. But that does rather depend on whether there's a hole in the doughnut or whether the Crown, as I tend to think, at least assumed that these excepted lands became part of the demesne lands of the Crown subject to trust. Anyway...

GLAZEBROOK J:

The question might well be whether the Crown in some ways saw itself as owning subject to any obligations there might be, either to allow the purchasers, so whenever there had been a purchase whether the Crown in undertaking its obligations saw itself as owning all of the land subject to whether the purchases would be validated and then if not whether it be returned or merely held in some kind of reserve arrangement and it's not entirely clear because that, either way would be consistent with obligations to the Aboriginal people as they were seen in colonial times.

MS FEINT:

There was a hiatus though, because in that July 1842 letter the Crown is thinking that you'd need to set up a statutory trust, invest the land that way.

ELIAS CJ:

Yes but equity steps in, surely in those circumstances? Well that's the argument.

WILLIAM YOUNG J:

But in a sense they're all being a bit previous in 1842 because there hadn't been a grant of land?

ELIAS CJ:

Yes.

MS FEINT:

No exactly.

GLAZEBROOK J:

But unless the Crown thought that it nevertheless owned that subject to whether it allowed that or whether it returned it, which is perhaps not entirely clear.

ARNOLD J:

Can I just ask something of her on this map. The colonial reserves are in red. Now what was the process, was the Government involved in some way in the selection of those or how did that come about?

MS FEINT:

They were held for public purposes is my understanding. But I'm, I don't know the details of how that was done.

ELIAS CJ:

How were they selected?

MS FEINT:

I presume they were selected by the Government but I don't know that.

ARNOLD J:

Is there anything about them in the 1840 agreement?

MS FEINT:

No there's not. I'll check that over lunch, I don't recall seeing anything on them.

GLAZEBROOK J:

And did you say the yellow were the Company reserves?

MS FEINT:

Yes.

GLAZEBROOK J:

What were they?

MS FEINT:

So they were holding some reserves for, until the settlement appreciated in value.

GLAZEBROOK J:

So they're not reserves as such, they are just their land that they're holding back?

MS FEINT:

Company lands, yes.

GLAZEBROOK J:

Yes so they're –

MS FEINT:

Yes. And then if you go backwards to look at the Motueka Reserves, tab 591 there's an old map showing the accommodation reserves. There are earlier 1842 maps but you can't really read them.

ELIAS CJ:

Sorry where are we going back to?

MS FEINT:

591.

GLAZEBROOK J:

Tab 591 is it?

WILLIAM YOUNG J:

And what does this show?

MS FEINT:

This shows the accommodation sections that were selected for Māori and it also shows, because this is a later map, exchanges that were done in relation to Te Maatu, the big wood and then if you go further back –

GLAZEBROOK J:

Were these selected by Thompson as well?

MS FEINT:

Yes they were, so those selections were both done in 1842 and then if you go further back to tab 578, so these are a collection of contemporary maps which are just a bit easier to read. So 578 is Nelson town, the yellow sections are the town tenths sections and then if you turn over to 579, you can see the 47 black sections that were removed from the town tenths. Then if you turn over again to tab 580, that shows the accommodation sections in Motueka, the yellow ones are the ones – the accommodation section selected for the tenths in 1842 and that green wobbly line shows the extent of Te Maatu, the big wood.

So then if you go over the next page, to 581, there's the – just a close up of that same area and then going over again that shows you in 1844 and 1845 how there were exchanges that were arranged as part of Commissioner Spain's enquiry. So the red sections are the sections re-designated as occupation reserves and the yellow and red sections are the ones which were already Tenths Reserves with became occupation reserves as well and then the black sections were taken out of the tenths to allow those exchanges to happen and then going on through that sequence of maps, it just shows the various exchanges that were done at different times and the next one is in 1849, because there was an ongoing problem through Māori occupying sections that have been allocated to settlers and then the following page shows you the 1853 grant to the church.

ELIAS CJ:

Sorry what page was that?

MS FEINT:

That's 584, that's the Whakarewa sections and then going over to 585, that shows you the 1862 re-designations which were again to make more occupation reserves available so they were taking Tenths Reserves as they were allocating occupation

reserves to Māori and that's why we say the occupation reserves were effectively a loss to the tenths because the occupation reserves should have been excluded from sale.

So after lunch I wanted to take Your Honours through the documents that show the way that the Crown was managing these tenths sections between 1842 and 1856.

ELIAS CJ:
Where are you on your road map?

MS FEINT:
We're on paragraph 3.

ELIAS CJ:
Paragraph 3, okay and then you're going to go back to the Spain enquiry and the Crown grant?

MS FEINT:
Yes we are.

COURT ADJOURNS: 1.00 PM
COURT RESUMES: 2.18 PM

MS FEINT:
Your Honours, over the lunch break I went back to the 1840 agreement and had a look at that, that's in volume 7 of the case on appeal at tab 43.

WILLIAM YOUNG J:
Volume 7?

O'REGAN J:
The case on appeal.

WILLIAM YOUNG J:
Sorry, I see it, yes.

MS FEINT:

So this is the volume with the top 30 documents in, so at tab 43.

GLAZEBROOK J:

Got it now, tab 43.

MS FEINT:

And there was a question that arose about the public reserve so I note first if you go down to clause 10 it says that, "All public works and buildings included in the estimate are to vest in and become the property of the Crown and trust for the public uses of the colony should the Governor require them for such a purpose." And that seems to be referring to all those public works referred to in clause 9 immediately above.

GLAZEBROOK J:

Although they seem to be sections in the map that you showed us?

MS FEINT:

Yes, yes, the, yes, and that's what we'll have a look at overnight because I can't recall seeing anything on that before but it appears that the arrangement was that the Company would lay out the town and reserve the public sections that were required for public works which would then vest in the Crown.

ELIAS CJ:

Including buildings to be built, post offices and things, one imagines.

MS FEINT:

Yes.

GLAZEBROOK J:

Yes, although there were a lot of sections in that, more than you would have thought would be needed for –

ELIAS CJ:

Well maybe the Crown was going to make a profit too.

GLAZEBROOK J:
Yes, although –

MS FEINT:
I just can't recall having read anything on that before but that's not to say that there's not something in those longer historical reports that were done.

So the other point is, just looking at clause 13 directly, it's worth pointing out that there's a clear distinction there between all lands reserved according to the New Zealand Company scheme which will be made for the benefit of Māori by Her Majesty's Government in fulfilment of and according to the tenor of such stipulations which, given that all the New Zealand Company deeds had a trust provision in them appears to indicate the intention was those lands would be held on trust. And then the second half of that clause just notes what would be the case anyway that the Government can reserve to themselves in respect of all other lands to make such arrangements as to them shall seem just an expedient for the benefit of the natives so –

ELIAS CJ:
Well that might be the lands in respect of which there wasn't any stipulation.

MS FEINT:
Well I read that as being lands other than the New Zealand Company lands in which case they make such reserves as they think are required but in terms of the New Zealand Company purchases the Crown is stepping into the shoes of the New Zealand Company and both the Kapiti and Queen Charlotte deeds and indeed every New Zealand Company purchase deed had that clause saying that the Māori reserves would be held on trust for the benefit of the chiefs, their families and their tribes, I think the wording was. If you go back to tab 40, for instance, which is the Kapiti deed.

O'REGAN J:
Sorry, which tab were you on?

MS FEINT:
Tab 40 and at the end of that deed is, "The trust provision that William Wakefield on behalf of the Governors, Directors and Shareholders does hereby covenant, promise

and agree to, and with the said chiefs and manner following, that is to say, a portion of the land ceded by them as suitable and sufficient for the residence and proper maintenance of the said chiefs their tribes and families will be reserved by the New Zealand Land Company and held in trust by them."

ELIAS CJ:
And where's the equivalent provision in the Nelson, in the rights and purchase because you've taken us to the agreement between the Company and the Crown?

MS FEINT:
Yes, and the Kapiti and Queen Charlotte deeds were the deeds under which –

ELIAS CJ:
Of course, yes.

MS FEINT:
– the purchase of Nelson was confirmed.

ELIAS CJ:
I'm sorry, yes.

MS FEINT:
Even though those deeds were with Ngāti Toa and Te Ātiawa respectively.

So then I wanted to return to that letter that we were discussing before lunch and I'd ask you to get the Crown submissions out as well as our volume 7 of the case on appeal and at page 11 of the Crown's submission. At 6.4 the Crown are saying that the appellants having identified any statement by a person with the authority to declare a trust on behalf of the Crown, to the effect that the Crown was constituting itself as a trustee of the reserves and they say, "To the contrary there are abundant references to an intention to establish a statutory trust at some future time and on terms yet to be determined," and in the footnote they cite that 26 July 1842 letter. Now that letter is a pivotal letter, both in terms of the Crown's argument but also in terms of Justice Clifford's analysis in the High Court and I think it's fair to say in the Court of Appeal too. So I'd like to turn to that now and that's in our volume 7, top 30 volume at tab 39, 49.

WILLIAM YOUNG J:

Sorry 49?

GLAZEBROOK J:

Aren't you saying in any event that the 1840 agreement which was under the authority of the Crown implicitly does recognise a trust, because of the agreement to administer those, those lands on behalf of –

MS FEINT:

Yes.

GLAZEBROOK J:

So that would be your personal authority, assuming that is someone in authority making that 1840 agreement?

MS FEINT:

Because the Crown is stepping into the shoes of the New Zealand Company for those purposes but in the Courts below this letter was seen to be influential to the question of whether there was an intention to declare a private law trust because it says –

GLAZEBROOK J:

What's meant by it – it's two years later than the 1840 agreement?

MS FEINT:

It is and it also, I mean I suppose the point I want to make is that this letter does indicate there's an intention to create a statutory trust but it then says in the penultimate paragraph, "That until these objects can be carried into effect under the authority of a legislative enactment, the Governor requests that you will avail yourself with the opportunity afforded by your visits to the Company settlement, direct from to time the disposal of any funds that may have arisen from the reserves." And that's the point really that –

O'REGAN J:

So where does it say that exactly?

MS FEINT:

It says it in the penultimate paragraph from the bottom. Starting, "Until these objects."

GLAZEBROOK J:

Sorry I've probably lost that, what – 39?

MS FEINT:

No 49 sorry Your Honour.

GLAZEBROOK J:

49. I see.

MS FEINT:

So looking at the second paragraph from the bottom. So they're saying, "Until the statutory trust is established carry on directing from time to time the disposal of any funds that may have arisen from the reserves," and the point really is that for the next 14 years until the 1856 Act was enacted that's exactly what the Crown's doing. And I've collected together in our supplementary bundle of documents –

ELIAS CJ:

The one that came in today?

MS FEINT:

No sorry the supplementary case on appeal, the one that came in last week, volume 1 and I've collected together some of the documents that show the way these Tenths were being managed from 1842 onwards.

ELIAS CJ:

So where are we going?

MS FEINT:

So these are all the documents between tab 90, between tab 91 onwards to –

ELIAS CJ:

They're not in volume 1 I think.

GLAZEBROOK J:

One of three.

MS FEINT:

Sorry they're in volume 2.

GLAZEBROOK J:

So volume 1 of three, is that – no is that something else?

O'REGAN J:

No because it doesn't have tab 91, it must be volume 2 of three. Did you say tab 91, it's in volume 2.

MS FEINT:

Sorry, Your Honours, this gets very confusing when you've got – so if you turn to tab 92, for instance –

O'REGAN J:

So that's in volume 2?

MS FEINT:

In volume 2. So this is a letter from the Bishop of New Zealand who had been appointed as one of the trustees under the trust and he's writing to Thompson as his agent and it sets out in those sub-paragraphs, he's setting out the general principles upon which he conceives the native reserves ought to be let and he says they should be let not so much with a view to the largest immediate return as to be the creation of a permanent and respectable property into the general improvement of the settlement of Nelson, and then he says, "With that in mind the length of leases granted ought to vary with the description of property proposed to be placed upon the ground." And he sets out that the terms could be seven, 14, 21 years depending on the extent to which improvements will be made.

ELIAS CJ:

I'm sorry, I'm lost, what…

MS FEINT:
We're at tab 92.

ELIAS CJ:
In the copy letter from the Bishop of New Zealand?

MS FEINT:
Yes.

WILLIAM YOUNG J:
These are in relation to reserves which will in due course become legally vested in the Crown. So they are in relation to already – reserves which have been by this stage identified. Is that right or not?

MS FEINT:
That's – yes, that's anticipated because he says that in that second paragraph. He refers back to that July 1842 letter but then he says in the third paragraph down, "Acting as I can conceive in the spirit of the instructions," he's been given, "I now proceed to place in your hands general directions with regard to the management of the native reserves." And they started managing them in 1842.

WILLIAM YOUNG J:
Yes, that's right, but these are essentially the town sections that have been identified.

MS FEINT:
That's right.

WILLIAM YOUNG J:
And the accommodation sector is that correct?

MS FEINT:
That's right, yes, Your Honour.

And then if you turn over to tab 93, this is the Bishop writing to his mother and he's saying there in the middle of the paragraph, "There are already buildings of a considerable value upon them yielding a rental from £300 to £400 per annum.

Going over to tab 95, and he had also set out here plans to build a chapel, a school. He had a hostel for Māori at Auckland Point to go and stay in. Under tab 95 there was a proposal the New Zealand Company offered to lend them some money, £5000, on a mortgage and the Bishop said no because he considered that the reserves were supposed to be inalienable, and this is a letter from the Governor approving the Bishop's decision to turn down the offer of that loan. So he appears to be approving that decision. "I entirely agree with the Bishop and the view he has taken of the case and, therefore, cannot recommend the adoption of the plan proposed by Mr Somes." And that's also set out in the following tab.

And then I've got in my paragraph 3.5(c) I've got a series of reports that were made to the Colonial Secretary on the financial position on what they called the Nelson Native Trust between 1846 and 1848. So you can look at, for instance, tab 108, and what had happened, the Bishop, the Chief Justice and the Third Trustee had all resigned by 1844 and the reserves weren't being managed by anyone, so the fell into disrepair and they didn't have anyone collecting the arrears of rent and then the Government directed the Superintendent of Nelson to provide a report on the financial position of the trust and where it had got to. So this tab 108, for instance, is setting out the current financial position of that trust, which you can see better actually over in tab 110.

"We have the honour to report for His Excellency, the Lieutenant Governor, since our appointment as members of the Board, we have proceeded to take an account of these sections occupied within the town of Nelson." And they talk about how they've found tenants who have entered into terms for occupation. They found people who have been squatting. They are trying to find out who has leased the sections because they haven't been looked after for that period, and then if you turn over to the last page of that document, they've set out the financial position of the trust . So they've got a bank account at the Union Bank of Australia, £77 in credit. They've got rent due and then they set out the liability.

And then the final set of documents I had was at tabs 106 and 107 which is where there's a decision in 1848 to place the Trusts under the direct management of the Government.

So at 106 the trustees formally nominated to undertake the management of the native reserves, "Having formally resigned from their office, I have the honour to

inform Your Excellency that I propose taking the reserves for the future under the direct management of the Government under whom local boards of management may investigate and recommend such a system of leasing as may seem to them best adapted for promoting the objects contemplated when the reserves were originally set apart."

O'REGAN J:
Who is this letter to?

MS FEINT:
This letter is to the Governor.

O'REGAN J:
From whom?

MS FEINT:
I'll just go back to the index. That will tell us.

GLAZEBROOK J:
Mr Eyre, whoever he is.

MS FEINT:
Yes, so it's from the Lieutenant Governor of New Munster, which is a southern province to Governor Grey, and so they're talking about how they might handle those trusts in the future. And he also indicates that they should be – that there should be separate accounts kept for the Native Reserve Fund.

So all these documents we say are conduct leading both up to the 1845 grant but also subsequent to the 1845 grant which tends to indicate that the Crown was taking a very active role in handling and managing these properties. And I think the term that my learned friend, Mr Goddard, uses in his submissions is de-facto management but I think those documents clearly show it was considerably more than that.

So I'll turn now –

ELIAS CJ:
He's the Jamaican Eyre isn't he?

MS FEINT:
Jamaican?

ELIAS CJ:
Yes, the one who had the –

MS FEINT:
I don't know.

ELIAS CJ:
I think he then went on to Jamaica and caused trouble.

MS FEINT:
Goodness.

ELIAS CJ:
It was a rebellion and lots of people were hanged.

MS FEINT:
I can't assist you on that matter Your Honour. So now I was going to move onto the Spain Inquiry and 1845 Crown grant, so I'm at paragraph 4 in my outline and at 4.2 and 4.3 I've set out the clear distinction that was made in the grant by Spain and also by Governor Fitzroy between the lands which hadn't been sold, being the park cultivations and burial grounds and the Tenths which were intended as endowment reserves for the benefit of Māori. And that wouldn't be controversial because that was the factual finding made by Justice Clifford but the Crown in their submissions before this Court are effectively contesting that position because they say in their submissions that the Government was trying to reach a fair and workable result in undertaking the exchanges between the Tenths and the occupied lands and that fair and workable result in fact completely breaks down that distinction between unsold occupied lands and the Tenths.

So I wanted to take the Court to the documents that set out how that distinction came about and these are in volume 7 of the case on appeal.

GLAZEBROOK J:
Which is the one we had out just before the volume 7 at seven?

MS FEINT:

It is, it's the top 31 Your Honour. And effectively the position that had been reached in 1842 Halswell had reported to the Governor that he'd selected reserves, Tenths reserves in Wellington for Māori and he had reported to them that he had taken care to select Tenths reserves upon which Māori were living and the Colonial Secretary had sent a reply to him making it very clear that that was not to be done because the Government did not permit the New Zealand Company to select any of the homes or cultivations that Māori were relying upon for their livelihoods. And so the Colonial Secretary had said to Mr Halswell back in 1842, "With reference to your observation that you've taken special –

O'REGAN J:

Where is this document?

MS FEINT:

I'm sorry, this is volume 1 of the supplementary bundle of documents. And it's at tab 34.

ELIAS CJ:

34.

MS FEINT:

Yes. So he's acknowledging there the letter that he's received from Mr Halswell saying that he'd taken special care to secure for the natives their own cultivations and pā and he says, "I'm directed by the Governor to remark that His Excellency cannot sanction native residences, which do not appear to have been originally sold, being included in the reserves for the benefit of the Aborigines. These spots must however," His Excellency remarks, "Be retained by the natives in their own possession and the reserves selected independent of them." And that would seem to follow because the whole purpose of the Tenths was that they were supposed to be the true consideration for the sale of the lands and –

ELIAS CJ:

But the last paragraph has to be read too doesn't it, that –

MS FEINT:

It does.

ELIAS CJ:

– depending on the terms of the agreement for sale and purchase where they have been sold they can be included in the reserves. But I mean is it really helpful to go to this, presumably these terms are a little bit different because here the grant identifies cultivations and pās separately from the Tenths so there's both sorts of reserves?

MS FEINT:

That's right but that distinction arose through the treatment of the Wellington situation and Nelson was very much a follow-on from that. So what had happened in Wellington was there were pā at Te Aro and Thorndon I think and the New Zealand Company had laid out its town over the top of them –

ELIAS CJ:

Yes.

MS FEINT:

– and there was a whole lot of trouble because they couldn't get Māori to move off –

ELIAS CJ:

Yes.

MS FEINT:

– their homes and the oral history evidence is really clear that Māori didn't sell their pā because that's where they were living so why would you because then you'd be put out of your home and the New Zealand Company was warned about that as early as 1842 but they hadn't resolved the problem and then the next document I was going to come onto which is in this volume 7, back in the top 30, was where this issue was finally resolved at this January 1844 meeting which was held in relation to the Wellington arbitration but the same principles were applied to Nelson. So that's how it came about. And that document is at tab 55 of that volume 7 of the case on appeal. And so this had followed on from – Spain had started his inquiry in Wellington in 1843 and that's when it had become clear to Spain that the New Zealand Company purchases looked very flaky indeed and there was some consternation at that because of course the New Zealand Company had brought in thousands of settlers who were living in Wellington and had nowhere else to go and there was an arbitration process had been conducted at that time and part of that process was that the protector of Aborigines came in to represent the Māori interest

and negotiate fair terms for them in relation to these inquiries into the New Zealand Company settlements in both Wellington and Nelson and this is a pivotal meeting, the January 1844 meeting because this was where the agreement was reached that pā, cultivations and burial grounds had to be excluded.

So if you turn over the page to 3369, and so at this meeting a Governor Fitzroy who's effectively stepped in to arbitrate between the parties. There's Commissioner Spain, there's Richmond the Chief Police Magistrate, there's Colonel Wakefield who's there for the New Zealand Company and there's Mr Protector Clark who is the protector of Aborigines. And over at 3669 there's an account there of this argument between them where Colonel Wakefield's trying to say well Māori have sold their pā and cultivations so we claim them as part of our purchase and Mr Spain says, if you see that second paragraph about half way down Mr Spain says, "I've always told you it was contrary to my instructions and out of my power to compel the natives to sell their pā and cultivations. You must be aware that if I exceeded my powers and instructions my acts would not be recognised at headquarters."

GLAZEBROOK J:
Sorry I'm lost –

ELIAS CJ:
About a third of the way down.

O'REGAN J:
Half way down the second paragraph.

MS FEINT:
Yes and then if you go into the next paragraph there's an extract of a letter from Mr Clarke to Colonel Wakefield which is read, dated March 1843, "With respect to their pās and cultivations you observe you are bound and candid to state that it is utterly out of your power to become a party to any arrangement which does not prospectively, at least, provide for the cession of any such lands as already under the sanction of Government have been allotted to individuals or vested in the corporation of Wellington," and then a couple of lines further on, "On the contrary, my official instructions pointedly and repeatedly inform me that under any circumstances the Government will maintain the natives in the possession of their pās and cultivations so long as they are desirous to retain them and I, on my part and on behalf of the

Aborigines, speak to be clearly understood as contrary to my own instructions and utterly out of my power to become a party to any arrangements which stipulate the cessation by the natives of the power and cultivations to the New Zealand Company under any circumstances without their own free consent," and the Governor read that passage twice over and said if Mr Clarke had been sitting before Lord Stanley when he wrote that letter he could not have expressed Lord Stanley's views more clearly.

So they put the pressure on Colonel Wakefield to say, well, it's clear that Māori haven't sold their pā and cultivations and the Government is going to insist that the New Zealand Company purchases cannot include them and, interestingly, in that just before the last paragraph on that page, about four lines up in the penultimate paragraph the Governor makes the point that the settlers who have purchased land from the Company at home, having paid for those lands, have a remedy and action at law against the Company. So it wasn't the Crown's job to provide for those people. They could proceed against the Company but in terms of the Māori pā and cultivations the Government had an obligation to ensure that Māori were protected in those.

His Excellency, this is the last paragraph in that page, then went on to assure the gentleman present that, "The policy of the home Government towards the Aborigines would be founded upon the strictest principles of justice." At the same time he felt it his duty to do all in his power for the welfare and prosperity of so large a body of settlers as had immigrated to the place and he would therefore ask the question he had already put to Colonel Wakefield remarking it was a question of general principle.

ELIAS CJ:

This may well be how it all – this obviously is how it all came about and perhaps you can just simply tell us and give us the references but I'm not sure that it is necessary to give us chapter and verse on all of this because it is indisputable that the grants as made did exclude the powers and cultivations and urupā and the Tenths, and the reserve lands whatever they were.

MS FEINT:

Well I entirely agree, Your Honour, but Mr Goddard does dispute that because when he refers to the exchanges that are made he argues that the exchanges there were made were done to produce a fair and workable result, and the appellants say, well,

they had a right to have their pā and cultivations and burial grounds excluded, consequent upon the 1845 grant having been approved there needed to be either a resurveying or some sort of arrangement made so that Māori would receive or would have reserve to them, both their pā cultivations and burial grounds but also the Tenths which were the consideration for the purchase.

And I think the exchanges that are pointed to in the Crown submissions are the exchanges that Commissioner Spain approved apparently as part of his inquiry in Nelson where he approves the exchanges in the Big Wood, but that big wood was an area that was cultivated by Māori and it also had a pā on one corner of it so it there appellant –

ELIAS CJ:
It should have been excluded not included in the reserves.

MS FEINT:
Yes, the appellants say it should have been excluded not an exchange. I believe the Crown doesn't accept that position and is effectively, therefore, challenging the factual findings that Justice Clifford reached.

O'REGAN J:
So is your case that the Trust relates not only to the Tenths but also to the land that ought not to have been transferred because it was occupied by a pā or an urupa or a cultivation?

MS FEINT:
No, because we would say because that land hasn't been sold it remains in customary title and it has been excepted out of the grant.

O'REGAN J:
But this is a – I mean isn't that really part of the Treaty settlement that's been done with the Crown under the legislation rather than – this is a fiduciary duty claim here isn't it?

MS FEINT:
Well, no. We say it's part of this claim as well.

O'REGAN J:

Well, was it pleaded as part of the claim?

MS FEINT:

It was pleaded that that was the arrangement, that pā, cultivations and burial grounds were supposed to be excluded.

O'REGAN J:

But the declaration you're seeking relates to the Tenths, doesn't it, not to this land?

MS FEINT:

No it relates to both.

ELIAS CJ:

That's what I'd understood.

MS FEINT:

So the declaration that we're seeking was that the Crown is in breach of legally enforceable obligations owed to reserve and hold on trust the one-tenth and to except the pā, burial places and cultivations from the New Zealand Company grant and thereafter properly administer the one-tenth.

GLAZEBROOK J:

Sorry, I haven't been back to the pleadings. Was that in the original pleadings was it, that wording?

MS FEINT:

So in the original statement of claim the pā, cultivations and burial reserves were referred to as the occupation reserves and the claim for relief sought there was a declaration that the Crown was obliged to reserve and hold on trust 15,100 acres in addition to occupation reserves and one-tenth of any further land acquired by the New Zealand Company.

O'REGAN J:

But that's a trust claim, not a customary title claim isn't it? So you're saying the Crown took the land but subject to a trust, is that the claim?

MS FEINT:

Well –

O'REGAN J:

Or are you saying there was never anything that cancelled the customary title of the original owners?

MS FEINT:

That is the claim as put in the High Court in relation to the occupation reserves but given the wording of the Crown grant that except the pā, cultivation and burial grounds from it, that can't have the effect of extinguishing customary title.

ELIAS CJ:

Well that's a flagged issue.

GLAZEBROOK J:

And just so I can be clear, what's said against you in terms of the Crown's submissions is that this is the first time here that that's been raised. So it doesn't look, as you say, as if it had been raised in the High Court because it was a trust claim in the High Court for the occupation lands as well as for the Tenths – well, endowment land shall we call them because I quite like that endowment and occupation. It's quite a good split. So – and it doesn't seem to have been put in quite that way in the Court of Appeal either does it?

MS FEINT:

No it was put that way in the Court of Appeal in relation to the occupied lands. So in the Court of Appeal we said the occupied lands have not had customary title extinguished because in principle if they hadn't been sold –

WILLIAM YOUNG J:

But in reality there are titles issued in relation to this land? I mean all of the land is subject now to the Land Transfer Act, I take it, except some of it will be subject to the Te Whenua Māori Act but there's no, as it were, unaccounted for land?

MS FEINT:

Well there are a few fragments of untitled land that is not subject to the Land Transfer Act.

WILLIAM YOUNG J:
So what's happening on that land?

MS FEINT:
I don't know Your Honour.

WILLIAM YOUNG J:
Okay, well leave that aside.

MS FEINT:
Mhm.

WILLIAM YOUNG J:
Something has happened, leaving aside some items of land that we can't identify at the moment, the occupied land as it was in the 1840s is now subject to one form of title or another.

MS FEINT:
That would be the case in relation to – yes.

WILLIAM YOUNG J:
The past cultivations, et cetera?

MS FEINT:
Yes, virtually all of it, yes.

WILLIAM YOUNG J:
So can you say customary title survives and if you do what does it mean?

MS FEINT:
There would need to be an inquiry into the extent to which customary title survived.

WILLIAM YOUNG J:
Say it's held under the Land Transfer Act –

MS FEINT:
Mhm.

WILLIAM YOUNG J:

– can you have an inquiry as to that being subject to customary title?

MS FEINT:

No.

ELIAS CJ:

You can change its status, can't you, under Te Ture Whenua Māori? You could –

MS FEINT:

You can if it's still owned by Māori.

ELIAS CJ:

I'm not sure whether you can change it to customary or whether it just goes to Māori land.

WILLIAM YOUNG J:

No it would be just –

O'REGAN J:

Well if it's not under Te Ture Whenua Māori Act you wouldn't be able to, I don't think.

ELIAS CJ:

No, maybe not.

WILLIAM YOUNG J:

So what I just, what I'm really trying to get at, what do you mean by saying it's customary land or customary title that hasn't been extinguished? It might be difficult to identify precisely how –

GLAZEBROOK J:

Or do you say it hadn't been extinguished until –

MS FEINT:

We're saying it can't have been extinguished by the 1848 grant because a Crown grant cannot have the effect of extinguishing subsisting equitable or customary title

rights, that's the nemo dat principle. There is legislation subsequent to 1848 which has the effect of extinguishing customary title in relation to Land Transfer Act land.

O'REGAN J:
So the claim is for a failure to recognise the customary title rather than a claim that there is still a customary title, is that right or have I misunderstood you?

MS FEINT:
Well to the extent that there's land that is not subject to a title. It may still be in customary title because it is never, you have to have plain and clear extinguishment of customary title.

WILLIAM YOUNG J:
Have we got any – is there a document somewhere that identifies the land which is not subject to title at all?

MS FEINT:
There was evidence given by Mr Ingram, I believe he was cross-examined on this point so I will get you the transcript references, Your Honour but the – so in the 1882 Reserves Act it deems New Zealand Company reserves to be included in the Act and for customary title to have been extinguished. So certainly –

ELIAS CJ:
Sorry, which Act is that?

MS FEINT:
That's the 1882 Act.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
Native Reserve Act 1882.

MS FEINT:
Yes, do you want to look at that now?

GLAZEBROOK J:

Although you'd presumably still say that that doesn't apply to the occupation lands, wouldn't you?

WILLIAM YOUNG J:

But if the occupation lands got 12 – can we see what the Act says because –

MS FEINT:

Yes. So it's tab 18 of the legislation volume which is the pink one.

ELIAS CJ:

Tab 18 –

O'REGAN J:

Volume 1 of the authorities.

GLAZEBROOK J:

Tab what, sorry?

MS FEINT:

18. That's right it's section 3, section 3 –

GLAZEBROOK J:

"Excepted or reserved."

MS FEINT:

Subsection (5), "Land reserves for the benefit of natives by the New Zealand Land Company is deemed to be a native reserve."

WILLIAM YOUNG J:

"Reserved or Excepted."

GLAZEBROOK J:

Does that include the excluded lands then? I wonder what "excepted" meant?

MS FEINT:

Well no it won't include all of them.

ELIAS CJ:

No it's only reserved.

WILLIAM YOUNG J:

No it's only reserved by the New Zealand Land Company.

MS FEINT:

So that will refer to the Tenths land.

GLAZEBROOK J:

Tenths land. Although you wonder because at that stage they were treating them as interchangeable –

MS FEINT:

Yes.

GLAZEBROOK J:

– so you wonder whether this was meant to include the occupation lands as well.

WILLIAM YOUNG J:

Well is there an example of occupation land that was identified as such in the 1840s and not incorporated in the Tenths?

MS FEINT:

Yes there were reserves over in Golden Bay.

WILLIAM YOUNG J:

Okay so they –

MS FEINT:

They were identified.

WILLIAM YOUNG J:

So what's happened – they might be a good example, what's happened in the title to those reserves?

MS FEINT:

Those reserves, as I understand it, ended up being managed as part of the New Zealand Company reserves I think and –

ELIAS CJ:

What part of the Tenths?

MS FEINT:

Yes.

GLAZEBROOK J:

Because they do seem to have been treating them as interchangeable don't they?

MS FEINT:

Yes, there is never a clear delineation made between occupied lands and Tenths lands in fact but there may have been a distinction in law, given the terms of the grant.

ELIAS CJ:

And you're only making the submission really on the basis of the difference in language between excepting and reserving are you – is there more?

MS FEINT:

And the provenance of the occupied lands as not having been sold.

ELIAS CJ:

Yes, except the whole territory was arguably sold. They weren't excepted in the deed of purchase.

O'REGAN J:

They may have been –

ELIAS CJ:

I think they were in the deed of purchase.

WILLIAM YOUNG J:

They were probably excepted in the mop up deeds though, in the receipts.

GLAZEBROOK J:

Yes.

MS FEINT:

Can we look at the deeds of release because they were excepted in that?

ELIAS CJ:

By the way before you leave section 3 of the Native Reserves Act 1882, I have no clue but is section 3(3), was any of this land by virtue of that '56 and '62 Act subject to the provisions of the New Zealand Native Reserves Act 1856?

MS FEINT:

Well it was treated as if it was but –

ELIAS CJ:

Well it's just that if, if that applies then you don't need to worry about lands reserved for the benefit of the natives by the New Zealand Land Company because this land has already been treated as subject to native reserves. That (5) would be a mop up really.

MS FEINT:

Except that they, there are a number of Acts where they are treated and listed separately.

ELIAS CJ:

Well I'm just flagging it's not clear to me that you're driven to section 3(5) and the effect of this maybe to prevent the argument you're putting forward if the lands, that's the occupation lands as well as the Tenths lands come under section 3(3)?

MS FEINT:

Well in that case can we return to this tomorrow?

ELIAS CJ:

Yes, well yes. If you can find out anything more, it's just you know it would be really nice to get at least the law right on this, we may not be able to get the facts right.

GLAZEBROOK J:

Isn't the argument that, as Justice O'Regan put it, that they should have left it out and it clearly hasn't been left out at least under the Land Transfer and possibly under the 1856 and certainly wasn't in practice as they were treating it as interchangeable. Is that…

MS FEINT:

Yes that, well both categories actually. There were occupied lands on Tenths but there were also occupied lands outside the Tenths that weren't reserved separately at all.

ELIAS CJ:

But there are two things here, aren't there. There's the status that they have, whether they're excluded or they are reserved, and they're reserved lands, and there's whether they're cumulative reserves because that also is the complaint you make, that the occupation lands should have been added to the Tenths in terms of the scope of the reserves?

MS FEINT:

That's right, well or at least that if you exclude the occupation reserves you should still have the full tenth after that.

ELIAS CJ:

Well I would have thought you were saying we should have had, as reserves, the Tenths plus all the land occupied.

MS FEINT:

Yes, yes, that is exactly what we say.

ELIAS CJ:

Yes, so that even if you don't succeed on the argument that the occupied lands didn't come into – weren't properly treated as native reserves at all, even if you don't succeed on that you've still got the cumulative argument.

MS FEINT:

Yes.

ARNOLD J:

When you come, you're coming back to this tomorrow, can you just explain it. I don't quite understand where section 19 kicks in because it says, it talks about native reserves where native title hasn't been extinguished.

MS FEINT:

Mhm.

ARNOLD J:

And so the fact that something is defined as a native reserve doesn't necessarily mean that native title has not been extinguished and so do you go somewhere else to find that out, whether the native title's been extinguished? In other words it's not the classification of native reserve that determines it, it's something else.

ELIAS CJ:

Well it's the Crown grant and then that's the argument as to whether the excepted lands are included within the Crown grant.

MS FEINT:

Or accepted and as the Crown submissions pointed out, the occupation reserves that were made over in Golden Bay in 1846 and 1847 were treated by the Crown as not having a customary title extinguished, but it's not really clear why they treated those ones separately from the New Zealand Company reserves. I don't –

ELIAS CJ:

So were they under a subsequent purchase?

MS FEINT:

No they weren't.

WILLIAM YOUNG J:

Well they were under the receipts weren't they?

ELIAS CJ:

Oh, one of the receipts were they.

WILLIAM YOUNG J:

Wasn't that the one where that wasn't signed initially and then was signed in 1846? Sorry, where it was paid for in 1846.

MS FEINT:

The deed of release. Yes, I'm not sure that that would affect it though. They seem to be treated as not being part of the 1845 grant because they've been made subsequent to it. But I can't –

WILLIAM YOUNG J:

But wasn't that deed of release signed before the Spain War but the money was only paid afterwards? The £290?

MS FEINT:

Yes. That's in relation, yes, in relation to the Golden Bay Māori. But that, it was all, because it was all treated as one purchase I can't see why that would be the distinguishing feature. So the deeds of release, to be clear –

ELIAS CJ:

What are the dates of deeds of release again?

MS FEINT:

So they're dated the 24th of August 1844, the ones that were signed on the day that Spain concluded his inquiry.

ELIAS CJ:

Yes.

MS FEINT:

So they're at tab 58 of volume 7. And those deeds of release except the pā, cultivations, burial places and wāhi rongoa. And Alexander Mackay who translated these documents because they were in te reo says it was difficult to give a correct interpretation of that term.

GLAZEBROOK J:

Where's this, sorry, re 401?

MS FEINT:

So in the footnote you see the asterisks he's made.

ELIAS CJ:

It's tab 58.

GLAZEBROOK J:

Yes I'm trying to find the –

MS FEINT:

In the footnote at the bottom of the page.

GLAZEBROOK J:

Okay, sorry, I've found it now.

MS FEINT:

And we had Ropata Taylor translated those deeds of release again and that translation is at tab 41 of the first supplementary case on appeal.

O'REGAN J:

This is the one from three days ago?

ELIAS CJ:

No.

MS FEINT:

Yes it is.

ELIAS CJ:

Is it? I thought you said volume 1.

MS FEINT:

So the translation he's made tends to suggest that the deed of release may not have made a whole lot of sense to Māori who read it but some of the points that he refers to so it's clear at least that our areas of occupation, cultivations, wāhi tapu and wāhi rongoa will be left to us. He makes the point in footnote 4 that wāhi tapu is a wider term than simply a burial place, it could include a burial place but it may be any place

that's tapu. It can refer to places that are prohibited, restricted, sacred or which commemorate an important event. And then in terms of wāhi rongoa because rongoa normally would be understood as referring to medicine but he can, he says it can mean places of healing, physically, spiritually or socially, for example, healing the community. And the Wellington Waitangi Tribunal actually suggested wāhi rongoa was supposed to refer to the Tenths Reserves.

The other point to note from this translation is that the expression tuku whenua is used in tikanga Māori; tuku whenua is not a sale so much as a transaction based on reciprocal obligations which may mean that land is given in exchange for someone living on it and becoming part of your community but it doesn't necessarily mean that the land is going to be alienated permanently and certainly the evidence that Te Iti who was the chief who gave evidence before Spain's inquiry in Nelson tends to suggest that Māori hadn't understood that an outright alienation was going to be the result, or certainly not in 1841 when they met at Kaiteriteri but it does seem to me it's reasonable to suppose that between 1841 and 1844 there was an evolution in understanding because, after all, the land had been surveyed, settlers had moved onto it and it became apparent that something much more was happening than perhaps what might have been intended initially.

GLAZEBROOK J:
Although from that oral evidence they were assuming they would move in and they would be mutual benefit between them so that, although it mightn't have been seen if they'd gone away they wouldn't have kept the land. They were assuming that they would come and live among them. In fact that was the very idea that they had.

MS FEINT:
That's right. That's exactly right but prior to that most of the transactions that had taken place in the previous decades would've been, we say whalers and sealers had come in and they tended to be absorbed into the communities, as opposed to a whole new community coming and setting itself up.

And if you look at Te Iti's evidence under tab 57, I think that makes that pretty clear. So in volume 7 the top 30 volume of the case on appeal. If you go to tab 57.

ELIAS CJ:
Sorry, in volume 7?

MS FEINT:

And if you flick over to the transcript, that's at page 3390. So he was one of the chiefs of the Motueka district, Ngāti Rarua and he said he was present at Kaiteriteri and he's questioned about – see half way down the page there on 3390, "Did you consent on that occasion on receiving these goods to allow the occupation of the land by the settlers?" "Yes, on that occasion I did consent for the Europeans to settle but not to take all the land." "Was it not explained to you that there would be reserves for the natives and did you not perfectly understand it?" "I did not understand that from Captain Wakefield there was to be one part reserve for us. I said I would point out to Captain Wakefield what part I would let them have. Mr Wakefield said, "Don't be afraid. This will not be the last payment you will have for me". I still persisted in showing Wakefield the land he should have. I showed him from Kaiteriteri outwards to the ocean and when I showed him it was done, afterwards he encroached and came on this side."

And then if you go over to 3393 and if you read right through it he says repeatedly he consented for the Europeans to come but not to take all the land. And then at the top of 3393 he's asked, "Did not Mr Brooks tell you and the rest of the natives assembled at Kaiteriteri that the whole district would be surveyed and a certain proportion of the land would be set apart for the use of the natives?" "No, I did not understand that. I thought the survey was a mere form." And then he goes on to say, "I did not exactly understand Brooks' meaning at that time but I have lately understood it." So it seems that there was what Professor Williams called mutual incomprehension in 1841 but by 1844, because of what was happening on the ground, there was an evolution in understanding what was going on. But when Brooks gave evidence, his evidence was that he was marking out in the sand a checker board and saying every tenth will be kept for you.

So then turning to tab 59, that's Commissioner Spain's report, I think Professor Williams said it most clearly when he said that Spain, in effect, decided that the further payment that had been made to the hāpu and whānau who occupied the Nelson settlement district cured the deficiency of the original purchase. So after Te Iti's evidence Wakefield asked for the inquiry to be adjourned and then they went away and he arranged to pay a further £800 to the various hāpu and that's the point at which the deeds of release were signed. And we've included in the supplementary casebook the diaries from Meurant, one of the other Europeans who was there who

say they attended that meeting on the last day of Spain's inquiry and that Māori appeared satisfied with the result of the transaction.

So the former Spain's report was a report into case number 374A and 374B. That's the Kapiti and Queen Charlotte deeds and in effect, I don't think we need to go right through it, he found that the resident Māori who lived in the Golden Bay and Tasman Bay areas have been amply remunerated by the further payments and the original gifts made to them that they were satisfied with the transaction, and so he made the grant in the terms set out. He rejected Ngāti Toa's claim and he also rejected the New Zealand Company claim to the Wairau purchase, and it was his rejection of the Wairau claim that left the New Zealand Company short of land because they needed that 80,000 odd acres over in the Wairau in order to make up the full amount of land that they had under their prospectus.

So that, then, takes us to the Crown grant which we say crystallises the Tenths entitlement and the Crown's obligations, and confirms that the pā, burial grounds and cultivations had not been sold. The grant itself is in the ownership bundle that has been filed and that's got the –

ELIAS CJ:
Is it also in 7?

MS FEINT:
Yes it is in 7 as well.

ELIAS CJ:
At 3418. I've just moved onto that one.

MS FEINT:
But the plan – is the – the plan's not in 7.

ELIAS CJ:
I see.

GLAZEBROOK J:
Now that's in what, the ownership volume?

ELIAS CJ:

The ownership volume.

GLAZEBROOK J:

Which is what?

O'REGAN J:

It's called the ownership volume.

ELIAS CJ:

You see it's ownership bundle. It's the one that came in in response to our minute.

ELIAS CJ:

Yes, I've seen it somewhere.

ELIAS CJ:

Where is it in the ownership volume?

MS FEINT:

Tab 8.

ELIAS CJ:

You can see it minus the plan.

MS FEINT:

So if you look at it, in the ownership volume you can see the plans as well.

O'REGAN J:

What tab is it?

MS FEINT:

Tab 8 and tab 9. So the wording of the grant refers to the number of acres that the New Zealand Company is entitled to in each district and it says, in relation to both Motueka and Massacre Bay district, that's Golden Bay, those areas are partly surveyed. The remaining quantity required to be selected from the portions of land coloured red. And then if you look at the plans under tab 9 –

O'REGAN J:

Is this this plan?

MS FEINT:

Yes it is. That's it in one thick one. It's got a boundary around the districts and some of that correspondence we went through in our Crown ownership statement showed that the Governor waited until he could put a boundary around each dispatch, even though the whole thing hadn't been properly surveyed before he issued the grant, and then within the boundaries those areas are coloured red, and the green sections are the Tenths Reserves that had been allocated at that time, so that's the town and accommodation section. But in relation to the accommodation sections they didn't include the exchanges that were ostensibly arranged during the Spain Inquiry. I've gone through in some detail in our Crown ownership statement what happened, both in the process of drawing up the grant and after that, so I probably don't need to go through that again, but suffice to say the New Zealand Company wasn't happy with the terms of the grant. The Governor was instructed to enquire and take such measures as may be within his power to adopt. So those instructions were sent from London and I've referred to that in 5.1(a) of my outline. That document is in that supplementary case on appeal volume, I don't think we need to go there. There were no steps taken is, of course, no right of appeal under the Land Claims Ordinance process, and there were no steps taken to annul the 1845 grant and indeed as Mr Galbraith said this morning, the New Zealand Company proceeded, in some quarters at least, on the basis that the 1845 grants for both Wellington and Nelson were valid, even though it had said it wouldn't accept them in that form and the *Scott v Grace* litigation was a test case that the New Zealand Company had taken based on the Wellington 1845 Crown grant to test its claim against an old land claim, so a prior claimant.

ELIAS CJ:

Where do we find that?

MS FEINT:

That is in the supplementary bundle of authorities that was handed up this morning.

ELIAS CJ:

The supplementary casebook?

MS FEINT:

Yes. We've done a very poor job of distinguishing between all these different bundles. Tab 15. And the New Zealand Company lost that case actually but that's because the old land claimant had established a prior claim and so fell within the exceptions of the 1845 grant.

ELIAS CJ:

So what are we meant to take from this?

MS FEINT:

Well simply the point that the New Zealand Company didn't regard the –

ELIAS CJ:

Oh I see.

MS FEINT:

– grants as invalid.

ELIAS CJ:

Yes.

MS FEINT:

It regarded its purchase as having been confirmed, it was trying to get some of what it called the loose exceptions pinned down. So subsequent to that Governor Grey had replaced Governor Fitzroy and in effect what happened and Justice Clifford accepted this on the basis of the evidence. Governor Grey decided to abandon the Tenths' scheme and replace it with a policy of instead reserving for Māori land that was sufficient for their wants, and that's set out in volume 7 of the case on appeal, at tab 63. So here is reporting back to London on the investigation he has made of the New Zealand Company's complaints, that shove out the elevenths, not the tenths, the prior land claimants, and the exceptions for the pā cultivations and burial ground, and he says that he agrees that the description of the pā burial grounds and cultivations was very vague and that there needed to be some better delineation made of where those places were.

ELIAS CJ:

This is all in respect of Wellington, isn't it?

MS FEINT:

No it's Nelson as well, this letter refers to both Wellington and Nelson.

ELIAS CJ:

Okay.

MS FEINT:

So just to short circuit this, if you go over the page to 3426, so three paragraphs up from the bottom he says, "What should at once be settled is, what lands are included in Governor Fitzroy's arrangement? These should at once be defined and surveyed." So he's saying they need to make proper reserves for those areas that are in cultivations, and then at the bottom of the page he says, "I think it proper to observe generally, that the system of Native reserves as laid down by the New Zealand Company, although an admirable means of providing for the future wants of the aborigines, is in some respects insufficient for their present wants, and ill adapted for their existing notions." Then on the following page he refers to the same process needing to be gone through in relation to Nelson.

ELIAS CJ:

So he too though is saying that it's important to reserve not only the reserves to them but also the lands they're occupying and cultivating.

MS FEINT:

Yes, that's right. But in effect what happens is that he'll – so there haven't been reserves made in Golden Bay at that time, there were reserves made for the occupied areas and then he said, well, set aside some land for their future wants as well and a further 500 acres was reserved, which meant that they got around 1000 acres of reserves over in Golden Bay, which was a long way short of what the original Tenths entitlement would have left them with.

So moving on to paragraph 6, I think we can finish all the facts today. I set out there how there was a plan to select the rural Tenths in Golden Bay in 1846, but that didn't proceed at that time. So those were the letters we looked at this morning actually there. The police magistrate wrote to the Governor and got authority to go ahead and select them and then the New Zealand Company effectively said, shall we go ahead and select them, and the settlers refused because they wanted the full number of rural sections to be surveyed out before they went ahead with the selection

process. Because what happened under the ballot system, you had a number by ballot and then you, that determined the order in which you could select the sections and in effect the rural sections were made up from the Wairau as well as Golden Bay. So although there were enough, there was enough land in Golden Bay to select the full complement of rural Tenths, that didn't happen at all because in 1847 the Crown decided to abandon the Tenths' scheme and the Governor excused them from proceeding with that and in those letters that I've set out in paragraph A of 6.1, the police magistrate writes several times and says, so just to be clear you're telling me I don't need to select the rural Tenths now, I just select as much land as I want and Governor Grey says yes, 3000 acres is far too much, just give them 500, that will be sufficient. And the other justification the Governor gave was that there had been reserves made in the Wairau purchase but given that that was a different purchase with different hapū with interests there, that had no impact at all.

O'REGAN J:
Were there actually reserves from the Wairau purchase?

MS FEINT:
Yes there were.

O'REGAN J:
But not for this group of claimants?

MS FEINT:
No, so the Wairau purchase was made with Ngāti Toa and I think some Rārua who had interests in the Wairau, were included in the reserves there.

ELIAS CJ:
Those reserves, I'm getting confused, those reserves were not based on anything like the Tenths calculation, is that right?

MS FEINT:
No.

ELIAS CJ:
They were done on what was thought to be necessary to support Māori, is that right?

MS FEINT:

Yes, they were negotiated as part of the purchase –

ELIAS CJ:

Raise, yes.

MS FEINT:

Yes, and then they went fairly quickly. They were lost after that. Because Ngāti Toa were under pressure at that time because Governor Grey had detained Te Rauparaha without trial and he was held for some 18 months and they were using that to put pressure on them which is why I've said in my outline that he was described as ruthless and high-handed by the Waitangi Tribunal for his actions both in relation to the Wairau purchase but also the 1848 Crown bid.

So then coming onto – oh, and I should just say in passing, there was one small error in Justice Clifford's judgment. I thought he did a sterling job on the evidence as a whole but he said at one point it wasn't clear to him whether rural sections had ever been reserved for settlers in the Nelson settlement, and they definitely were, and I've put a reference in that supplementary case on appeal to those sections having been selected. So the settlers got their full complement of town accommodation and rural sections, it was just Māori that didn't.

So the removal of the 47 town sections, that is set out most clearly in the Mitchell's reply brief of evidence and the point they make, which I think I can just make by explaining to you here, is that the remodelling of the town did not reduce the overall number of sections in Nelson town, all it did was, they put sections back into the pot and had a redistribution so that settlers had a chance to select better sections and they were retained 53 sections for the Tenths and put 47 sections back into the pot on the basis that Māori should get one-tenth of the sections that had been sold to settlers as opposed to one-tenth of the land that had been acquired by the New Zealand Company and that reduction was approved by the Crown and I've put the references in the supplementary case on appeal volume there. Then coming onto –

ELIAS CJ:

Oh, yes, sorry. Thank you.

MS FEINT:

Did you have a question?

ELIAS CJ:

No, it's fine.

O'REGAN J:

So who was actually the trustee of the Trust at this time, on your –

MS FEINT:

There wasn't one so between 1844 and 1848 there was no one managing them so nothing was happening but –

ELIAS CJ:

Was anyone receiving rents?

MS FEINT:

Well some of them were in arrears.

O'REGAN J:

They must have been paid to someone?

MS FEINT:

Yes, because there was a bank account. When the – someone had to select the sections that were being removed and that was, I think, let me just check, the superintendent of Nelson so in our supplementary case on appeal, volume 2, at tab 80, the superintendent of Nelson is writing to the colonial secretary and he says, according to the request of the New Zealand Company which has received the sanction of the Governor, a reduction in the number of native reserves proportionate to that proposed in respect of the whole settlement should be made and I have withdrawn the requisite number of town allotments 47. I notice he says in the footnote there, there's a charge against the trust for the selection of 100 sections by the late Mr Thompson. So there were some negotiations going on at that point over whether Mr Thompson should be paid for the work that he'd done in managing the Trust at that earlier time. He'd been killed in the Wairau incident. And those documents that I referred you to straight after lunch cover that exchange. I think they ended up paying him £100 or so or £200.

So then as we've discussed already the third complaint is the failure to except the pā cultivations and burial grounds from the land granted to the New Zealand Company and Dr Gould's evidence was there should have been a re-survey done so that you could make sure that you excepted the land that was occupied which didn't happen. There were definitely pā and cultivations within Tenths' sections at Te Maatu, which is the big wood, and also Auckland Point and Mr Morgan in his evidence identifies a number of other areas. And then there was a process where Crown officials were asked whether there were any other pā and cultivations within the boundaries of the Nelson settlement land awarded by Spain, except those already reserved for Māori, and the replies back were, no, there are no other pā and cultivations within this 101,050 acres and the evidence given by the appellant was there definitely were pā and cultivations outside those areas and that tab 81 had a map of those pā in the Motueka area, that's in the second case on appeal. That just shows you a map of where the pā were in the Motueka area and the ones that have been highlighted, they're the ones with that grey fuzz over them, were the pā so Puketutu, Putarepo, Pounamu, Te Kumera, Whakapaetuara , Hui Te Rangiora and Puketawai.

O'REGAN J:
And these were ones that weren't properly excluded, is that right?

MS FEINT:
That's right. Some were outside the Tenths' sections and some were within it so Te Pounamu Pā was one of the ones and Te Maatu, the big wood that ended up as an occupation was – so in the 1848 Crown grant all the reserves that had been identified by that time, which were the Tenths Reserves, those that had been exchanged, and the extra occupation reserves reserved over in Golden Bay, and also the ones for the future needs of Māori in Golden Bay, they were all set out on the plans attached to the 1848 Crown grant. But you notice looking at the 1848 Crown grant, which is at tab 11 of the ownership bundle, that it uses the language, "Also excepting and reserving all the pās, burial places, and native reserves situated within that said block of land granted to the New Zealand Company."

There's then a whole series of plans attached. So the first plan shows you the whole area of the 1848 Crown grant and then there's a whole succession of plans which set out respectively the plans that have been made over in Golden Bay.

O'REGAN J:

But this area was more particularly described elsewhere, was it, because there were already a lot of sections already surveyed by now, and Tenths already established, so is this, this is just the area that the grant covers, it's not saying the grant is of all that land.

MS FEINT:

It says the grant –

O'REGAN J:

It says the gross block of land is what –

MS FEINT:

Yes.

O'REGAN J:

– it describes it as, I don't know what that means.

MS FEINT:

But then it excepts, as well as the pās, burial places and native reserves situated within the block of land described on the plans annexed, and then it says –

O'REGAN J:

Oh I see, so you have to go to the other plans?

MS FEINT:

Yes.

O'REGAN J:

Okay.

MS FEINT:

And then it says together with all and every rights and appurtenances whatsoever there to belong.

O'REGAN J:

That's really helpful.

MS FEINT:

That would except any other existing interest.

ELIAS CJ:

So for our purposes what changes apart from the additional lands? The Wairau lands, are they in here? From the 1845 grant.

MS FEINT:

Yes so Governor Grey had bought the Wairau and he made that available to the New Zealand Company and he said to them you can select the lands you need from within that block and use that for your Nelson settlement, and they said, no we don't want to do that, we want you to give us all this land and we'll enter into a side agreement but we'll re-convey to you the land that we don't need from within that. So there is, I've put in my outline where those letters were exchanged, that was in 7.1, and they basically said to restore public confidence we just want you to convey us the whole block, make it look like an absolute grant, even though it's clear that there was customary title lands within this area where rights hadn't been extinguished because it hadn't been the subject of a purchase, and that's seen most clearly, there's a map attached to the Court of Appeal judgment, which is in volume 1 of the case on appeal. So the Court of Appeal judgment is at tab 12 and if you go over to page 304 there's a map there that shows the New Zealand Company grant of 1845, although that appears to be a larger area than was included in the 1845 grant itself and it also shows the Wairau purchase and then it indicates there's a wide area outside those two purchase blocks that would still be subject to customary title and as I said earlier it appears to me on the terms of the loans at 1847 that they were given the right of pre-emption under that Act.

ELIAS CJ:

Was that ever exercised?

MS FEINT:

No, my understanding is –

ELIAS CJ:

So just a passing phase? Well they were in trouble by then anyway.

MS FEINT:

They were. They actually didn't issue any titles before they collapsed in 1850 so the whole lot came back to the Crown and then the Crown had to sort it all out. But it's quite clear there was no further, and I think the Crown in their submissions are saying, well the 1848 grant was the combination of the 1841 Ordinance inquiry in my submission it plainly wasn't if you look at the evidence it's quite clear that after Fitzroy approves Spain's report there's no further investigation into the New Zealand Company's purchase. What happened was that Governor Grey went and purchased the Wairau so he could make that available to the New Zealand Company and that gave them the extra land they needed. Although there were discussions between 1845 and 1848 between the Crown and the New Zealand Company, Māori weren't represented by that time because the protector of Aborigines had been disestablished by Governor Grey and it's not even clear the extent to which they were even told let alone involved in those decisions which resulted in the Tenths Trust losing a lot of land between 1845 and 1848. They lost the rural Tenths, they lost the 47 town sections and then there were all those exchanges where they had to give up tenths so that they could keep their occupied land including in particular 800 acres in Te Maatu and the evidence was really clear, both in Spain's report and also the oral history evidence and various contemporaneous documents at the time, that Māori had always said from the outset Te Maatu was to be excluded from the New Zealand Company purchase. So I see that's -

ELIAS CJ:

Are you taking us to the Loans Act?

MS FEINT:

Yes, shall we do that to finish off the day? I'm conscious it's 4 o'clock. So the Loans Act is in our legislation bundle, point 1 at tab 9, and the preamble sets out in quite some detail the New Zealand Company colonisation scheme and how they're advancing them a loan and effectively the arrangements were that a loan would be advanced to the New Zealand Company to prop them up and in exchange they would become the agent for the Crown in the colonisation of New Munster so section 2 says that all the demesne lands of the Crown in the province of New Munster and all the estate and right of Her Majesty or power and authority over the same shall be absolutely and entirely vested in the New Zealand Company in trust for the purposes and subject to the provisions herein after contained and those powers and rights and authorities can be exercised and administered by the

company in all respects as to the, as shall seem best fitted to promote the efficient colonisation of New Zealand.

ARNOLD J:
Did you say this morning that under this the company could extinguish native title?

MS FEINT:
Yes, that's my understanding, because –

ARNOLD J:
Well I was a bit puzzled by that because what the, if you look just above the section 2 bit, there are a number of savings. What the Act does is suspend certain legislation but it saves some including legislation relating to the claims of the Aboriginal inhabitants to land, and then if you look towards the end of the Act, in section 12 – sorry, 22, "Nothing herein contained shall invalidate or in any manner alter or affect…ordinances.. regulating the sale of lands belonging to the aboriginal inhabitants." So all they are getting is the demesne lands of the Crown, that is land that is already in Crown ownership. They're not able to effectively cancel native title in any way, are they?

MS FEINT:
Well except it does say in section 6 that they can use all monies that come into their hands in the compensation to be made to Māori for the purchase or satisfaction of their claims, rights or interests in the said demesne lands. That's curious for a number of reasons, one of which is our understanding of the demesne lands is that they only become demesne lands of the Crown once the [inaudible] and all title has been extinguished.

WILLIAM YOUNG J:
So is this just referable to the South Island or does it also encompass Wellington and New Plymouth?

MS FEINT:
New Munster finished at Patea River so it would include Wellington but not New Plymouth so it's the lower North Island.

WILLIAM YOUNG J:

How is this timed in relation to the Wairau purchase? Is it…

MS FEINT:

I think the agreement was reached between the New Zealand Company and the Crown in 1846 and this legislation is passed July 1847 and the Wairau purchase was, it will be in our chronology, I can't remember if it was –

WILLIAM YOUNG J:

So it's intended to encompass that purchase.

MS FEINT:

Sorry?

WILLIAM YOUNG J:

It's intended to encompass that purchase or did it bite on any later acquired, any land later acquired by the Crown, as demesne land?

MS FEINT:

It would encompass that purchase because that was demesne land of the Crown.

WILLIAM YOUNG J:

But only demesne land after the purchase?

MS FEINT:

Yes. And so one issue is the Act had the effect of vesting the land in the New Zealand Company through the Act, it's not entirely clear why the 1848 grant had to include that wider area. But then as I mentioned earlier there is evidence that the New Zealand Company asked for that to satisfy public confidence in their purchases. There's quite a good account of the negotiations between the Crown and the New Zealand Company in Dr Gould's Tribunal report which we put an extract in the supplementary case on appeal at tab 90.

ELIAS CJ:

Sorry, 19 or 90?

MS FEINT:

Nine zero.

ELIAS CJ:

So which volume is that, 2?

MS FEINT:

The Wairau purchase is completed in March 1847 I'm advised, so that's in the statement of agreed facts.

ELIAS CJ:

But nothing was done under the 1847 Act beyond the taking over of the New Zealand Company assets and obligations in 1850, is that right?

MS FEINT:

That's right.

ELIAS CJ:

So for our purposes, I mean it's background, but – and that came under what, I can't remember now what provision that was –

MS FEINT:

It was section 19 of the Loans Act. So the Loans Act didn't affect existing contracts or liabilities. It didn't, as Justice Arnold pointed out, invalidate the ordinances relating to the sale of land of Māori, so that was section 22, and then section 19 was the section within which following the collapse of the New Zealand Company the lands, tenements and hereditaments of the Company would then revert and become vested in the Crown as part of the demesne lands of the Crown. But then it's got that proviso, subject nevertheless to any contracts which shall then be subsisting in regard to any of those lands and upon the condition of satisfying any liabilities to which the Company may then be liable under their existing engagements. So that re-vesting again under the nemo dat principle and under the express terms of this section was done subject to any existing rights and in relation to the New Zealand Company's liabilities there is then a process followed for granting title to the New Zealand Company claimants.

ARNOLD J:

It's also interesting that the preamble to the Act, if you look at the top of the page, well on the Act it's 1014, it says, "Whereas the said Company have acquired or become entitled to large tracts of land in the said colony," and so on, and so on, but of course they didn't have, they hadn't accepted the Crown grant at this point –

MS FEINT:

Mmm.

ARNOLD J:

But they are treated as having either acquired or become entitled to large tracts of land, so it's recognised that there is an underlying contract, I guess, for sale and purchase of the land of Māori.

MS FEINT:

Yes, that's right, and that very much comes out of the documentation that they treated that, 151,000 acres, as being an entitlement to which, I think, they've been known to expunge the conditions that they weren't happy with and add the Wairau leg. So is that a convenient place to finish for the day?

ELIAS CJ:

Yes, can I just check with you, does that complete what you want to say about the 1848 Crown grant and have you, in fact, taken out of order what you wanted to say in eight, so are we at the end of the facts?

MS FEINT:

Yes.

ELIAS CJ:

Subject to any tidy up you want to do arising out of today and then where are we going with the submissions for the appellant, Mr Galbraith? We're going back to you are we?

MR GALBRAITH QC:

Yes.

ELIAS CJ:

We haven't got a road map for you so I'm just trying to work out where –

MR GALBRAITH QC:

It will be, I need to talk about the terms of the declaration, because I don't – the terms of the declaration which are in the notice of appeal, I think they need amending, that's the first thing. The second thing, I will then be talking about ownership, the sort of issues that Your Honour was raising this morning and then thirdly, express trusts; fourthly, fiduciary and then I suppose relief, limitation, standing and the excluded provisions in the settlement.

ELIAS CJ:

Well how are you tracking to complete by three tomorrow?

MR GALBRAITH QC:

I will.

ELIAS CJ:

Thank you counsel, we'll take the adjournment now.

COURT ADJOURNS: 4.13 PM

COURT RESUMES ON TUESDAY 13 OCTOBER 2015 AT 10.07 AM

ELIAS CJ:
Yes.

MR GALBRAITH QC:
I said last night that I'd go to the terms of the declaration first. Could I just postpone that and we talk about relief because it fits more helpfully, I think, and thereafter, I've talked about one or two of the other matters, and so I will otherwise stay with the order and talk about ownership next. We filed a not very short statement on ownership. Crown filed a much shorter and more compliant with the Court's request statement on ownership. As I said to the Court yesterday I personally struggled with trying to reconcile various of the terminology to be found in old cases and new cases, and old statutes and new statutes in this area so just to take an example of the type of issue that I certainly have struggled with, if one looks back at the 1841 Ordinance, it speaks in section 2 of the domain lands, D-O-M-A-I-N lands, which are take to be the demesne, D-E-M-E-S-N-E, lands as we would now speak of them, but it speaks of them in terms of them vesting in the Crown subject only to you might say customary title, so it speaks in a different sense than that which I read Ngāti Apa is saying, is that demesne lands are lands where customary title, native title has been extinguished, and then they become demesne lands of the Crown. So I'm, it's that sort of difficulty that certainly I have encountered but my troubles aren't really –

ELIAS CJ:
Subject to, was it subject to the necessary rights of occupation or something were they?

MR GALBRAITH QC:
Yes, the – what it says is –

ELIAS CJ:
Sorry where is that volume?

MR GALBRAITH QC:
It's in legislation, volume 1 I think, tab 3, section 2, "It is expedient to remove certain doubts in respect of titles… all unappropriated lands within the said colony… subject however to the rightful and necessary occupation and use thereof by the aboriginal

inhabitants… are and remain Crown or domain lands of Her Majesty," et cetera, subject to the right of pre-emption. Our ownership statement has been drafted in respect of what we take to be the currently established law in New Zealand which is Ngāti Apa so that's what we've focused on.

ELIAS CJ:

But anything that's not held by Māori according to their customs and usages is, by this statute, demesne lands of the Crown, so it's a residual category for –

WILLIAM YOUNG J:

I'm not sure that's what Mr Galbraith thinks it means.

MR GALBRAITH QC:

No, well one can interpret the wording, I guess, one way or the other and there was that debate Ms Feint was talking about yesterday as to whether native title, customary title applied to all land in New Zealand or only parts of it, and that was an argument that was going on –

ELIAS CJ:

Yes, but that was put to rest fairly early on.

MR GALBRAITH QC:

Yes, I agree totally, I'm not suggesting that –

ELIAS CJ:

As a matter of fact.

MR GALBRAITH QC:

Yes, yes.

ELIAS CJ:

It was put to rest.

MR GALBRAITH QC:

Yes, as a matter of fact it was put to rest. All I'm really saying is that we rested on Ngāti Apa as being the currently declared law in relation to customary title in New Zealand.

ELIAS CJ:

But why is that not consistent with this?

WILLIAM YOUNG J:

Because this suggests that it's all, everything is demesne land of the Crown, even though there are customary rights and usages over it.

ELIAS CJ:

No, but it's subject to that and there's plenty of other authority following on which says that that land is held by Māori according to their customs and usages. So this is a statute vis-à-vis the Europeans.

MR GALBRAITH QC:

I agree with what Your Honour is saying, I'm not arguing for the opposite of that, I'm just saying, I'm sorry, all I was trying to do was illustrate the sort of issue I attempted to grapple with and without the expertise that other people have in this area.

ELIAS CJ:

I mean the argument that Justice Young is putting forward is the argument that the settler Judge has clung to over the 19th century and the Privy Council said you are wrong.

MR GALBRAITH QC:

Yes, I'm not –

WILLIAM YOUNG J:

It's a linguistic issue. What does demesne land mean when it's referred to as –

MR GALBRAITH QC:

Yes, I'm not disagreeing with Your Honour at all –

ELIAS CJ:

Demesne lands means the lands owned by the Crown.

MR GALBRAITH QC:

Yes, on which native title has been extinguished, that's what Ngāti Apa says, as I understand it.

ELIAS CJ:

Well, and this exception provides for that too.

MR GALBRAITH QC:

Yes, well as I say –

GLAZEBROOK J:

Remember in 1841 they thought that because the debate hadn't been, is that the point, the debate had not been –

MR GALBRAITH QC:

No, no, I was really, sorry, I've led us down into a rabbit hole.

ELIAS CJ:

Well I am concerned that in this case where nobody has really got down into the entrails of a lot of this, about this question of ownership, and New Zealand law has been bedevilled since 1840 by these issues and surely in 2015 we are not going to decide this on a partial basis. I'm surprised we haven't been taken to the old cases, to the Privy Council cases and to the Court of Appeal cases. I was looking this morning at *Nireaha Tamaki v Baker* [1901] AC 561 (PC) on the point, I know it's charitable trust, but nevertheless a trust, in which the Privy Council said that the land which had been endowed for the school by Māori out of their reserve lands, was land on which the title had never been extinguished. So that actually buys into the point that you were making yesterday, that the reserve land stays outside the demesne lands of the Crown.

MR GALBRAITH QC:

The only point I was trying to make, and making very badly, was that, as Your Honour is describing, the thinking, or at least as I see it, and I have struggled through a number of the cases, seems to have become, evolved, let's put it that way, over time and so that's why we rested on Ngāti Apa as being at least, it seems to be a safe waypoint which deals with the fluctuations, if that's the right way to describe it, of some of the cases in the 1800s in particular, and perhaps even in the 1900s, that, as Your Honour has said, saw things from, it may not have been a settler perspective then but certainly a Pākehā perspective then and were put to right by the Privy Council.

ELIAS CJ:

Well attempted to.

MR GALBRAITH QC:

Well attempted to, yes, but the Privy Council –

ELIAS CJ:

I mean some of these issues never really did get to the Privy Council.

MR GALBRAITH QC:

– at least stood up and said, "It's far too late to run this sort of argument now," that was put to rest some time before and then it wasn't, to some extent, until Ngāti Apa that it was, well, hopefully finally put to rest and that's all I was trying to explain is why we're resting on Ngāti Apa as being a safe harbour.

ELIAS CJ:

But you have to rest on the 1841 Ordinance as well.

MR GALBRAITH QC:

Yes, but we rest on the 1841 Ordinance in respect of how it was to be determined whether, equitably, some title might arise in a pre-1840 purchaser, yes, of course we rest on that but I was speaking more of the question of defining and identifying what's the demesne land of the Crown and where customary title fits with that. So I'm sorry –

ELIAS CJ:

So what's your submission?

MR GALBRAITH QC:

It really was only an explanation as to –

ELIAS CJ:

As to why you haven't gone through all the old cases, it's at the old statutes?

MR GALBRAITH QC:

To be honest I've read most of them but – and we do deal with a number of them in our ownership statement but we haven't taken the Court through those. But what I

did want to turn to is the issue which Your Honour raised yesterday which was about the status of land in, and I'm confining in the moment in respect to the 1845 grant, where 151,000 acres is, on the face of it, dealt with in the grant but there are exceptions in the grant for land to be preserved or endowed of 15,100 acres. There's an exception, and the same terminology is used for each of these three categories in exception for pās, burial grounds and cultivations and there's an exception for any pre-existing grants which may have been made, and the issue which Your Honour raised with me yesterday was, well, what's the situation in respect of the endowment land and the pā sites? Do they then, are they then demesne lands of the Crown but of course on our argument subject to the equitable and beneficial interest of Māori in those lands, and that was the position, with a certain hesitation or qualification, I'm trying to express in a moment, we took in the Court of Appeal. We accepted that the 1845 grant did deal with the whole 151,000 acres. It specifically granted whatever the balance is after you take off the other exceptions to the New Zealand Company and we accepted that the residue became demesne lands of the Crown but subject to an equitable interest in Māori for its reserves or pā or burial grounds, et cetera.

Now the slight qualification that we did express at the time but only as a hesitation that we've expressed more vigorously or more precisely here, is that in respect of the exception for pā, burial grounds and cultivations and, of course, the position we took in the Court of Appeal in some ways is the easier position for us because one says, well, the Crown got that land but it only got it on bare title and the equitable title to beneficial interest resided in Māori.

And that was the position and if I can just take the Court a little bit back to some of the historical cases in this area. We refer to some of these in our footnote 19 in our ownership statement. If the Court wouldn't mind finding our, not so short, ownership statement. And you'll see in footnote 19 we refer to *R v Fitzherbert* (1872) 2 NZCAR 143 which was a decision that the Crown made something of in the Court of Appeal and in the High Court I think, and we've set out a –

ELIAS CJ:
What do you want to say about the two, which I read last night, and is not easy reading.

MR GALBRAITH QC:
No.

ELIAS CJ:

All of those replications and –

MR GALBRAITH QC:

Yes and the –

ELIAS CJ:

But I have to say that the essential reasoning is totally absent in that case.

MR GALBRAITH QC:

The Waitangi Tribunal made a similar trenchant criticism of *Fitzherbert* and I'm not sure the Crown rests too much weigh on *Fitzherbert* anymore but –

ELIAS CJ:

No, but surely we have to grapple with it because presumably that represented the view taken in the New Zealand Courts and it is a decision of the New Zealand Court of Appeal.

MR GALBRAITH QC:

Yes, well, it is and I was actually going to take you to something we've got at the foot of that footnote - perhaps we can come back to *Fitzherbe*rt – which was from Professor Boast's book in his discussion of *Kaitorete* MLC 35, 5 May 1868 case which you'll see, which is mentioned in that footnote, and if you wouldn't mind finding volume 9, which is a green volume.

WILLIAM YOUNG J:

Of the authorities.

GLAZEBROOK J:

9 of the authorities?

MR GALBRAITH QC:

Of the authorities, yes, joint bundle of authorities. Behind tab 148 you'll see this is a discussion of Professor Boast about the *Kaitorete* case and just looking under that heading in the left-hand column –

WILLIAM YOUNG J:
Sorry, I missed the reference. What's the tab?

MR GALBRAITH QC:
I'm sorry, behind tab 148. And the reason Your Honour, the Chief Justice, why I'm taking you to this, it seems to fall into that kind of category of circumstance that you were asking, or raising yesterday, where there'd been very large tracts of land purportedly acquired and what's the outcome of a determination in relation to who gets what or what does somebody get under the 1841 Ordinance.

So, you'll see here that this was a purported transaction in relation to 20 million acres, so it's a very large tract. Half way down that left-hand column and, again, one of the struggles I've had at least is that a number of these cases seem to be arguments about which Court has jurisdiction and you'll see there in order to claim title to Kaitorete in the Native Land Court it had to be shown the area was still uninvestigated land held under Māori customary law but to put it in another way that the customary title had never been extinguished. The Crown, however, relied on the 1848 purchase in order to demonstrate the title had, indeed, been extinguished and thus the Court had no jurisdiction over Kaitorete or to anywhere else within the boundaries of the Canterbury block. So it became a, as Professor Boast says, a legal debate about the jurisdiction.

If you go across the page, it was before, I'm not sure if he was Chief Judge Fenton, at that stage it features a deal in some of the history in relation to Māori land. So there's, then, a discussion of the argument which was made by counsel for Ngāi Tahu and you'll see there that it's described as a complex argument showing the Canterbury purchase invalid and it was invalid firstly because it purported to be a conveyance of land held under Māori customary title, breach of the document of Crown pre-emption, conveyance of land by native people to private purchase are void. Fenton summarised that part of the argument.

Then there was an argument about whether there was an oral – there was an argument about statutory frauds and then whether there was an oral contract that was part performed but what happened was, as you'll see in the top right-hand column, during the course of the case, Crown counsel handed into the Court an order of reference from the Government made pursuant to section 38 of the Native Lands Act 1867, essentially requesting the Court to make orders giving effect to stipulations

made in the Company deed with respect to reserves, that certain reserves were to be made which had never been carried out in respect –

ELIAS CJ:

Well we can't understand that unless we look at section 38 of the Native Lands Act.

WILLIAM YOUNG J:

I take it – is there a transcript of Judge Fenton's judgment or not?

MR GALBRAITH QC:

Not in the bundle of authorities, Your Honour, I'm afraid. But the point I really was just wanting to get to was –

ELIAS CJ:

I must say, I, well, I would prefer to look at the primary materials but –

MR GALBRAITH QC:

Yes, now I can understand that, Your Honour. Look, I'm just not sure if the 18 –

ELIAS CJ:

All right, carry on for now.

MR GALBRAITH QC:

If I could just make one point and then we'll come back and see if I can find that? But you'll see the last paragraph on the right-hand column, in order to deal with the argument about invalidity and pre-emption, Fenton analysed the length of the various enactments, ordinances and other instruments relating to Māori land title in the 1840s and 1850s refers to Land Claims Ordinance of 1841 which Fenton say had the effect of vesting all land in the colony absolutely in the Crown, "Under this statute the whole land of the colony became the demesne land of the Crown subject to certain or other uncertain rights of the Māoris." However, the Constitution Act, this is Professor Boast's –

ELIAS CJ:

We don't have the next bit which would be quite interesting to know.

MR GALBRAITH QC:

No we don't unfortunately. Yes I know.

ELIAS CJ:

Since it's a contrast that's being set up.

MR GALBRAITH QC:

Which I tried to look at in the early hours of this morning, Your Honour. I ran into the same problem but you'll see in our footnote what Boast, or what we say Professor Boast says. He describes the reasoning as convoluted and I can say, with respect, that seems to be what Your Honour finds in *Fitzherbert* also. It is convoluted a lot of the reasoning at that time.

ELIAS CJ:

Sorry, what reasoning is – oh, he's talking about the *Kaitorete* reasoning.

MR GALBRAITH QC:

Yes he is.

ELIAS CJ:

Yes, I mean, since, of course, things have marched on to a considerable extent by the time of the Native Land Acts.

MR GALBRAITH QC:

Absolutely, yes, no, absolutely, and that's why I say, we've tried to find a safe harbour in Ngāti Apa because – but it does, in some of these cases, certainly look to me that the way the Court would have approached it was along the way that Your Honour was perhaps expressing yesterday, that when the – there is a consideration of a Crown grant and a Crown grant is made that there is then an, I don't know if it's a presumption or a consequence that native title is seen to have been extinguished in the balance of the area in which has been dealt with under that consideration, at least where it's like our 151,000 acres where the Crown grant purports to deal with each element of the 151,000 acres. I don't think that it supports the view that the 20 million acres if – well, here say in 1848 Crown grant, 1.7 million acres but if the Crown grant had dealt with only 151,000 acres that would mean that Māori customary title was lost in the balance of whatever it is, 155, sorry, 1,550,000

acres. But that which was dealt with in the Crown grant I can see the argument that –

ELIAS CJ:

Well there's no argument about what's in the Crown grant. The argument can only be about what's excepted from the Crown grant.

MR GALBRAITH QC:

Excepted, well, that's right.

ELIAS CJ:

Because there's no doubt that – I think that there's a specific provision isn't there? Is it in the 1841 or – well, in the Crown Grants Ordinance as to the effect of a Crown grant on native title. Perhaps someone can just say but –

MR GALBRAITH QC:

Well, there's certainly in that –

ELIAS CJ:

It's all right. I think there is no help but to go through all the early ordinances. Also it is probably the case that there is inconsistency in treatment in some of the cases. So that, as I mentioned to you in *Nireaha Tamaki v Baker* the Privy Council seems to have assumed that anything not included within the grant but within the purchase was unextinguished native title.

MR GALBRAITH QC:

Yes.

ELIAS CJ:

Whereas I'm not sure that in some of the local cases that, and including *Fitzherbert* that that assumption is made.

MR GALBRAITH QC:

No I think that's right but, again, if you look – and I don't think this is in our casebook.

ELIAS CJ:

But I really like to put my fingers in the wounds really. I'd like to know –

MR GALBRAITH QC:

Yes, I understand.

ELIAS CJ:

I'd like to know why these decisions and *Fitzherbert* is incredibly frustrating because there is simply an assertion.

MR GALBRAITH QC:

Yes there is. Can I just, because I commented on the Waitangi Tribunal's comment on *Fitzherbert* and you'll find that in our supplementary casebook at tab 19, if I can find our supplementary casebook.

GLAZEBROOK J:

Can I just check this, that his concern only relates to the occupation lands, doesn't it?

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

Because it's accepted that the endowment lands – well I suppose it's accepted the endowment lands were under the ground and became demesne lands, is that –

MR GALBRAITH QC:

Well that's certainly what we accept in the Court of Appeal. You can – the endowment lands, the difficulty we have is that Māori's view is that the endowment lands weren't, sorry, the occupation lands, I'm sorry, weren't ever intended to be sold, that's the oral history. There's no differentiation of them in the two early purchase deeds but in the deeds of release, yes they are accepted as an exception for pās, burial grounds and cultivation lands. So the difficulty that we have which complicates the argument is that we would say that those lands were never sold and Ngāti Apa and other authority would say that unless there's a free consent to the termination of customary title it continues and therefore customary title would have continued in those pā, burial grounds and cultivations. Now it just –

GLAZEBROOK J:

But that doesn't apply to the endowment lands, just to be clear?

MR GALBRAITH QC:

Well theoretically it could because they're both excepted in the same way from the grant.

GLAZEBROOK J:

All right, that's what I was just going to ask –

MR GALBRAITH QC:

Yes, but –

GLAZEBROOK J:

– that's why I was asking you the question.

O'REGAN J:

So in relation to the pās and burial grounds and cultivations, are you saying that the Crown got title but subject to an equitable interest by the previous Māori owners or are you saying that the ownership of those previous Māori owners never terminated and they retained customary title?

MR GALBRAITH QC:

If you take that, the view that they weren't sold then customary title never terminated.

O'REGAN J:

Yes but what are you saying, I'm asking you what's your submission?

ELIAS CJ:

You put it on both bases in your submissions?

MR GALBRAITH QC:

Yes we did.

ELIAS CJ:

Which is really like throwing the whole problem at the Court.

MR GALBRAITH QC:

Yes, I accept the criticism but it's not, it wasn't clear, it wasn't for want of trying to come up with a definitive answer, it was for want of actually finding a definitive

answer. And the easy solution for us running a case was one we took in the Court of Appeal that they become demesne lands of the Crown and subject to, we argued, an express trust and all fiduciary duty. But if they, if it is the customary title is preserved, in other words it wasn't lost because this land wasn't sold, I don't think that makes any difference at the end of the day in terms of the fundamental aspect of the claim which is that the Crown were in breach because those lands weren't reserved, all the pā sites, burial grounds, et cetera weren't reserved, weren't left out of the grant and so have been lost to Māori even though legally, if one takes that alternative customary title is preserved.

ELIAS CJ:

Well does that step not have to be demonstrated to us, that because you said well they did become lands of the Crown, surely the argument is still available that they did not?

MR GALBRAITH QC:

Yes that's what I'm saying. If – there's, the two alternatives are if they became lands of the Crown, we're now talking the occupation of lands.

GLAZEBROOK J:

And is the difference with the endowment lands is there might have been free consent to those being sold because they were intended to be included in the original purchase?

MR GALBRAITH QC:

They're in the original purchase and there's a recognition of reserves not specified and they're not excluded in the deeds of release whereas the pā sites et cetera are specifically excluded in the deeds of release.

GLAZEBROOK J:

So there may have been free consent in fact to those demesne, to those endowment lands subject obviously to the obligations that were included in respect of them but –

MR GALBRAITH QC:

Yes, yes. And so the point I'm making, if the position we took in the Court of Appeal was right which was that that applied also to the occupation lands, well then they get treated the same way as the endowment lands. If the position we took in the Court of

Appeal isn't right and indeed customary title was preserved to the pā and other sites, then the Crown is still, in our submission, in breach of –

ELIAS CJ:
Well that would have to be fiduciary duty not trust –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– whereas you do have a live argument if the Crown obtained the title.

MR GALBRAITH QC:
Yes. So it –

ELIAS CJ:
So it matters a lot in terms of how the case is presented.

GLAZEBROOK J:
It might be a constructive trust though rather than fiduciary duty.

ELIAS CJ:
Well yes I'm not saying that there isn't a, that remedial consequence but it matters a lot because of the Limitation Act and laches and everything else and it matters, yes. I think it is significant.

GLAZEBROOK J:
But I think it would be an institutional constructive trust not a remedial constructive trust.

MR GALBRAITH QC:
Yes I agree.

GLAZEBROOK J:
So in fact it's probably similar.

MR GALBRAITH QC:
I think it still has a section 21(1)(b) result or that would certainly be my submission but I think my learned friend would argue to the contrary of course but that would be my submission.

The, the, it's important – I mean the easy answer for somebody arguing cases will take the simple route but for Māori this is important because Māori generally, genuinely believe that that land wasn't intended to be sold, wasn't sold and therefore customary title continued in it and that has the consequences that Her Honour the Chief Justice has just said, that certainly as an express trust, that won't arise in an express trust but can arise as an institutional constructive trust and in our submission inevitably there must be, well we would say, that there must be a fiduciary duty owed in respect of Crown dealings with that land. It wasn't excluded except in small part from the grants so the exception wasn't applied and so it has been or much of it has been lost to Māori over the ensuing period. Now next question that obviously –

O'REGAN J:
So there's this argument that the retention of customary title hasn't been, hasn't been run before in the High Court or the Court of Appeal, is this – it's only been run previously as an equitable title argument, is that right?

MR GALBRAITH QC:
Yes I think that's right. I think that is right. Well I wasn't there in the High Court so I'm a bit lost on that but certainly in the Court of Appeal I've gone back to my written notes and other than I think sort of raise a very, very small flag at some stage, it certainly wasn't run as a, well not in my notes, it wasn't served so.

O'REGAN J:
So on this basis there's a different argument running in relation to the pās or pās and cultivations stand from the reserves, is that correct?

MR GALBRAITH QC:
Yes on that basis. Now the Court may say that I'm –

ELIAS CJ:
Well necessarily, because the same language of exception is used?

MR GALBRAITH QC:

Yes, yes well that's the, that's the complication, well it's another one of the complications.

ELIAS CJ:

I mean isn't it another option you're preserving?

GLAZEBROOK J:

Although they may –

MR GALBRAITH QC:

Yes. Well we accept in the Court of Appeal that in respect of the endowment lands that they do become demesne lands subject to the equitable title and the... I mean that the possibility still exists, that they should be treated the same way as the pā sites and some have customary title because they're excepted in the same way and of course the pre-existing grants to any other owner is also excepted in the same way and those grants would exist in their own right also, so you can say that the three categories all should be treated the same.

GLAZEBROOK J:

Does the history have any effect because in effect with those endowment lands they have been treated effectively as a Crown trust before the 1845 grant and presumably with the consent of Māori they were presumably excepting the, what bounty came from them et cetera, and had in the original purchases intended that they be, well I think the evidence isn't totally clear on that, that they, it wasn't clear exactly that they'd understood what that meant in terms of who was going to choose where they were because –

MR GALBRAITH QC:

But you're right, Your Honour, because even those photos that Ms Feint had yesterday which shows where the hostel is up in Auckland Point is et cetera so that is correct and that land that was among the sections that were selected in 1842 was leased and so I think, there is a valid distinction one can draw between the two and also the distinction that they're not excepted in the deeds of release, whereas the pā sites et cetera are. But it's a new argument.

I just was taking you to the supplementary bundle of authorities behind tab 19. It's the Waitangi Tribunal's discussion of *Fitzherbert* and you'll see that it goes through and analyses the judgment and the submissions that were made. It comes to – they note at the end of it that the legislature –

O'REGAN J:

Whereabouts are you in the document?

MR GALBRAITH QC:

I'm sorry, I was looking through what was said, it starts at page 325, as Her Honour said it was by way of appeal and you'll see the consequence of the, well perhaps the conclusion on 329, that the Court of Appeal held against the claimant on legal grounds based, it said here in part on totally erroneous facts, which I take it is a criticism of the judgment, stated that to Māori any claims upon the favourable consideration presumed to be respected and properly represented, and the legislature then enacted the Natives Reserves Act 1873 which was intended to overcome in part this decision was never bought into operation and the Act recognised, would have recognised that the Wellington Tenths had been set apart for the benefit of Māori and provided by the Native Reserves Commissioner but as we say there it wasn't brought into operation and again it's a bit similar to the case that Professor Boast was talking about where, in that other case *Kaitorete* where the Crown managed to head off a situation. We have got the Native Land Act 1867 also in the casebook which was the one under which *Kaitorete*, and it's under tab 15 in the casebook –

ELIAS CJ:

Sorry, in which volume is that, the legislature volume?

MR GALBRAITH QC:

Yes part 1 –

GLAZEBROOK J:

What was the point you were taking from the Waitangi Tribunal report, I'm sorry, I think I lost it.

MR GALBRAITH QC:

It was just, it's a commentary and a criticism of the outcome of the –

ELIAS CJ:

Why don't we go to the original documents?

MR GALBRAITH QC:

Fitzherbert, all right.

ELIAS CJ:

In *Fitzherbert*, because there's this long disciple, as they had to do in those pleadings, which is actually quite interesting because we're laboriously going through, not in terrifically chronological order, some of this material, but it seems to be quite well set out there in some respects, although I suppose it's disputed, but –

MR GALBRAITH QC:

Well the Waitangi Tribunal certainly thought it got the facts –

ELIAS CJ:

Well, no, it's talking to the – about the reasoning but have we been taken to the dispatch of Lord Stanley of 10 January 1843, we might have been, because –

MR GALBRAITH QC:

I think we were.

ELIAS CJ:

Because – but that, I mean that draws a distinction between the proportionate parts conveyed for endowment purposes which are in addition to the continued enjoyment of such land as belongs to them and they have not sold.

MR GALBRAITH QC:

Yes.

ELIAS CJ:

So, you know, I mean, obviously these things were looked at in some sort of framework at the time. It would be rather useful to see it in that context.

MR GALBRAITH QC:

Well *Fitzherbert* is in –

ELIAS CJ:

I mean, we've had the historical narrative –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– but really what we need is we need the law now and some of this material does bear on that and I would have thought we could have some legal argument based on it.

MR GALBRAITH QC:

Yes, well that's obviously entirely fair, Your Honour. I'm not sure that these cases, though, determine the issue which we've really brought before the Court which is whether there's an express trust or whether there is a fiduciary duty owed though they obviously bear on that question that Your Honour raised, whether, when a Crown grant is issued in the terms the 1845 was issued, whether that does mean that the lands that were reserved or endowed become demesne lands of the Crown and, we accept for the purpose of this case, that is what happened and whether the lands which were not sold where the customary titles terminate and we don't accept that it was. So –

ELIAS CJ:

All right, I'll be quiet shortly but what really bothers me is we don't even have a framework for understanding what was authoritative in New Zealand in the 1840s. We have a colony which is under the Crown prerogative. What's the status of a direction given by Lord Stanley? One would have thought it actually has some legal significance so that if he's saying the land that is the endowment land, and he's saying this to Governor Grey in respect of the proposals as to the 1848, I think, well anyway. He's right, it must have some significance. I don't know whether it does or not because we don't really, we haven't really had any constitutional context to look at all of this but he's drawing a distinction between the endowment lands and the lands which are additional in which they have continued enjoyment and have not sold and that's under the same deeds of sale.

MR GALBRAITH QC:

Well that's what, I think, Ms Feint's first section yesterday was meant to be discussing, if you go back to that, where she goes back to the 1837 select committee report and Lord Normanby's instructions and the 1840 charter and the royal instructions of December 1840 and the 1846 charter but –

ELIAS CJ:

So who's going to draw it together in terms of the legal submission?

MR GALBRAITH QC:

Well we're relying upon those communications and the other discussions which were held by Governor, well Governor Hobbs and also Governor Fitzroy pursuant to those, or pursuant to the instructions which he'd received as being evidence upon which the Court can rely or can place weight in determining the intention of the Crown at that, as at that time and I went through some of those yesterday and setting out the basis for our claim that there is, as we had put it in writing, fiduciary duty or, as we want to talk about today, potentially an express trust.

But to look at what the legal – I think in our supplementary casebook there is a discussion of this in, it may not have got in here, there is an early case which does talk about the different legal effects of the charter as against the instructions and I'm just bereft of it at the moment, if I can look for it at the morning adjournment –

ELIAS CJ:

Yes.

MR GALBRAITH QC:

– I'll come back on that. It may, it's one of those three forgotten cases that were spoken about in one of the articles –

ELIAS CJ:

So we don't have really a full, we've got a newspaper report?

MR GALBRAITH QC:

No, no we've got, I had a copy of it but –

ELIAS CJ:

Right.

MR GALBRAITH QC:

– I'm just not quite sure where –

ARNOLD J:

Is that the Mark Hickford article?

MR GALBRAITH QC:

Yes, yes that article. One of those cases. I have it somewhere amongst, I'll have to find it but it does draw a differentiation between the legal effect of the charter as against the legal effect of communications like Lord Stanley's, but we rest on those communications and that's why Ms Feint mentioned it yesterday because in our respectful submission they are consistent in indicating the Crown's commitment to these reserve lands or endowment lands being held for Māori by the Crown on trust and the agreement of 1840 and clause 13 of that agreement as recognition by the Crown that it is going to have to step up and make that commitment because that's the only way.

ELIAS CJ:

Sorry what's the evidence for that?

MR GALBRAITH QC:

I'm just trying to see if it's in, it's the 1840 agreement which I think is 3.2 of Ms Feint's outline.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

So if I can just look for that case at morning tea which I'll do. Going back to where we may or may not be at, differentiating between the endowment lands which we accept became demesne lands of the Crown subject, to we say, to the equitable right of Māori and the pā sites, et cetera, which we say, in which customary title was preserved, as I said before, it seems to me that it ultimately doesn't make any real difference unless Mr Goddard is right, it's potentially a remedial constructive trust in

that our claim was still that there was a breach by the Crown that land has been lost of Māori and that's in breach of either a fiduciary or constructive trust, institutional constructive trust.

WILLIAM YOUNG J:
Well what do you say, I think you are going to deal with *Paragon* I take it?

MR GALBRAITH QC:
Yes, but we haven't got there yet Sir.

WILLIAM YOUNG J:
Okay.

MR GALBRAITH QC:
We're still in the – yes.

WILLIAM YOUNG J:
You're upstream of *Paragon*.

ELIAS CJ:
Primordial swamp.

MR GALBRAITH QC:
Exactly, it feels very much like that, but another question which I may get asked, again I'm afraid I cannot find an absolute answer to is, well, when would that customary title have terminated if it was preserved past the 1845 grant and the best answer, or about all I can say at the moment, the best answer that we can give to the Court is that, well perhaps Ms Chan can give to the Court just a couple of pieces of paper that we have given in overnight.

We've tried to track when customary title has recognised that it is coming to an end and I think Ms Feint yesterday referred to the decision of Justice Blanchard in *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) which I have just handed up. What His Honour held there was that the effect of the 1894 – this was a question about whether land was still in customary title and therefore wasn't rateable land or not, that's what the particular issue was and His Honour did deal with a number of the early cases and his decision was that under the 1894 Native Land

Court Act that customary title, at least in land that was under the land transfer system or Torrens system, was transmuted into Torrens title land and customary title was terminated and therefore the land was rateable and he does discuss *Tamaki v Baker* and discusses the Privy Council case in *Kapua v Haimona* [1913] AC 761 (PC) and a number of the other cases.

So his conclusion was bringing land under the Torrens system where the Crown issued a fee simple title, that was the end of customary title. The complications are that – and then if one looks –

ELIAS CJ:
Sorry what are you referring us to in *Faulkner* can you just take us to what you are referring to?

MR GALBRAITH QC:
Well there's a heading on page 363, "Extinguishment of customary title".

ELIAS CJ:
I see.

MR GALBRAITH QC:
"The question to be determined is therefore whether the land with which the present case is concerned continues to be held by Māori and the customs and usage is notwithstanding the various dealings to which reference has been made is held by trustees for an estate in fee simple registered under the Land Transfer Act." It goes on to say, "Customary title is a burden on the Crown's feudal title. Well settled customary title can be extinguished by the Crown only by means of a deliberate act unless there is legislative authority or provisions such as in the 1909 Act," which I am just going to go to, "The executive cannot, for example, extinguish customary title by granting the land to someone other than the customary owners." It talks about *Tamaki v Baker*. It earlier talked about *Kapua* and *Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) and decides that the effect of the Tauranga District Lands Act was –

ELIAS CJ:
What's the proposition you want us to take from this for our purposes?

MR GALBRAITH QC:

It seems to determine, and I say seems to determine, that if you go across to page 365, "Effect of Native Land Court Act 1894. If there could be any doubt on this point it seems to me that it is well and truly settled by the Native Land Court Act 1894. If the Ohuki Block remained customary land as defined in that Act section 73 provided for the land to thenceforth be and become subject to the provisions of the Land Transfer Act and for the owners, subject to all equities affecting them and to all existing restrictions on alienation, to be deemed to be proprietors of an estate in fee simple." And so what His Honour determined, as I read the case, is that the effect of the 1894 Act was to –

ELIAS CJ:

Once you have a land transfer title you no longer have land held according to customary ownership.

MR GALBRAITH QC:

Yes that's my understanding of it and I think my learned friend agrees.

ELIAS CJ:

And we don't know – well I know that's the way it's always been treated. I've never really - I can't remember whether there's – I think there may be some explicit statutory provisions hanging off Crown grants actually, so that land transfer comes a bit later. Oh it's deemed –

MR GALBRAITH QC:

Well the other two pieces of papers, there's the 1909 Act which His Honour refers to the Native Land Act 1909 and you'll see, we've only given you an extract from it but you'll see in the definition section, section 2, there's a, fourth down, definition of customary land. "Customary land means land which being vested in the Crown is held by natives or the descendants of natives under the customs and usages of the Māori people." Which I must confess sounds a little bit like what was in the 1841 Ordinance.

ELIAS CJ:

No, no it's not. It's not domain lands it's – that's a reference to radical title.

MR GALBRAITH QC:

Yes. Well, I was going to suggest that earlier on as being the explanation for what's said in *Korokai*, I think it is, by Justice Cooper and that where he talks about title he's actually talking about radical title being vested in the Crown. In any event, there's that definition. We've tried to track it on through and I mean just again under the 1993 Act, the Māori Land Act, there's section 130 which says, "No land shall acquire or lose the status of Māori customary land or of Māori freehold land otherwise in accordance with this Act or as expressly provided in any other Act." So that throws it pretty much at large and as I understand it there are people far more expert than I who believe that customary title may still exist in some pieces of land but …

ELIAS CJ:

Well, it did in relation to Crown forest but they immediately, when that was pointed out to them, granted certificates of title over it all.

MR GALBRAITH QC:

Yes. There may be land. I think it is possible that there could be other land where there aren't depths of title having been granted.

ELIAS CJ:

Yes, there may be.

MR GALBRAITH QC:

But it would be that –

ELIAS CJ:

But that would be tiny, wouldn't it?

MR GALBRAITH QC:

Yes, and it would be that sort of land, I suspect.

ELIAS CJ:

Well, we don't know what this land is that we're talking about.

MR GALBRAITH QC:

No.

ELIAS CJ:

We can probably assume that it's land held under the –

GLAZEBROOK J:

No because the large part – I think it was indicated yesterday that there might be some untitled land.

MR GALBRAITH QC:

Yes, there might be some untitled land.

ELIAS CJ:

But it's just fragments, one would imagine.

MR GALBRAITH QC:

So that was my unsatisfactory way of describing the ownership issue which really takes us on to a discussion about express trust which isn't in any depth in our written submissions so we have prepared a short summary of what we want to say in relation to express trust. As the Court will be aware from the Court of Appeal judgment, this failed in both the High Court and the Court of Appeal. In the Court of Appeal and probably in the High Court too on the certainty of intention and in part, at least, on certainty of subject matter, in part the difference between 5100 acres which was identified and the 10,000 rural sections which weren't specifically identified. So turning first to the certainty of intention, Her Honour in the Court of Appeal accepted that the Crown could act as a trustee and you'll see that not only in respect of the particular material identified situations where the Crown does act as trustee and even what Her Honour described as the high point of the political trust case and footnotes there references to cases where the Crown had acted as trust, been held to act as a trustee, but it was held in the Court of Appeal on parity of reason with the fiduciary duty reasoning that there was no intention to constitute a trustee because effectively the Government was engaged in a balancing exercise between the interests of Māori and settlers at the time.

GLAZEBROOK J:

Mr Galbraith, this is probably a question more for Mr Goddard but what was the balancing that was taking place in relation to the tenths?

MR GALBRAITH QC:

Well –

GLAZEBROOK J:

I mean, I can understand a balancing taking place in relation to whether you would uphold the purchase or not because you are looking at various interests at that stage. But once you get down to just the tenths, what possible balancing was there?

MR GALBRAITH QC:

Well, that's, with respect, what I submitted in the Court of Appeal but once you've identified the, certainly the 5100 acres which is the Tenths, the identified Tenths part, that was land in which Māori had a proprietary interest previously. If, as we accepted, it then became demesne land of the Crown it must be subject to equitable interests in Māori and there was nothing to balance then. It was, it was gone, it had gone into an equitable estate for reserves and... But this thinking about balancing and politics or political infused the Court of Appeal judgment and somewhat surprisingly because Her Honour did not entirely dismiss but did not accept that the *Tito v Waddell* (No.2) [1977] 1 Ch 106 type of approach. I mean she discussed *Tito v Waddell* as being a high point and didn't adopt it but on the other hand still speaks in the judgment about interpreting, for example, the 1840 instructions et cetera as being, or the 1840 agreement, for example, that Her Honour the Chief Justice was asking about before as being political and so put in this box of something which couldn't contribute to a concept of –

ELIAS CJ:

Most legislation, well all legislation is political, it still has legal consequences.

MR GALBRAITH QC:

Yes that's right and you can't do things with proprietary interest, you can't do things with just, just broadly say property, without having a legal right to do those things and there will be a legal consequence in that and so taking up the point that Justice Glazebrook made that was our rather blunt submission, at least in stating in the Court of Appeal that once you'd identified this land you'd categorised it in the way it was categorised then it was either subject to an express trust which was the first argument and if it wasn't subject to an express trust, it must surely be subject to a fiduciary obligation.

ELIAS CJ:

Well I wondered whether perhaps the idea of all of this being in negotiation had come in part from *Fitzherbert* but that was different because there the agreement had been entered into partly with the wrong people. So then there really did have to be some "horse trading".

MR GALBRAITH QC:

Yes and there was in Wellington because if you read McKay and I have actually tried to read some of this historical stuff, that's what Governor Grey did in Wellington where he had a similar problem. He was sent a captain from England, Mackle Downie I think his name was who entered into what Your Honour's described as "horse trading" with both Pākehā and Māori interests and so things were adjusted, land that Māori was occupying that had been granted to Pākehā was, there was then compensation given to Pākehā et cetera and was sorted out that way but when they came to Nelson they ran out of time and so, and that's what McKay records and so there was then the Wairau purchase and the 1848 grant and there wasn't an attempt to reconcile the interests so Fitzherbert was of course about Wellington and that's why, as Your Honour rightly says, there was that horse trading that went on but it wasn't in Nelson.

And so we, with respect, do submit that come 1845 then there was a sufficient intention which is evidence as I said a moment ago but that series of Crown, Imperial Crown statements going right back to the 1837 select committee hearings but more expressly found in the 1840 agreement and in the charter and in the directions given to first Governor Hobson and later Governor Fitzroy and the meetings which Governor Fitzroy had with Wakefield which Ms Feint referred to. All of which make it clear that this land is to be set aside and preserved and protected for Māori which are all characterisations which are resonant in trust, certainly trust and fiduciary duty.

ARNOLD J:

And it doesn't matter to your case whether the 1840 agreement was a contract or not, it was clearly a statement of principles the parties intended would be adhered to and I think the Company actually went back to the Crown and asked for various variations or modifications to it.

MR GALBRAITH QC:

Yes. And Stanley, Lord Stanley to his credit always said, this is more than a line in the sand, it's – there's no going back, that's the position and so you get the same in that 18, I think it was 1844, it might have been 1843 discussion between the Governor and Wakefield with Spain present and the protector of Aborigines where there was the argument about, well are the pās, if Māori have agreed to sell their cultivations or pā sites and the Governor's saying, no way, that they're going to be excluded and if you don't accept that well Mr Spain's, Commissioner Spain's inquiry will not continue, full stop and Spain says the same thing. So it, everything which Ms Feint took you, the Court to and the factual background is consistent, in my respectful submission, that there's nothing other than, that the one thing which the Crown points to is the intention at some time to set up a statutory regime to, for the administration of these lands and as we've said here, that in our respectful submission, that was given a great deal of weight both in the High Court and in the Court of Appeal and we say as a negative and our respectful submission is that it's not in any sense positive of the otherwise consistently expressed intentions to hold these lands on behalf of Māori. And indeed if one thinks about it, it's a very odd situation because it would then mean that until that statutory regime was put into place that the Crown could dispose of these lands as it chose, so the 1848 grant which of course took away 10,000 acres could have taken away the whole 15,100 acres and nobody could do anything about it, subject to what the Crown does concede, a public law obligation. But that was of no value to Māori so it's really a fairly stark choice, if I can put it that way between the Court recognising what the Crown in all honesty seems to have declared throughout that period as against a decision which we have at the moment that there were no obligations other than these public law obligations which –

GLAZEBROOK J:

Well what would the public law obligations be if there wasn't actually any right, if they could sell the land and it wasn't subject to any trust, what possible public law obligations would there be – unless they're talking about a substantive reasonable expectation?

MR GALBRAITH QC:

That would have been difficult in those days –

GLAZEBROOK J:
Well exactly, it's going to be fairly difficult in these days but I can't see what else –

MR GALBRAITH QC:
Well I suppose in respect of the lands which we would say weren't included in the, that's the pā sites et cetera, it would have been – but it's not a, that's a private law claim in any case so it's not a public law case.

ELIAS CJ:
I must say I do not understand all this emphasis on private and public.

MR GALBRAITH QC:
No.

ELIAS CJ:
There's either an obligation, it doesn't matter to me –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– how it's characterised but everyone seems to think that it matters a huge amount?

MR GALBRAITH QC:
Well it, yes and it –

GLAZEBROOK J:
No, I was just wondering what claim there was if in fact the Crown was free to – if the Crown argument is that the Crown was free to sell, whether it's public law, private law I can't quite see what sort of claim there might be?

MR GALBRAITH QC:
Well there wouldn't be a claim unless there's an obligation which is really the point that Her Honour's making and I agree entirely and yet it's been said there is no obligation so far.

ELIAS CJ:

And if you accept land and it is subject to obligations that it seems to me is a trust –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– or you've constituted a fiduciary, if that's the basis of it so...

MR GALBRAITH QC:

Well I've always, I must have seen it in fairly simple terms that if, that if I gave my land to somebody and it was meant to be for my benefit, that I would hope it was on trust but it was certainly of fiduciary duty. So as I said before and I am going to repeat myself just briefly, there does seem that this, certainly in the High Court although the Court of Appeal said *Tito v Waddell* didn't feature too much in Justice Clifford's judgment, in the Crown's hand up at the Court of Appeal *Tito v Waddell* did feature though, I accept not a major part of the argument put forward by the Crown but that sort of thinking which you find in *Tito v Waddell* does seem, in my respectful submission, to have some or other infused the Court of Appeal judgment because you do get this characterisation of political as being an explanation of why there might not be a, it won't be an express trust and made off the fiduciary duty and all we've done in this outline here, we've referred to both in *Guerin v The Queen* [1984] 2 SCR 335, 385 (SCC) and *Paki (No 2)* where those cases are discussed and dismissed.

I can't help but comment, because I had to read *Tito v Waddell* a few times at the time, that the authorities in which *Tito v Waddell* are based are very odd cases indeed. Their case is about war booty and people saying that they should have a share of the war booty and that which are so far different from what we have here, a pre-existing proprietary interest that, in my respectful submission, they are just inapposite.

O'REGAN J:

So are you saying that the 1845 grant is the evidence of what the trust's property was?

MR GALBRAITH QC:
Yes.

O'REGAN J:
So that the previous documents are sort of crystallised in the 1845 grant, isn't it?

MR GALBRAITH QC:
Yes that's –

O'REGAN J:
So the trust you're claiming in relation to the reserves is the 15,000 which is identified in that grant.

MR GALBRAITH QC:
Yes.

ELIAS CJ:
And what's the answer you make to the 1848 grant?

MR GALBRAITH QC:
The 1848 grant, because, we say, there's a trust in relation to the 15,000 acres. The 1848 grant is simply either legally ineffectual or it's simply a breach of trust.

ELIAS CJ:
Breach of trust.

MR GALBRAITH QC:
One or the other, or potentially both. Well, no, it has to be one or the other I guess.

So certainty of subject matter we of course come into the issue about the 5100 acres which was identifiable as being the sections which had been chosen in 1842 as against the 10,000 acres of rural sections, the 100 acre sections which hadn't at that stage been identified.

O'REGAN J:
Well as Justice Young said yesterday, there was a slight oddity about choosing sections when they didn't have a Crown grant yet.

MR GALBRAITH QC:

Yes, well that's why the 1845, you know, it's one of the reasons in any case, Your Honour, why we focus on the 1845 grant.

ELIAS CJ:

Well it's not so very far away, is it, from the equitable interests recognised for a purchaser before conveyance.

MR GALBRAITH QC:

Yes, there's a beneficial interest which arises.

O'REGAN J:

But usually that's over a piece of land that is identified and has a title and so on –

MR GALBRAITH QC:

Well that's true.

O'REGAN J:

– whereas here it was a sort of undivided, well, a divided share and an amorphous mass, wasn't it?

MR GALBRAITH QC:

Well, yes, yes it is in one sense, but it has a means of identification which the Crown had exercised in 1842 and the Crown still had the power to exercise and had the opportunity to exercise and the land was there, as we say in our, in the factual area and that. There was enough land to choose that 10,000 acres that had been surveyed at that time when the Wairau purchase was then acquired also which was subsequently, it was even more land but at the time of the 1845 grant there was something like 45,000 acres of rural land available so that the opportunity was there for the Crown to make that choice and, as I say, it had the power to make the choice because it had made it in 1842.

O'REGAN J:

You say that there was enough land for the Crown to set aside the reserves or because wasn't the problem with the Wairau that led to the Wairau massacre, that the –

MR GALBRAITH QC:

Yes.

O'REGAN J:

That there wasn't enough to give all of the settlers what they'd been promised –

MR GALBRAITH QC:

Yes.

O'REGAN J:

– in the prospectus?

MR GALBRAITH QC:

Yes, there wasn't enough to set aside the rural land for both settlers and Māori in the full amount that had been promised in the prospectus.

O'REGAN J:

No, but on your case you're saying well that doesn't matter because you're only concerned about the reserves and there was enough for them.

MR GALBRAITH QC:

Yes, and there was enough for that. So what we would say is the trust, if the Crown is a trustee at that time then it has to get in the, has to get in the trust property and it had the power to get in the trust property and it had the opportunity to get in the trust property. It chose not to get in the trust property because Governor Grey said Wairau –

WILLIAM YOUNG J:

So the breach of trust is failing to get in the trust property?

MR GALBRAITH QC:

Yes, because the trustees had an obligation to, one, safeguard the property of the trust, obviously, but there may be many situations where the trustees take under maybe a contract which has to be performed, maybe things that the trustees have to do, they have to act in the interests of the beneficiaries and where the trust is crystallised, using that term in the 1845 grant, identifies the 15,100 acres and the

Crown has the means and the opportunity then in our submission it has to exercise that.

ELIAS CJ:
Remind me again what is the means that the Crown have? Are you pointing to a statutory means?

MR GALBRAITH QC:
No, no.

WILLIAM YOUNG J:
Well how could it have compelled the New Zealand Company to accept the 1845 grant?

MR GALBRAITH QC:
If the New Zealand Company wanted to have the benefit of the grant, yes it obviously could.

ARNOLD J:
Well surely the Company could have compelled it – the Crown could have compelled it simply by not giving the 1848 grant.

MR GALBRAITH QC:
Yes.

ARNOLD J:
The point is that they have been offered a grant, they'd already sold land. If the Crown was not prepared to change it, then the Company was either going to accept or be in breach of –

WILLIAM YOUNG J:
Or default. It defaulted only – it effectively failed only five years later.

MR GALBRAITH QC:
Yes it did and if it wasn't for the Crown I mean the Company would've failed earlier than that.

GLAZEBROOK J:

And with the default, even if the Company hadn't accepted or had defaulted, would that have affected the trust?

MR GALBRAITH QC:

If the company had defaulted, no, no.

ELIAS CJ:

Not on your argument because the Crown was subject to it.

WILLIAM YOUNG J:

But if the company defaulted all the land would still be owned by the customary owners, so there'd be no trust, nothing to have a trust over.

ELIAS CJ:

Well I query that. I'm not sure that that's right. I think if the company have not picked up the grant, then I think the lands were domain lands of the Crown created by the grant but subject to or arguably subject to the interests of Māori.

MR GALBRAITH QC:

In my respectful submission I think, in my respectful submission that is certainly the position I would take.

ELIAS CJ:

And there's no doubt that the Crown would have re-granted to someone.

MR GALBRAITH QC:

Yes. Well the Crown had control of everything. Nothing could happen so far as the New Zealand Company was concerned unless the Crown agreed to it or did it or whatever else, so the Crown could always enforce –

GLAZEBROOK J:

Well the Crown might have granted to the individual settlers in any event because effectively it's not going to have a whole pile of landless settlers who have paid for their land hanging around.

O'REGAN J:

It was operating under effectively an exception to the pre-emption provision wasn't it?

MR GALBRAITH QC:

Yes.

O'REGAN J:

It was saying well we will sort of retrospectively validate a pre-existing contract and if the party for whom they were doing that had said we don't want you to, then that contract would've fallen away wouldn't it? Wouldn't that leave the land in customary ownership?

MR GALBRAITH QC:

Well not because of the Crown grant because the Crown grant –

ELIAS CJ:

I think you need to take us to the legislation about Crown grants and their effect.

MR GALBRAITH QC:

Well yes and that's what I was really trying to say yesterday about the Crown grant that it doesn't require delivery by history, it's just a grant and –

ELIAS CJ:

My understanding and which might be quite wrong is that Crown grants actually transformed the form of title. The Crown grant in itself.

MR GALBRAITH QC:

Yes that's –

ELIAS CJ:

But I'm not sure whether that's right. I'd like to know whether it is right.

MR GALBRAITH QC:

But that would follow from what we were saying yesterday that it doesn't require delivery. If the Crown grants, the Crown grants, it does whatever it sets out to do. Whether the person on the receiving end likes it or doesn't like it is irrelevant.

ELIAS CJ:

The Crown could only grant its domain lands.

MR GALBRAITH QC:

Yes, yes.

WILLIAM YOUNG J:

Well not under the statute.

ELIAS CJ:

Yes under the statute.

WILLIAM YOUNG J:

Because the statute was that you could make – Commissioner Spain was entitled to make a recommendation. If the Crown accepted the recommendation it issued a grant. There wasn't an intermediate acquisition by the Crown of domain land and an on-sale.

ELIAS CJ:

No but the Crown grant, the Crown grant constituted the land, domain lands of the Crown subject to the exception.

GLAZEBROOK J:

Well, but wasn't it –

ELIAS CJ:

I think that's the effective –

GLAZEBROOK J:

In terms of customary title, though –

ELIAS CJ:

Yes, but that didn't really matter in a way, because that could –

GLAZEBROOK J:

But in terms of customary title, wasn't the validation of the purchase effectively an indication that there'd been a free consent by Māori for proper consideration because

that was what the whole enquiry process was designed to do, to see whether there'd been free consent to the alienation of the land, and nobody's suggesting, even the contemporary people, weren't suggesting that they hadn't sold – but leaving aside the occupation of land, they did intend to welcome the settlers. There may have been a misunderstanding about the extent and the relationship between them but they did intend that the settlers would be coming and would have land and that purchase was effectively validated.

MR GALBRAITH QC:
Yes, and that's what the enquiry was about, to see whether there had been free consent.

GLAZEBROOK J:
So there had been free consent to the removal of customary title. That had already happened. It couldn't revert if that had already happened.

O'REGAN J:
But wasn't the pre-emption provisions saying that all pre-existing contracts were void and it was only if the Crown validated it by this exception to the pre-emption rules that it became a valid contract, and that was what Commissioner Spain's enquiry was about, wasn't it, whether to validate that earlier contract and also to establish what it provided for.

ELIAS CJ:
No, no, pre-emption wasn't right of first refusal. Pre-emption was that the land came to the Crown.

O'REGAN J:
And the Crown had to buy it, correct, and the Crown hadn't bought this land so this was an exception to that.

ELIAS CJ:
No, I don't think that's the way it was treated.

WILLIAM YOUNG J:
Isn't it dealt with in the 1841 Act?

MR GALBRAITH QC:

That's right. That's what I was just going to look at. It's behind tab 3 of the pink volume.

ELIAS CJ:

There's a big history of imperial history of pre-emption and pre-emption doesn't have the – well, as I understand it doesn't have the connotation of right of first refusal so that the Crown is waiving that in this Spain process. The Spain process ended up in the lands being treated as demesne lands of the Crown and the Crown granting it so that if the grant was not affected my understanding has always been that it became, it remained demesne lands of the Crown.

MR GALBRAITH QC:

Yes. I don't think the ordinance spelled it out, Your Honour, just on my quick reading of it.

ELIAS CJ:

Well, what about 2?

GLAZEBROOK J:

But I guess you either had a claim to land which was validated under that process or you didn't. I'm not sure they were thinking of somebody saying, well, you validated my claim to land but, oh, sorry, I don't think I'll have it.

WILLIAM YOUNG J:

Is it section 6 of the – oh, I might be looking at the New South Wales Act. Isn't it section 6 of the 1841 Ordinance, the "what happens", that the Commissioner has recommended grant of land and that the Commissioner – that the Governor with the advice of the affected council then does so. Sorry, it's just the Governor.

GLAZEBROOK J:

But I suspect they didn't think of a situation where the person who'd made the claim just didn't accept the grant because it was effectively validating a claim.

ELIAS CJ:

Well I think there were some examples in the law –

GLAZEBROOK J:

I'm sure there were but I'm not sure that they were –

ELIAS CJ:

– where old land claimants didn't take up the grants.

WILLIAM YOUNG J:

Was there any *Hansard* debate of relevance in relation to the 1867 Act as to why it was seen as necessary to provide the revoked Crown grants were null and void?

MR GALBRAITH QC:

I asked about that and as I understood we didn't find anything of relevance.

WILLIAM YOUNG J:

So there's no legislative history because that might – rather, the fact that it's stuck there in the middle of a statute where it's not obviously relevant, otherwise relevant, suggests that there wasn't any particular issue that was being addressed.

MR GALBRAITH QC:

I suspect that given when all this happened there was more than one situation, Sir, where there'd been double grants.

WILLIAM YOUNG J:

And just, I couldn't find, the Attorney-General seems to have given a memorandum, issued a memorandum in relation to the revocation of the 1845 grant and its substitution but I couldn't actually put my hands on anything that was, at least, easy to read in that regard.

MR GALBRAITH QC:

The only things I've seen, but I'll be corrected, is in Governor Grey writing back to the Claimant Office saying that he'd instructed the Attorney-General to bring proceedings.

WILLIAM YOUNG J:

That was for something else though wasn't it?

MR GALBRAITH QC:
I'll have to ask Ms Feint.

MR GODDARD QC:
Tab 23.

ELIAS CJ:
Of what?

MR GODDARD QC:
I've got evidence where it's set out in full. I haven't found the document yet, Your Honour. If one goes to volume 5 of the case on appeal, tab 23. This is Mr Parker's –

WILLIAM YOUNG J:
So what page?

MR GODDARD QC:
So tab 23, beginning on page 2033, all the steps leading up to the 1848 Crown grant is set out, including over on 2034 to 5, the full content of the Attorney-General's memorandum.

GLAZEBROOK J:
2-0 what, sorry, 4?

MR GODDARD QC:
2034 to 5, sorry Your Honour.

MR GALBRAITH QC:
Oh, that's right, we've referred to part of this, I think, previously. Perhaps once the Court's read it.

ELIAS CJ:
Sorry, what – can you give me the page again?

WILLIAM YOUNG J:
Okay, so it's just really a drafting instruction rather than an analysis of one.

MR GALBRAITH QC:

Yes, yes. He's saying it would be more sensible to actually define the various areas rather than accept them, which I can understand.

ELIAS CJ:

Sorry, what page is that again?

MR GALBRAITH QC:

Sorry, 2034 to 2035 but you'll see also, the Court will see on page 2035, the second paragraph, "It appears that in some of the districts the native reserves have not yet been chosen. If so it would be desirable. It should be done at once and they should be distinguished in the plan to be endorsed in the grant." Of course that wasn't done but, therefore, again, it indicates that it was within the power of the Crown to do.

ELIAS CJ:

Am I – I assume somebody has checked the schedules to the successive Native Reserves Act and these lands are not in them, is that right?

MR GALBRAITH QC:

They are 1856 on they're in, aren't they, yes.

ELIAS CJ:

They are in?

MR GALBRAITH QC:

Yes.

ELIAS CJ:

That's the allotment, the town lands and the –

MR GALBRAITH QC:

Only the town and the –

MR GODDARD QC:

I think there are full schedules in Mr Parker's –

ELIAS CJ:

Yes that's right.

MR GALBRAITH QC:

It takes us through each Act and which lands are in and out in gruesome detail Your Honour.

ELIAS CJ:

I know that there is but, again, it's secondary evidence and I'd quite like to have a look at the material. I did go through Mr Parker's evidence in some detail and the query I had was I'd like to look at Schedule 7 of the Native Reserves Act and the First Schedule to the 1896 Act. So I was left with a bit of a question mark about that, but anyway. We don't have those do we? We may have them in the huge amount of material before us.

MR GALBRAITH QC:

Yes I think we do, I think, somewhere. Yes, we'll have a look at that.

ELIAS CJ:

Well I would have thought since it is a formal record of trust that it's of some significance for the Court.

MR GALBRAITH QC:

Yes, I will enquire at morning tea about that.

ELIAS CJ:

Yes, thank you. All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.35 AM
COURT RESUMES: 11.53 AM

MR GALBRAITH QC:

Just going back for a moment to something we were discussing earlier, that decision that I didn't think was in the casebook is in fact in the casebook, *R v Clarke* which is

one of those three lost cases, is in volume 4 at tab 75, but this is the Supreme Court decision, not – it went on to the Privy Council, which I'll just refer to in a moment. The issue was whether a grant for a larger area than the 2560 I think acres it was that was provided for in the ordinance was valid or not, and the reason that I was referring to it previously wasn't really for that point, was that there is a discussion at pages 9 through, really through to 12, about Crown grants and the particular issue which was, well, one of the things which was discussed was the legal, whether instructions – charters obviously were legally binding because they came under Great Seal et cetera – where instructions were similarly legally binding, and the opinion of Justice Chapman, which he pursued in this case and thereafter, was that they weren't, but in some later writings he talked about the possibility if they were publicly made that they might be, and that case is discussed in the Hickford article which is to be found in volume 9 behind tab 155 and at page 25 of the article –

ELIAS CJ:

Sorry, can you…

MR GALBRAITH QC:

Sorry, volume 9 tab 155, page 25 of the article, where he discusses the – the case went off to the Privy Council and the Privy Council decided that the grant was –

GLAZEBROOK J:

Sorry, I missed the page number of the article.

MR GALBRAITH QC:

Sorry, page 25, under the heading, "*Clarke* and the prerogative." They ultimately found in favour of the Crown, which was – and they emphasised the fact, as you'll see on page 25, or particularly the footnote, "Their Lordships advised the grant is founded upon the report and the report is founded upon the ordinance, and that the grant that was made was clearly contrary to the terms of the ordinance and therefore the grant must fall and the judgment upon the scire facias must be for the Crown. So, but they hesitated and didn't get into the broader issues which were discussed in Justice Chapman's judgment in the Supreme Court. In other words they did, in a sense, the right thing, they made a decision on the particular issue and –

ELIAS CJ:

Well, what did they decide though? I don't quite understand it.

MR GALBRAITH QC:
Sorry, they decided that the grant failed because it was for a greater quantity than the 2560 acres that was provided for in the ordinance.

ELIAS CJ:
Right.

MR GALBRAITH QC:
And that there was wasn't any evidence, whereas the Court below had thought there was. There wasn't any evidence that the Executive Council and the Governor had decided to extend the jurisdiction of the Commissioners.

ELIAS CJ:
Ah, I see, yes.

MR GALBRAITH QC:
So, but as I say, the Supreme Court case –

ELIAS CJ:
Which they could have done under the order.

MR GALBRAITH QC:
Which they could have done, yes.

ELIAS CJ:
Yes.

MR GALBRAITH QC:
And in the Supreme Court case just has that discussion about Crown grant and that.

ELIAS CJ:
So what's useful to us in that?

MR GALBRAITH QC:
It's really that the ordinance is the – well, firstly, Justice Chapman would say charters et cetera are legally binding.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

And he would say – and it's a subject of debate, as Hickford talks about – that instructions may not be legally binding. But so far as our case is concerned that doesn't matter, for the reason we discussed before, that they are still a clear indication, evidence of what the Crown's intention was, so the fact that they're not, that somebody can't sue on an instruction, is on our case neither, is not directly relevant.

ELIAS CJ:

Well, they might though also indicate that the Governor didn't have authority to do what he did, if what he does is contrary to the instructions.

MR GALBRAITH QC:

Absolutely, absolutely right. Contrary to instructions or contrary to, in this case, the ordinance. Well, I think the Privy Council kind of perhaps fudged that a little, from reading Hickford.

ELIAS CJ:

Well, what did the Privy Council say, do we have that?

MR GALBRAITH QC:

No, we've only got Hickford on the Privy Council I'm afraid.

ELIAS CJ:

Okay. [inaudible]

MR GALBRAITH QC:

In our casebook or our legislation authorities there are the authorities which Ms Feint has referred to in her outline, which traced back the authority for the Acts that were applying from New South Wales but I don't know that we need, for the moment, to go back to those but they are in the casebook starting at tab 1, sorry, of our supplementary bundle of authorities, and so those early Acts are to be found there.

ELIAS CJ:

Sorry, you're talking about the New South Wales Act?

MR GALBRAITH QC:

Yes and tracing through to the New Zealand Constitution Act of 1852 which is after the events that certainly we're relying upon.

ELIAS CJ:

Well how is, you know, that tantalising reference you took us to which contrasts the position with the following the 1852 Act?

MR GALBRAITH QC:

The 1852 Act, Your Honour, which is in the supplementary bundle of authorities at tab –

ELIAS CJ:

What does it deal with that's of relevance to us? I'm quite familiar with the Act.

MR GALBRAITH QC:

Sorry, it –

ELIAS CJ:

Served as our constitution tool –

MR GALBRAITH QC:

That's right.

ELIAS CJ:

– 1986.

MR GALBRAITH QC:

Yes. It provided for the delegation of certain powers to the Governor. It also provided for –

ELIAS CJ:

Representative Government.

MR GALBRAITH QC:

Yes, it saved the lands of Aboriginal native tribes in section, my Latin numbering is not too good these days.

ELIAS CJ:

No, but what does it do that bears on this issue of Crown grants and trusts and ownership?

MR GALBRAITH QC:

Well it legislated for some of the things which previously weren't legislated for so that it gave a power to the general assembly, for example, to regulate sales, et cetera and none of that existed. Previously it was all in the Crown previously –

ELIAS CJ:

Yes.

MR GALBRAITH QC:

– so it –

ELIAS CJ:

Well there's a move from Crown colony to –

MR GALBRAITH QC:

Yes to represent –

ELIAS CJ:

– representative Government, yes.

MR GALBRAITH QC:

Yes, that's really the sea change.

ELIAS CJ:

And so it doesn't have any –

MR GALBRAITH QC:

No.

ELIAS CJ:

– any effect?

MR GALBRAITH QC:

No.

ELIAS CJ:

Okay, thank you.

MR GALBRAITH QC:

That was the sea change. So going back to express trusts, we'd been just talking about the certainty of subject matter. Certainty of objects, both His Honour Justice Clifford and also the Court of Appeal were satisfied that there was, certainty of objects, and of course the Crown's through its appointees have been exercising beneficial distributions from 1842 on with the lands that have been leased and I'm not sure that certainty of objects remains an issue of significant debate.

So I was then going to go to fiduciary duty somewhat briefly, although our written submissions have an extensive submission in relation to fiduciary duty starting at section 5 on page 9. And the reason perhaps I'm not going to go at such length is that what I said to the Court of Appeal and, with respect, having now made the submission about express trust here, was that the elements that we were asserting in the Court of Appeal in support of an express trust, the same elements that one would assert in respect of a fiduciary duty with the evidence of the Crown intention, that Māori should be protected, there should be reserves, that pā sites should be protected and excluded from sale and it's trite, as I said yesterday, that whether there's a fiduciary relationship is all dependent upon the facts and the circumstances, the factual circumstances of the relationship and, in our submission, there were more than adequate factual circumstances too, should the Court not be persuaded there's an express trust, at least with a duty owed and in respect of if we're into the situation of customary title remaining in the pā sites, et cetera, then it would be appropriate for a fiduciary duty to be recognised in respect of those sites which still remained in customary title.

Now one of the reasons that the Court of Appeal said that there was no fiduciary duty was this loyalty issue and the suggestion again went back into the balancing type of issue. A couple of comments about that and if we are staying away for the moment

from the Canadian approach which I will talk about in a moment, when one looks at loyalty I think one has to be just a wee bit careful that – I was reading Mathew Conaglen's book on fiduciary loyalty and his definition of loyalty is faithful adherence to ones promises and obligations. So it's not like cheering for a particular rugby team and as Her Honour Justice France did determine or did say in the Court of Appeal, it is quite possible for the Crown (a) to be a trustee and (b) be subject to a fiduciary duty, albeit that it's got lots of other obligations and political pulls et cetera. So you can have all those other obligations and simply the duty in one respect and of course the distinction in respect here we would say is that the fact that Māori had pre-existing legal rights in the land and the Crown chose to assume control, certainly assume control of the designated sections from 1842 on and from 1845 and then subsequently 1848 assume control of both the designated lands, so the endowment lands and also didn't except the pā sites and those got lost in the swale of the land which the Crown regarded itself as entitled to from 1850 on.

So we say that Her Honour was correct to say the Crown could owe fiduciary duties but with respect incorrect to suggest that the duties here were political and duties that allowed for a balancing and we say in relation to a situation where we are talking about proprietary interests which we are in this situation that it's inappropriate, inapposite to talk about balancing and duties then being non-obligations or there being no obligation and as I said earlier, before morning tea, if there is no obligation then the Crown can simply do as it will and indeed Governor Grey seems pretty much to have done that in 1848 albeit of course he explained it or justified it on the basis that there were reserves made available in the Wairau area but of course they were two different customary owners and it's interesting actually in that second document that, or communication that Ms Feint read from, just above that part of it Governor Grey actually goes on about how Māori from one hapū don't feel comfortable being asked to go into another area and one can well understand that but he seems to have blinked or ignored that when it came to justification.

O'REGAN J:
So did the Wairau purchase have provisions in it for reserves as well?

MR GALBRAITH QC:
Yes it did but unfortunately, as Ms Feint said, the pressure from the settlers subsequent to that meant that those reserves got swept up in a later purchase, I think about three years later.

O'REGAN J:
I see.

MR GALBRAITH QC:
Or the bulk of them anyway.

O'REGAN J:
But in 1848 there were reserves available in Wairau but obviously in a different place with a different –

MR GALBRAITH QC:
Yes in the Wairau.

WILLIAM YOUNG J:
They were very substantial, they were over 100,000 acres weren't they?

MR GALBRAITH QC:
It was a fairly substantial chunk. They unfortunately disappeared.

O'REGAN J:
I mean in one view of it that could be seen as an acknowledgement by Governor Grey that the obligation to provide the reserve still existed.

MR GALBRAITH QC:
Well he's – that's in fact how he treated it, he said well the New Zealand Company or the New Zealand Company land doesn't have to be subject to the reserves because now we have these reserves in the Wairau.

WILLIAM YOUNG J:
With a different sort of reserve he had in mind at that stage. It was a free to roam reserve rather than a house type or an occupation reserve.

MR GALBRAITH QC:
Yes. Well the extent of them indicates that because –

WILLIAM YOUNG J:

Yes I think that was what he had in mind from the material I've read.

ELIAS CJ:

Where does that appear?

WILLIAM YOUNG J:

Oh it's in there somewhere. It will be the – effectively the ability to hunt, to gather food, to move from place to place rather than the rather rigid reserve system that the New Zealand Company proposal would've had.

MR GALBRAITH QC:

He certainly said in that communication Ms Feint went to that the New Zealand Company proposal was, while well intentioned, inappropriate or inadequate or words to that effect and he also, in some of the communications quite properly acknowledged that it was important that there be reserves but –

ELIAS CJ:

But they're a different form of reserve.

MR GALBRAITH QC:

But they're a different form of reserve.

ELIAS CJ:

They're not endowment reserves?

MR GALBRAITH QC:

Well, there were no – they weren't reserves for the hapū and whānau or for the people who negotiated these treaties.

O'REGAN J:

I guess the point that can be made, though, is that he wasn't saying there shouldn't be reserves so he did seem to acknowledge that the Crown still had some obligation.

MR GALBRAITH QC:

And as I say, he himself recognised that there should be reserves because they were necessary, otherwise what had sparked the whole idea of reserves in the first place

would happen in New Zealand as it had happened in other places, that Māori would be left without any land and so it wasn't that he didn't think that but he had political pressure. He had settlers beating on his door and in that way the Court of Appeal is quite right. It was a political decision. That's where I got into a discussion with Her Honour in the Court of Appeal because again a little bit like the point that was made to me earlier in respect of express trusts it seemed to me that a situation where you've got propriety interests and the Crown ends up dealing with those to its own ends that you're really into an orthodox type of fiduciary duty. That certainly is my primary submission. But we did deal with the Canadian jurisprudence, as we do in our written submissions here, where still the factor of the pre-existing propriety interest is the driving influence on that decision and I think Justice Young in one of the cases later on said that that was something pretty orthodox and it had trust-like characteristics and with respect I agree with that. It seems to be a fairly conservative case which I'm happy to take the Court through but I suspect I don't need to. I suspect the Court is well aware. Some of the cases which have built on it later on, of course, are less conservative or less traditional, perhaps I should say, but interesting in the way that Canada has developed a sophisticated doctrine of fiduciary duty in the context of the relationship between Crown and the Indian bands. Again in those cases it's – I certainly find it interesting the way the Court has been prepared to shape the content of the duty depending upon the specific context and we identify that process in our written submissions.

ELIAS CJ:

So what is the duty that you are relying on here? Can you re-express it?

MR GALBRAITH QC:

The duty which, in my submission, exists here is, so far as, I suppose we've got two situations. If we're correct in relation to the endowment lands resting in the Crown, to deal with those for the benefit of Māori and Māori in that sense, in our view, is the hapū and whānau who were participants to the sale which gave rise to the 1845 grant.

ELIAS CJ:

Well, it's hold and treat, presumably, is it?

MR GALBRAITH QC:

Yes, to hold and treat for the benefit, and for the land –

ELIAS CJ:

And that's as to the ascertained endowment lands, and an obligation to ascertain and set apart the balance, is that right?

MR GALBRAITH QC:

Yes, in relation to the endowment lands, yes. And in relation to the pā burial grounds, et cetera, if they're still in customary title and not part of the endowment lands, to protect that title and not, that is the Crown, not to act adversely to the interests of hapū and whānau who held customary title in that land. So in other words, don't tip them into the 1848 grant, and certainly don't tip them in without excepting them, because while that grant does except pā sites, et cetera, it doesn't identify.

O'REGAN J:

But that's presumably a duty though that is place-specific, location-specific?

MR GALBRAITH QC:

Yes, yes, it is, it is. And, as I said before, I've been conservative, I suppose, or traditional, I see that as fitting pretty squarely within orthodox fiduciary principles, given the nature of the interest, in both cases.

WILLIAM YOUNG J:

Don't you have to get, at least on *Paragon*, from an argument that the Crown should have done more to see that reserves were established, to a position where it acquired land subject to a particular obligation to create a reserve?

MR GALBRAITH QC:

In respect – we're talking about the reserves now, Sir, are we?

WILLIAM YOUNG J:

Yes.

MR GALBRAITH QC:

Yes, but I would say they had the particular obligation to create a reserve.

MR GALBRAITH QC:

In respect of – because we're talking about the reserves now, I would say they had a particular obligation to create.

WILLIAM YOUNG J:

Well, I mean …

MR GALBRAITH QC:

In our argument it's only a getting in of the land that was required.

WILLIAM YOUNG J:

Yes, all right. According to Lord Justice Millett, you are barred by limitation if the trust arises as a result of the unlawful transaction. Now, on your analysis isn't the unlawful transaction which is impeached either the taking of title by the New Zealand Company pursuant to the 1848 grant without acknowledging a trust, or will it be the later taking of land by the Government pursuant to the 1847 Act without acknowledging the trust?

MR GALBRAITH QC:

That may be the breach but the fiduciary duty arises, we would say, in 1845.

WILLIAM YOUNG J:

But don't you have to have an antecedent transaction which the trustee acknowledges holding the alleged trust property on trust for the beneficiary?

MR GALBRAITH QC:

That's the 1845 grant.

ELIAS CJ:

And the 1840 agreement.

MR GALBRAITH QC:

All of those steps coming through.

WILLIAM YOUNG J:

Yes but you've got to look at that for the Crown and you say – I mean, in the end the argument may come down to a fine point whether it can be the Crown can be said to have held any land on trust when that land hadn't been allocated.

MR GALBRAITH QC:

Well, in 1845 it was.

WILLIAM YOUNG J:

That depends – yes, I agree with that term. I understand the argument. But you face the argument that it was never accepted and implemented.

MR GALBRAITH QC:

Yes, sure.

ELIAS CJ:

But non-implementation, you say, is the breach.

WILLIAM YOUNG J:

Yes and I accept there may be a breach, too, but I'm just looking at the parallel, that's the line of argument, not what you might call the substantive issue.

ELIAS CJ:

No, but the answer to that is the one that, presumably, has been given is that it is of the breach that's relied upon as the source of the fiduciary relationship.

MR GALBRAITH QC:

No, no, that arises because of the –

WILLIAM YOUNG J:

No, it's always the pre-existing fiduciary relationship otherwise there's no breach. I mean, that's the point.

ELIAS CJ:

No, it can arise.

WILLIAM YOUNG J:

That's the point that's made in parallel because there was a pre-existing fiduciary relationship.

MR GALBRAITH QC:

Well …

ELIAS CJ:

Aren't you going to take us to the paragraph?

WILLIAM YOUNG J:

Well you're going to say paragraph 4 anyway.

MR GALBRAITH QC:

Well that's right but even if it's right –

ELIAS CJ:

It applies in quite different circumstances.

MR GALBRAITH QC:

Yes, that's something, sorry I'm just – I have a note about *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) I was going to refer to. But yes we do have to deal with that and so we would say that there's a pre-existing fiduciary relationship that is evidenced by everything which happened from 1840 on and which is, as we said before, I'm just repeating, crystallised in 1845, was pre-existing proprietary interests which Māori had that were either held in express trust or were subject to a fiduciary duty and the breach happens in 1848 or whenever Sir and so it's not a remedial, because I think that is really the distinction which Lord Millet makes, between – in institutional and remedial, if that's of, is a useful distinction but it is one he makes about section 21(1)(b) and so we say it's not a remedial, it doesn't fall within the remedial constructive trust category, it's something which arises because of the nature of the relationship and the interests which are involved as at 1845. And he goes that's, as Your Honour says that's the argument that we must make. So unless the Court wants, well as I say, we deal with Canadian authorities in our written submissions and we go onto talk about the application of the, if one's going down that sui generis track, the application of sui generis fiduciary duty in New Zealand, it's

– the Courts have commented frequently about it but have not yet had to make a determination because usually there has been another answer to it and the other two answers here are express trust or a orthodox form of fiduciary duty but the Canadian authorities and the Canadian approach is available.

ELIAS CJ:
Well it is if the, if the *Paragon* line prevails, it's an additional route.

MR GALBRAITH QC:
It's an additional, yes.

ELIAS CJ:
But if *Paragon* doesn't bite in these circumstances there's no need to go to that.

MR GALBRAITH QC:
I think that's right Your Honour, I think that is right. And this Court's had this before so as I say unless any of Your Honours want me to go to the specific cases... Perhaps to make one comment which we make in 5(18), one of the reasons that the Court of Appeal or Her Honour Justice France gave in not identifying a fiduciary duty here was her recognition or her acceptance of there were alternative remedies available under the Waitangi Tribunal legislation and so we've dealt with that in our written submission, and the short point of this is, a private law claim and it's something the Waitangi Tribunal was not able to give relief in respect of. I will have to come back to that issue because it has got relevance to Wakatū standing, so I just note that at the moment. And then we've got in section 6 a section on the Crown's fiduciary duty to the Māori defenders of the Nelson land which I think I've really discussed in enough detail.

O'REGAN J:
Why do you say the Tribunal couldn't give a remedy for this?

MR GALBRAITH QC:
Because the Tribunal doesn't give a remedy for private law claims, if I can put it that way. It deals with historic grievances, of course it makes a report which is a recommendation but it can't say –

O'REGAN J:

But an investigative, I mean this Mr Stafford did make the claim and the Tribunal did investigate it and then there was a settlement wasn't there?

MR GALBRAITH QC:

Yes, with the variant that the Tribunal did, it was considered as part of the iwi claim, the process which had been set up with Wakatū as one of the five original shareholders in what was to be, was in fact the mandated group, was not followed through because the Crown refused to negotiate with Wakatū and Mr Stafford is the, as the holder of the particular claim and would only negotiate with iwi and so the claim was presumably out of the iwi negotiation or discussion in any case, and there was a settlement which is why we have that settlement provision. Because the Crown wouldn't recognise the, the legal claim, if I can put it that way.

ELIAS CJ:

But leaving aside those questions of mandate and so on, the – and just looking at it in terms of what the Tribunal has authority to do, if no remedy were available for breach of legal rights, that would be within the jurisdiction, would it, of the Tribunal? I mean it's probably not right to talk about jurisdiction anyway but –

MR GALBRAITH QC:

No it's. I mean the Tribunal can look into –

ELIAS CJ:

Has the Tribunal actually proceeded on the assumption that there is no legal remedy?

MR GALBRAITH QC:

I don't, at the moment standing here, sorry so in other words that would be a treaty breach of –

ELIAS CJ:

Yes, yes –

MR GALBRAITH QC:

No, I don't think so, I don't think so. But I'm subject to correction on that. Well Mr Goddard's a bit AC/DC on that, I'm not sure.

GLAZEBROOK J:

But if the Tribunal, in terms of not having a remedy, if the Tribunal decided there was a proprietary claim and there was a legal right, it could say so and recommend that that be recognised?

MR GALBRAITH QC:

Yes it could.

GLAZEBROOK J:

So I mean Māori don't have to come to Court if they didn't want to come to Court and would prefer to deal with everything in front of the Tribunal, it's just –

MR GALBRAITH QC:

No they don't.

GLAZEBROOK J:

– it wouldn't be an actual remedy, it would be a recommendation, is that –

MR GALBRAITH QC:

That's right, that's right. And so there was a deal of discussion in the High Court in the evidence about the standing and the approach within the Waitangi Tribunal and I mean the bottom line of all that is that it's a negotiated outcome of –

ELIAS CJ:

Of a number of grievances?

MR GALBRAITH QC:

Of a lot of grievances and the end result will always, I think I can safely say, will always be less than if the legal rights were vindicated, if they were through a Court process because that's the nature of the process. So that was the consideration which the Court of Appeal took into account, in my respectful submission, in a legal claim, which this is – that's not an appropriate consideration and that parties shouldn't be denied access to the Court on the basis that they should go somewhere else for a less, for a non-legal result if I can put it that way.

So I don't know that I need to, as I say, go through those issues which we say in our written submission, I think we dealt with those. We then go on our written

submission at page 21 to talk about the breach of the Crown's duty to fulfil the terms of the 1845 Crown grant and again this is really a factual issue and I think Ms Feint went through this really yesterday and the Court well understands that we're talking of the 1848 grant and the loss of the 10,000 acres, the reduction of 47 town sections, the use of occupation areas for swapping with the Tenths sections therefore reducing the Tenths sections and that is tracked through in the schedule which is annexed to our submissions. And as we say in 6.9 which is the point that I was making before, it was possible for the Crown to fulfil the terms, the 1845 grant, and that there was 45,000 acres available in Golden Bay. There were surveyed 150 acre sections and so – and there was as you'll see in that memorandum of the Attorney-General's which my learned friend kindly directed us to before, there was an ability at the time recognised by the Crown to, in fact, make that selection and indeed that's what the Attorney-General suggested should be done, but it wasn't done because the settlers wanted it all in together and there wasn't enough land for the full rural allocation to be made. I don't know that...

I was going to, and I said I'd do it at this stage, hand up a perhaps revised declaration and this may end up being the subject of debate as matters go along. It is in one of the issues which the Court may take up with me. It is in general terms and the reason for that is, or the principal reason for that, is that to identify, if we take the pā sites, for example, the evidence isn't before this Court as to pā site one, pā site two, pā site three, is just isn't there. There's evidence that there were pā sites that weren't identified in the 1848 grant and excepted. There's evidence that there were pā sites in the 1845 grant that weren't identified and excepted, but to actually identify the scope of what wasn't excepted would require reference back to the High Court and a further factual –

ELIAS CJ:
It's not the – I mean, the pā sites may be the easiest thing, it's the cultivations which were meant to have been fenced and –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– identified and so on, and there's all that evidence that they moved over time. So how's one going to do that?

MR GALBRAITH QC:

Well, that's why, in that discussion that was held between the Governor and Wakefield, that there was that identification of the bounds and fencing of the cultivation sites. Now I agree, there's going to be some disagreement I think is what one might say, but I'm told that both, that factually there is evidence that can be brought in relation – certainly the pā sites, as Your Honour rightly says, that that's the easy part of it, the cultivations may be less easy, but in some parts like the big wood apparently that is relatively identifiable. There may be other parts which aren't, in which case if it can't be established it can't be established, and that's a risk of Māori in that sense. So that's why this is, that's one of the reasons this in fairly general terms. And one of the reasons also, I mean the most general term you'll see in the end of the second line and the beginning of the third line, "legally enforceable obligations" –

ELIAS CJ:

Well, I don't know what that means.

MR GALBRAITH QC:

Well –

ELIAS CJ:

I mean, if you're not able to identify what they are how could we possibly make a declaration along those lines?

MR GALBRAITH QC:

Well, that's to hedge the express trust fiduciary duty, and I suppose there are other potential possibilities, but…

ELIAS CJ:

Well, we'd have to put in one or t'other –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– whichever we arrived at.

MR GALBRAITH QC:

Yes, accept that. But that was a reason –

ELIAS CJ:

So it was in breach of trust or fiduciary –

MR GALBRAITH QC:

Well, fiduciary duty.

ELIAS CJ:

– obligations.

MR GALBRAITH QC:

Yes. But that was the wording that's actually in the notice of appeal, so…

ELIAS CJ:

Yes, I know.

MR GALBRAITH QC:

So that's, I'm just explaining why that's in those grounds.

O'REGAN J:

I mean, you need to know what the breach is, so, in order to work out what the remedy is, don't you? And you can't really decide whether there's a limitational lapse of time defence until you know what the duty is.

MR GALBRAITH QC:

Well, that's correct, well, it does make a difference in express trust, well, fiduciary, yes, I mean Your Honour is – though our submission on fiduciary is there is no limitation in fiduciary now.

O'REGAN J:

I mean I'm not asking you to get into that now, I'm just saying that I don't – saying there's legally enforceable obligations is not – it doesn't really decide anything. We've got to decide what the obligations are, don't we?

MR GALBRAITH QC:

Yes, yes that's right.

O'REGAN J:
So if there is a trust, we need to know what the terms are and what the Crown was required to do and what it didn't do.

MR GALBRAITH QC:
Yes and that's the discussion about the object of the trust which was had in the Court of Appeal and it's a generally benefice the Crown says but does it have this term or that term or some other term in it, right of sale for example. So that's as a, I mean I accept what Your Honours say, that's a very general declaration. I will have a look and see if we can refine it more for you in the course of today.

ELIAS CJ:
Well what do you want to cover? You still have to cover standing and limitations.

MR GALBRAITH QC:
Yes.

ELIAS CJ:
And –

MR GALBRAITH QC:
Shall I talk about standing then which is dealt with our written submissions at section 4. Again as the Court knows His Honour Justice Clifford said there was no standing for any of the plaintiffs. The Court of Appeal accepted there was standing for Mr Stafford and as you heard from my learned friend Mr Castle yesterday, it's accepted by Mr Castle's clients also that Mr Stafford has standing within Mr Castle's client's iwi and that standing for Mr Stafford is not opposed by Mr Castle's clients anymore, so…

ELIAS CJ:
I must say I'm not sure about this emphasis on standing at all because it is just a question of whether the claimants have claims isn't it?

MR GALBRAITH QC:
Yes, well that's –

ELIAS CJ:

I mean standing is, you know, in relation to busy bodies and generally arises in public law cases.

MR GALBRAITH QC:

And that's what this Court said of course in *Paki* that it wasn't an issue of standing in relation to the issues that were then before the Court which were legal issues to be determined and there the solicitor-general conceded that and so the case proceeded on its merits and without consideration of standing and was the submission I was going to make that standing has to be seen in the context of what the proceeding is about and here we are seeking effectively declarations which are declarations of a legal position which then is on behalf of other person and so I was going to –

ELIAS CJ:

But apart from Mr Stafford, none of the appellants have legal claims except in a representative capacity perhaps, is that right?

MR GALBRAITH QC:

That's right, Mr Stafford has both an individual and representative, if I can put it that way, status in respect of this proceeding. Wakatū, as we say in our submissions in 4.2 perhaps encapsulates it best. Wakatū doesn't have a claim as Wakatū in its own right but it is an entity which was created by the Crown to represent the residual Tenths and therefore its members say those who by bequest or whatever else have changed somewhat over time, it represents the 254 or 285, whatever it be, tūpuna that were identified in the 1892 Court order and so it is a party that has been active in protecting and preserving and advocating in respect of this particular legal issue on behalf of those who certainly are some and maybe determined in due course, all of the potential beneficiaries of any recovery that might be made against the Crown. And so that's why, as I said to His Honour Justice O'Regan, Wakatū was recognised in the Deed of Mandate as the kaitiaki of the tenths claim but for the reasons we've set out in our written submissions the Crown wasn't prepared to treat with Wakatū on that basis despite saying it would, originally saying it would negotiate and so Wakatū then was forced to bring, or chose to bring this proceeding.

So one of the things we say is well, because one of the things the Crown says against us is well Wakatū, because it's an entity is separate from the customary

owners and, as we said before, can't bring a claim in its own right and that's because, but that's because of the Crown transformation of the customary owners interest into an entity for good reason. It seems odd, then, that that good reason should prevent Wakatū being represented and bringing and supporting this claim and it should be left to, otherwise to Mr Stafford.

O'REGAN J:
You say the Crown created Wakatū?

MR GALBRAITH QC:
The, it was set up by statute, Sir, so it was –

O'REGAN J:
It incorporated under a statute for Māori Incorporations?

MR GALBRAITH QC:
Yes.

O'REGAN J:
That doesn't mean the Crown set it up, does it?

MR GALBRAITH QC:
I think –

ELIAS CJ:
There's a specific statute for Wakatū.

MR GALBRAITH QC:
Yes there is.

ELIAS CJ:
What does it recite, that statute? It might be relevant.

MR GALBRAITH QC:
Yes. It's in supplementary bundle of documents, volume 3 of 3, so that's the ones that came in during the week. That's behind tab 149 and you'll see it's a specific order made under the Māori Reserve Act by the Governor-General. You'll see in the

constitutional incorporation 1, the beneficial owners of the land described in the schedule to this order being reserved land within the meaning of the Māori Reserve Land Act hereby constitute a Māori incorporation to be known as Proprietors of Wakatū under and subject to the Māori Affairs Amendment Act. To receive from the Māori trustee all land transferable by him to the incorporation. To manage administer et cetera. There's then the shareholding is identified and the land is scheduled and most, if not all, of that land, I think all of that land, would have been administered previously by the Public Trustee, is that right, yes.

O'REGAN J:
So the land described in the schedule as the 5000 acres that were, as –

MR GALBRAITH QC:
Well it's been diminished over time.

O'REGAN J:
Yes, with the changes that have happened that are referred to in –

MR GALBRAITH QC:
Yes –

ELIAS CJ:
But it is all originally sourced from that, is it, or the exchanges?

MR GALBRAITH QC:
Yes and also sourced from the Motueka occupation lands. Do you remember those, the ones that were excluded from the 1848 grant, on one of those maps that Ms Feint referred to. And it's the end result perhaps one should say that for a long time back, including Mackay going –

ELIAS CJ:
Sorry, just looking at the schedule, an awful lot of this land seems to be the Motueka land, is that right?

MR GALBRAITH QC:
Yes, because that was set aside outside the 1848 grant whereas the stuff that – sorry the land which got caught up and wasn't excepted literally disappeared into Crown

hands and some were subsequently, or a lot of it subsequently into other hands. I did know the total of this at one stage. I think –

O'REGAN J:
So the beneficial owners of the land, the term used here, means they're descendents of the 285 people identified by the Māori Land Court, is that right?

MR GALBRAITH QC:
Yes, in relation to Wakatū. There have been, as I said before, some of the shareholding in Wakatū has been, there's been dispositions by will, et cetera. I think I said that before, so some of those who are now shareholders in Wakatū aren't necessarily the descendents of the 285 original tūpuna but that's where it started out from.

O'REGAN J:
I see. So there's been changes since 1977 –

MR GALBRAITH QC:
Yes because –

O'REGAN J:
So it did mean that in 1977?

MR GALBRAITH QC:
– because people could leave by their will to their wife, for example, and she may not be a descendent, or a husband and they may not be descendents of the original 285 tūpuna because these shares are –

O'REGAN J:
So it sort of crystallised in 1977 and then changed.

MR GALBRAITH QC:
Crystallised in 1977. So that's Wakatū. And in the mandate deed it's, I think, described as the guardian of the Tenths and that's, in effect, what it has been since its incorporation in 1977 and it has been, obviously, the driving entity through this lengthy proceeding and was –

ELIAS CJ:

But the mandate deed is one entered into by the – is the Crown a party to that?

MR GALBRAITH QC:

No it's –

ELIAS CJ:

The one that you're referring to.

MR GALBRAITH QC:

It's, the mandate deed is in – oh, we haven't got it here. Oh, it's in one of the supplementary bundles. The mandate deed provided for the four iwi and Wakatū. Wakatū to be the mandate in respect of the Tenths. It's in, again that same supplementary bundle, volume 3 of 3, behind tab 151, and what it provided for and why the Crown, I think I can fairly say didn't like it, was that there was equal voting rights under the deed and it required unanimity and so the Crown recognised that it would have to treat with Wakatū as a principal and so that didn't take place and instead I dealt with iwi because the mandated organisation -

ELIAS CJ:

So where's the reference that you just told us is described as the Guardian of the Tenths?

MR GALBRAITH QC:

That's a good question. I'm not sure that's –

O'REGAN J:

It appears in the list above the diagram on page 8339. It talks about Wakatū Incorporation Wai 56. It's just meaning it's one of the shareholders.

MR GALBRAITH QC:

Yes.

ELIAS CJ:

It's just that if we are talking about having to consider questions of representation, effectively, in this standing point, then how it's described might be important.

MR GALBRAITH QC:

Yes, if you go across the next page, 8340, you'll see that third paragraph down, "The Wai 56 claim is the Wakatū Incorporation in 2005 has been agreed by all of the shareholders of Tainui Taranaki ki Te Tonga that the Wakatū Incorporation will carry the role of kaitiaki of Wai 56. South Island's Tenths claim will do this on behalf of Ngāti Kōata," et cetera, "Ngāti Rarua, Ngāti Tama and Te Atiawa whānui," and then the point I made across the page, 8341 at the first paragraph, "A shareholder protective mechanism adopted within Tainui Taranaki," et cetera, "Is unanimous decision-making at Board level. It means full voting support has to be given to any Board resolution." But, as I say, in any event the negotiations –

ELIAS CJ:

But it didn't proceed on the basis of this mandate though.

MR GALBRAITH QC:

Well, without Wakatū. Well, certainly as I understand it.

GLAZEBROOK J:

Was this the deed of mandate for the Waitangi Tribunal.

O'REGAN J:

No, it's for the negotiations with the Crown.

MR GALBRAITH QC:

For the negotiations with the Crown.

GLAZEBROOK J:

But this was – so this was put up but not accepted. Is that what the –

MR GALBRAITH QC:

My learned friend is saying it was accepted but I had understood that what happened was that the Crown would not agree to negotiate in a situation where Wakatū had that ability to prevent a conclusion because of its vote and because it was regarded as, within the mandate as the kaitiaki of the the Tenths claim and that, as I understand it, but I may well be corrected, that the Crown did not negotiate with Wakatū and Wakatū withdrew from the settlement negotiations and this proceeding resulted. But I think I've got that right but I'm subject to correction.

So the point of the mandate deed is just the recognition there that Wakatū was the kaitiaki of the Wai 56 claim and in my respectful submission, that should at least be enough to give it the right to proceed as plaintiff here in respect of these matters which –

O'REGAN J:

So does it say that it now represents the people who are beneficially entitled to the fruits of this claim or does it say that the people who are entitled to the fruits of this claim are the descendents of the original 285 and that those who have come into the Wakatū Incorporation since 1977 don't have an interest in this claim?

MR GALBRAITH QC:

Yes, it says that what would have to happen if there is a claim, that there would have to be because there is sometimes – I was going to say often is – sometimes is disagreement as to who customary owners are and who are the descendents of the customary owners. That would have to be a matter that would go back to the High Court and the High Court would presumably send it off to – it would end up in the Māori Appellate Court where that type of issue would be determined.

O'REGAN J:

But is Wakatū represented the beneficial owners in 1977, aren't they the beneficial owners of everything in relation to the reserves, including this claim, or are you saying there's some – that they are only the beneficial owners of the claim that the Crown had recognised up to that point and there's now a different group entitled to the benefits of this claim?

MR GALBRAITH QC:

Well, the dispute which the iwi raise is to whether the beneficial ownership rests with hāpu and whānau, the customary owners identified in 1892 or whether it's an interest which is owned by – owned is the wrong word, but rests with a larger entity and so Mr Castle's client would want to say it's not just the, I believe I think right on this, it's just not the descendents of the 285 tūpuna identified in 1892. The interest belongs to a wider group and so may some other iwi also want to make that claim and the –

O'REGAN J:

Well, that's a different issue again, sorry, but what I was getting to was if Wakatū represented those who had, just to use a broad term, an interest in the Tenths, why isn't that still true?

MR GALBRAITH QC:
Because Wakatū now has shareholders who –

O'REGAN J:
Yes but they're just people who have succeeded to that undivided interest in the Tenths aren't they?

MR GALBRAITH QC:
Oh, yes, I see what you mean, yes. Yes, I see what you mean. Well, from Wakatū's point of view, I think Wakatū might well take that position. Really all I'm flagging –

O'REGAN J:
But others might not.

MR GALBRAITH QC:
All I'm saying is that others might not, Sir, and so if there is a disagreement over that, and I suspect that there would be, then the way to resolve that is through the – I think it's section 61 of the –

O'REGAN J:
Well, if that's so what does the claim gain from having three different representatives of the claimants instead of one? I mean, if Mr Stafford does, in fact, represent all the claimants why do we need other people to represent them as well?

MR GALBRAITH QC:
One of the main reasons is that Wakatū has got the ability to fund a claim – albeit it's difficult for it – but it can fund a claim and Mr Stafford –

O'REGAN J:
You don't have to be a party to fund a claim, though.

MR GALBRAITH QC:
No, you don't.

GLAZEBROOK J:

It might be, to a degree, an issue of principle though because at the moment what presumably Wakatū says is that the actual beneficial owners have then denied even standing to say that they are beneficial owners.

MR GALBRAITH QC:

Yes, it means a lot to Wakatū given the role that they played since 1977 and what Ms Feint spoke about, the intergenerational interest of Māori in these sorts of issues. So having Wakatū recognised at least to that extent that it has standing to argue these matters before the Court is of significance to Wakatū, leaving aside the practical things about …

ELIAS CJ:

It's a bit like the litigation over Mangatu Incorporation.

MR GALBRAITH QC:

Now, the final –

ARNOLD J:

Just to be clear about something, after that document you referred us to at 151, then under the next tab are the terms of negotiation between groups and the Crown and it seems clear from what is said in clause 5.3 and 5.6 and so on that all this was within the terms of the negotiation because it specifically refers to claims founded on a right arising from equity, fiduciary duty, customary law, everything, and it refers to Wai 56, the Nelson Tenths claim. So what happened was Wakatū withdrew at a later point, is that right? I mean, how do we get the reservation in the Settlement Act?

MR GALBRAITH QC:

If you go again to that volume 3 of the supplementary bundle behind tab 154, there may be differences of opinion about this but my understanding is that Wakatū expected that it would be able to engage in direct negotiations in respect of Wai 56 with the Crown and you'll see behind 154 a letter from the Attorney-General, 10 August 2009, I think it is, and second paragraph, Wai 56, including the terms of negotiation which Your Honours just directed attention to. The next paragraph, the letter of agreement, clear redress is offered including Wai 56 and then the last sentence, "I want to be clear that the Crown does not intend to negotiate a settlement

for Wai 56 and I consider that the current agreement provides adequate redress for the historical aspects of that claim." So what happened was, as I correctly said before, that the Crown refused to negotiate with Wakatū in respect of Wai 56 and regard it as being encapsulated within its negotiations with the wider entity or group and relations fell apart around about there.

ARNOLD J:
So that leads to the proceedings.

MR GALBRAITH QC:
Yes, well, subsequently.

ARNOLD J:
And then the Crown sort of acknowledges that with the reservation in the settlement.

MR GALBRAITH QC:
Yes, yes, and that's the final thing I have to address.

O'REGAN J:
Sorry I'm not quite sure I understand this. So is the Minister saying they're not intending to settle Wai 56?

MR GALBRAITH QC:
No the Minister is saying –

O'REGAN J:
Because they did in fact settle Wai 56.

MR GALBRAITH QC:
Yes he's saying Wai 56 was settled and wrapped up in the general negotiations.

O'REGAN J:
Oh I see, right.

MR GALBRAITH QC:
And Wakatū is saying but we believed that we would have a one-on-one, if I can put it that way about Wai 56.

ELIAS CJ:

Isn't this letter though prospective? I mean the settlement has been concluded.

MR GALBRAITH QC:

Oh no the settlement hadn't been completed at that stage.

ELIAS CJ:

No, no, so the Minister is saying, "We will negotiate the settlement of the claim, including the historical claims with those we've entered into the mandate with and that led presumably to the filing of proceedings did it?

MR GALBRAITH QC:

Ultimately yes it did.

ELIAS CJ:

Yes. And then that was the background to the reservation in the Settlement Act?

MR GALBRAITH QC:

Yes and the reservation in the Settlement Act is an issue which this Court has said we have to deal with on appeal, though in fact the Crown didn't appeal that as I understand it, just raised it in a notice of opposition. I certainly can't find it in a notice of appeal.

ELIAS CJ:

I suppose the Crown's stance is vindicated if your clients don't have standing, effectively that determines that the settlement with those mandated is the whole settlement. I've probably put that wrongly.

MR GALBRAITH QC:

Yes well if the Crown wins on that point well that's it. If nobody has standing, well yes it's –

ELIAS CJ:

Well it isn't to say that any of the other matters that you are seeking in your declarations aren't correct, it's just to say they've all been subsumed in the settlement.

MR GALBRAITH QC:
Yes.

ELIAS CJ:
And that your clients weren't able to bring the separate proceedings.

MR GALBRAITH QC:
As a result of the settlement, yes.

ELIAS CJ:
No, no not as a result of the settlement but –

O'REGAN J:
As a result of the lack of standing if that's what the finding is, yes, yes.

ELIAS CJ:
Yes as a result –

MR GALBRAITH QC:
But that's the lack of standing before the Court.

ELIAS CJ:
Well that's right, you see the Crown fought it on the basis of lack of standing throughout, challenged it.

MR GALBRAITH QC:
Yes.

ELIAS CJ:
So that was a complete answer to the claim, therefore in the Settlement Act.

MR GALBRAITH QC:
But the Settlement Act, that's right the Settlement Act preserves the proceeding and – but of course it's subject to the arguments about standing or anything else which arises.

ELIAS CJ:
Yes.

MR GALBRAITH QC:
That's quite right.

O'REGAN J:
So presumably the preservation of these proceedings means that if the Court made a declaration would that be the end of it from your clients' point of view or would they seek actual redress in addition to the redress provided on –

MR GALBRAITH QC:
They would seek actual redress, depending on the terms of the declaration of course.

O'REGAN J:
But is that preserved in the settlement legislation?

MR GALBRAITH QC:
There's a disagreement between us.

ELIAS CJ:
There's an argument about that.

MR GALBRAITH QC:
Yes, there's an argument about that and what I would say, I mean there is an argument about that Your Honour but what I would say deal with first things first because while –

O'REGAN J:
Yes we've got enough on our plate.

MR GALBRAITH QC:
Well and – yes, and if, just saying if for a moment, if the Court made a declaration which leaving the Settlement Act aside for a moment, would otherwise give rise to a right, put it that way, to go on, then one shouldn't foreclose on that possibility just because of the Settlement Act because Settlement Acts can be changed and if in fact

this Court did say that some right had been – that the customary owners had been denied something which they, by the Crown's default, it may well be that future legislature says well that should be allowed to proceed.

ELIAS CJ:

What I'm just wondering really Mr Galbraith is whether the Court could do more than declare that your clients have standing because whether, or maybe it's going to be sufficiently argued that – because presumably Mr Goddard argues that even if they have standing everything is resolved.

MR GALBRAITH QC:

Yes, I think he does argue that. Well, I'm not sure he argues – well, he does argue that in this sense, as I read the written submissions, he says, well, there's no point giving them standing or allowing this to continue, because they can't go to the next stage.

ELIAS CJ:

It's all a bit circular really, isn't it?

MR GALBRAITH QC:

Yes.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

And I'm saying, "Well, let's deal with things one at a time and then we'll see what happens," if there is the chance of a next stage, put it that way. If there's no chance of a next stage because we haven't got standing, well, obviously that's the end of it, or if there's no express trust, no fiduciary duty, no breach, but, well, again that's the end of it. But if this Court did say that there was that, then there's a number of things can one happen. One, it has consequences in terms obviously of cost, it has consequences, potential consequences, in terms of discussions between representatives of the customary owners and the Crown, and in *Manitoba Métis Federation Inc v Canada* [2013] 1 SCR 623 (SCC) that was one of the consequences that was recognised as a valid reason for the proceedings, and it may have consequences because the legislature might in those circumstances say it is

appropriate to have this matter further determined. It may be that when one examines the s 26 and 27 through a prism that there is a way through to the next stage, because these proceedings have been preserved and it would still be within these proceedings if it was referred back to the High Court for that reason.

ELIAS CJ:

Where do we find – we should take the luncheon adjournment now –

MR GALBRAITH QC:

Yes, sorry.

ELIAS CJ:

– but where do we find in the bundle the Settlement Act?

MR GALBRAITH QC:

The settlement deed?

ELIAS CJ:

Oh, the settlement deed.

O'REGAN J:

It's in this one, I think.

MR GALBRAITH QC:

Right.

O'REGAN J:

No, the Settlement – well, the Settlement Act is what preserves this claim.

MR GALBRAITH QC:

Yes, it is, yes. Volume 2 of the authorities – is the settlement deed? Oh, the Act.

[UNKOWN]

Volume 2 tab 39.

MR GALBRAITH QC:

That's the legislation volume.

ELIAS CJ:

39?

MR GALBRAITH QC:

Yes.

ELIAS CJ:

That's a weighty Act.

MR GALBRAITH QC:

Well, as all these Act do, it has a, yes, it has a recitation of some history.

ELIAS CJ:

It's the recitals I want to read over lunchtime.

MR GALBRAITH QC:

Yes, right.

ELIAS CJ:

All right, we'll take the adjournment now.

COURT ADJOURNS: 1.08 PM

COURT RESUMES: 2.18 PM

MR GALBRAITH QC:

Can I just go back to what I was saying and I was being asked by Justice O'Regan about Wakatū and the position in 1977, just so I can be more accurate than I was. As I understand it under the Māori Trustee administration prior to 1977 it was and I'm, can't give Your Honour the legal basis for this but the Māori Trustee recognised individual interests or "shares" in the lands which it was administering and it would pay to individual persons and entitlement in relation to rents et cetera received. And because it recognised that on an individual basis there were bequests or assignments prior to 1977 so that in 1977 it wasn't only persons who were descendants of the 285 tūpuna who were, came in as shareholders of Wakatū. What also happened in 1967 as a result of the Māori Affairs Amendment Act, the Māori Trustee had the power, I suppose is the right word, to acquire an economic interest, not just in these trust lands but other trusts that were being administered on

behalf of Māori and Māori Trustee, in practice went around and acquired a lot of very uneconomic interests in Māori trusts so that by the time 1977 came along the Māori Trustee in fact owned a significant proportion of the individualised, the identified individualised interests –

O'REGAN J:
The Māori Trustee actually bought it for beneficial interest?

MR GALBRAITH QC:
I think, we just don't have it in front of us but I think initially it, they could purchase interests up to £50 in value and then it was increased to £200 in value so they were – they were small, small amounts.

O'REGAN J:
So it became the beneficial owner of some interests?

MR GALBRAITH QC:
It became beneficial owner and indeed that's part of the reason for the '77 incorporation was to perhaps it should – once they stopped the commercial activities of the Māori Trustee and so Wakatū since 1977, it took them 12 years to reacquire from the Māori Trustee all the interests that the Māori Trustee had acquired and it's Wakatū's intention if it made any recovery under this proceeding that it would seek to reinstate the interests of all descendants of the 285 who were customary owners historically to this, these lands or whatever recovery there might be so that's Wakatū's stated intention. It doesn't claim it for itself but it looks to bring this process for the benefit and the reinstatement of – and the other thing I should have added sorry; from 1993 on, again through legislation, these shares can't be assigned to other than persons having whakapapa in the land so you can't get a repetition of what happened previously.

O'REGAN J:
So the, what's stated in the 1977 order in counsel is not completely correct really. It's, that's – it wasn't actually –

MR GALBRAITH QC:
That's probably fair.

O'REGAN J:

– a complete representative because of these distortions that had happened?

MR GALBRAITH QC:

Yes I think that's accurate Sir. So I just wanted to clarify that. The second thing, I'm sorry there's just because it may be helpful. I have just put, had Ms Chander's put another piece of paper behind but I only want to talk to the bottom of the second page of it because it gives you a history of the, or step by step of the process that occurred during that settlement so if you just wouldn't mind heading to that paper which is headed "Treaty Settlement v Common Law" and turn to the second page and the bottom half of it under a heading "Mandated TTK TT bypassed by Crown due to Wakatū presence unanimity" and so there we've set out the steps and you find the correspondence and we looked at one of the letters previously, you find the, a serious of correspondence in that volume 3 of the supplementary bundle of documents running from tab 1, well we looked at, we looked at the Deed of Mandate which is 151, 152 is the terms and negotiation we looked at and then the correspondence runs from 153 and there's a bit of duplication through to 159 and you'll see in 153 which was a letter in February 2009 from the Attorney-General on the second page of that at page 8385, the point I was making before that in the second full paragraph down on 8385, "As agreed with Tainui Taranaki I acknowledge that the issues around Waikawa Marina and historical aspects of Wai 56 will be discussed by the parties in good faith between the signing of this Offer Letter and the signing of the Deed of Settlement." And then things, and then there's the letter I took you to before at 154 where the Attorney made it clear that the Crown doesn't intend to negotiate a settlement for 156 in regards the current agreement as dealing with that and then 155 there was a suspension of negotiations with Tainui Taranaki. 157 the proceedings have been issued, sorry the proceedings have been issued by that stage and the Attorney's saying it duplicates the settlement and 157 is much the same and 158 is the Attorney saying that, "I'll reopen negotiations for March 2011 on the basis that there's a commitment from Ngāti Koata to encourage and facilitate Wakatū Incorporation to withdraw the legal proceedings against the Crown." So that was the, that's the sequence of events which we summarise in that hand-up that I just referred to. Perhaps just one other thing to note in that hand-up in paragraph 19, that Wakatū is kaitiaki for the occupied lands and the Tenths wasn't permitted to chose any of the redress lands and, indeed, the land at Auckland Point School went to an iwi who, certainly in Wakatū's view, had no mana whenua in that land and my understanding is only three pieces of land that would form a Tenths land were dealt

with or provided, perhaps if you use that term in the settlement, and they were provided as commercial redress and commercial redress means that the iwi have to buy, they've got to pay for the land it's not like restoration which obviously would be the remedy that would be sought under in express trust or fiduciary duty so that the outcome of the settlement is quite different from what the outcome would be if Wakatū succeeded in this proceeding.

ELIAS CJ:
But there may be some duplication in terms of reparation because presumably the settlement amount for all the grievances included something for the Tenths?

MR GALBRAITH QC:
Unspecified, Your Honour, so –

ELIAS CJ:
Undifferential.

MR GALBRAITH QC:
Yes, undifferentiated, sorry.

ELIAS CJ:
But that is the way of those settlements.

MR GALBRAITH QC:
Well that's the way of those settlements but I think, as the Court will be aware, those settlements, well certainly the couple that I've subsequently had anything to do with are very small percentages of whatever the true value might be of what was lost and one is talking, as you say, very small percentages.

So then the issue is the effect of section 25 of the Settlement Act and preservation that's provided for there. It's dealt with in the Court of Appeal judgment between paragraphs 31 and 41 and I do, with respect, draw attention to that because in paragraph 41 the President of the Court of Appeal sets out the advice given by, I think, Crown Law – advice given by Crown Law which was that it's proper to preserve the proceedings as they preceded the settlement and the legislation.

Her Honour also said that she agreed with the judgment of Justice Clifford who had considered the issue in the context of caveats that were being sought in respect of some of the former Tenth land.

The trust, two thrusts, I think, to both Justice Clifford's decision and the Court of Appeal's decision in respect of the preservation order and they are that the intention of the preservation order was to preserve the proceeding and, as the Court of Appeal, as Justice France noted, the preservation order refers specifically to the Court of Appeal number and so it was the nature of the proceeding which she also saw as being significant because that was identified in the notice of appeal which had been filed in the Court of Appeal and Justice Clifford also believed that it was appropriate, it was significant as to the nature of the proceeding which he had ended up hearing, apart from the or as a development perhaps, one might say, of the pleaded case which, at least in the Canadian legislation it's regarded as a, almost, I think the word is "function". I'm not sure if it is "function" or "convenience" but they certainly acknowledge the fact that in these sort of cases there is development during the course of the hearing from whatever is initially anticipated by the claimants.

You find Justice Clifford's judgment in this behind tab 11 in volume 1 of the case on appeal and if I could just draw the Court's attention to – he discusses the whole issue of the preservation provision at length and he also refers to at least one Hansard extract, he refers to the report of –

ELIAS CJ:
Where are you up to?

MR GALBRAITH QC:
Sorry tab 11 and page – paragraph 51 of his judgment of 245 he says, "It's very clear therefore that a degree of preservation was intended is obvious from the statutory provisions themselves." And then he refers to an affidavit the Crown had filed and refers on page 246 to an extract from the select committee report and he refers on 247 to an extract from the speech of the Honourable Nanaia Mahuta. He, at paragraph 62, which is the paragraph I particularly want to take the Court to on page 248 says, "On the other hand I acknowledge Wakatū's submission as to the difficulty of reconciling the Crown's view of the effect of section 25(7) with the obvious statutory intent that the Wakatū proceedings are in terms of the private law claims made by the plaintiffs to be able to continue. Those proceedings have from the

outset and as I think my judgment in Wakatū shows, been brought by the plaintiffs on behalf of others. The plaintiffs were asserting private legal rights in particular under their claims for resulting constructive trusts but it was clear from the outset that the beneficiaries of those trusts and hence to the claims were the members of customary groups. Even if the way the plaintiffs characterised the nature and makeup of the customary groups is in question, as matters currently stand and accepting that I heard only limited argument on these matters as was inevitable, I have some difficult understanding what aspect of the Wakatū proceedings are preserved if the Crown's interpretation of section 25(7) is correct. By my assessment it is reasonably arguable that that interpretation is not correct and therefore on the basis that the claim to have beneficial interests in the caveat lands that Wakatū makes remains reasonably arguable. For these purposes I think it is also significant that that very argument is fully before the Court of Appeal and that it has not previously been considered in that way."

So what he is saying which is of significant in my respectful submission is that it was always on the boards that this was a claim made on behalf of others, however it might have been pleaded if one is pointy headed about the pleading and that if therefore it was intended to preserve the claim or the proceeding, then it must be preserved if it is going to be effective in terms of what had been argued before him, otherwise it has no content which of course is what the Crown argues here and that's the same discussion or consideration which Justice France gave to it in the Court of Appeal and she came to that same conclusion and as I say in paragraph 41 of her judgment which is behind tab 12 of course, she sets out the advice from the Office of Treaty Settlements in consultation with Crown Law saying that it is proper to preserve the claim and she accepts that the claim is a claim in the, if I use the term, the generality in which it was brought before Justice Clifford whose judgment she refers to in paragraph 38 and also in terms of the scope of the notice of appeal which had by that time had been filed and which she says is specifically identified in the preservation provision because of the reference to the Court of Appeal number. And if I could respond in reply to anything else which the Crown is going to say on that.

ELIAS CJ:

All right, yes thank you. Any questions? You've completed?

MR GALBRAITH QC:

Yes, before 3 o'clock.

GLAZEBROOK J:
What about the Limitation Act?

ELIAS CJ:
Oh yes limitation.

MR GALBRAITH QC:
Oh sorry. Yes I had some discussion. In relation to expressed trusts, we picked up that subject on the back of that piece of paper which I handed up this morning and I had some previous discussion with Justice Young on that.

ELIAS CJ:
Sorry, which…

MR GALBRAITH QC:
The one that we said, express trust, is this second page of it or back page of it.

ELIAS CJ:
Oh, yes.

MR GALBRAITH QC:
And this is, if I can say, this is a short, gone straight to section 21(1)(b) without going through the steps. Because the Limitation Act 1950, which His Honour Justice Young, when he considered this in one of the *Paki* cases, said that even if you start with the Real Property Act 1833 and the 1858 NZ Act adopting English law, et cetera, you end up with the 1950 Limitation Act, and that says there's no time bar to recover from the trust property or the proceeds thereof in the possession of the trustee, and that's a reflection of the trust law that restoration is, rather than restitution, restoration is a primary remedy for breach of trust. And so we refer to "but this equity in trust" which in our respectful submission would entitle the plaintiffs, if there was a declaration that there had been a breach of trust and property had been dealt with in breach of that trust, to capture both property which was, had been continuously held by the Crown, or property which had left the Crown hands but come back into the Crown's hands, which should have been held on that trust.

O'REGAN J:

But that isn't what you're claiming though, is it? I mean, you're relief, the relief you're seeking is a declaration that the Crown was in breach of the trust.

MR GALBRAITH QC:

Yes. The consequences of that, Sir, as I said before, is something which, because we've got to identify, for example, the powers – you know, that's the next step, if I can put it that way, and we're not asking this Court to make a declaration as to that at this stage because we haven't identified that land. I mean, there may be a pā site –

O'REGAN J:

Well, we have to identify it to know this provision applies, don't we?

MR GALBRAITH QC:

Oh, yes, we will, yes, indeed. But, I mean, just take a pā site, I mean, there may be a pā site which hasn't been identified in evidence before this Court, though the fact there are pā sites is, I think, properly identified in the evidence and it may have been, it may have gone into third party hands and re-acquired by the Crown under either purchase or Public Works Act or whatever down the track.

GLAZEBROOK J:

Is there any limitation on a declaration?

MR GALBRAITH QC:

No.

GLAZEBROOK J:

That's the submission, so, the declaration, is it a historical declaration of the status of the land could be made without limitation, is that the submission? When I say "historical declaration", because at the moment we don't know what the land –

MR GALBRAITH QC:

No, no. Certainly the declaration, the terms that handed up before, wouldn't entail any limitation provision in my respectful submission, because it isn't a declaration in respect of a particular breach of a particular piece of land.

O'REGAN J:
Well, yes, it is, isn't it?

MR GALBRAITH QC:
Well…

O'REGAN J:
You're asking us to declare that the Crown breached, well, was in breach of legally enforceable rights I think is what you said?

MR GALBRAITH QC:
Yes, that's true.

O'REGAN J:
That sounds like a breach.

MR GALBRAITH QC:
Well, yes, it does sound like a breach. I don't think, with respect, I don't think there's a limitation provision over that declaration in respect of the – because it's a semi-constitutional statement in terms of the declaration which is sought. If it was narrowed to the declaration that X bit of land has been granted to so-and-so in breach of the Act and the declaration that it should be restored or something like that, or handed over to Māori, then I think we'd be on a different footing. But in any event we say that, as section 21(1)(b) says, if it's trust property and if it's to be restored, or the proceeds, then there isn't a time bar, provided that we are into express trust, for example, of express property.

O'REGAN J:
But that would really only bite if you were asking the Court to make an order that land be restored.

MR GALBRAITH QC:
Yes.

O'REGAN J:
So your principal point is the declarations don't attract any limitation provisions or declarations of this kind.

MR GALBRAITH QC:
Declaration of this kind, yes. I'm sure there could be declarations that would but in my respectful submission this doesn't.

And so we've tracked through in five, as I was saying, that the Act which my learned friend sprung on us at some time during the Court of Appeal hearing but very fairly gave notice and so we say, as I discussed before with Justice Young, that the trust crystallised that 1845 with the crystallisation in that stage there was a trust of specific, what we would say as specific property, and it didn't arise because of a breach of that trust, though the right of restoration, of course, arises when there is a breach, so we would say it's not remedial on the facts and so parallel finance does apply, then it's available to the plaintiffs in section 21(1)(b). If on the other hand the Court characterised the trust as remedial rather than institutional than we say *Paragon* shouldn't apply here because it comes out of very different circumstances. Here we have the Crown's intent consistently to be a trustee and we've got all the constitutional and statutory obligations to protect Māori land which, of course, continue even more vigorously through to the present day and we've just drawn attention to some of the more present-day provisions including the 1993 Act preamble which makes it very clear that the importance of Māori land and the protection of that and we've also referred to a number of the Court's decisions, accepting that it's not a legal – it doesn't impose a legal obligation on the Court but it certainly is an indication of the seriousness with which these issues of redemption of how the land should be treated.

So that's on express trust and we say in relation to the express trust there aren't disqualifying equities and that's certainly what Justice France decided in the Court of Appeal although the other two Judges were not persuaded and saw prejudice to the Crown. We say that prejudice is largely a one-way street in relation to Māori, not to the Crown, and as we say they've suffered serious economic, cultural, social hardship. It's not surprising that litigation wasn't commenced earlier and there's a whole history of the Crown's dealings with Māori over a very extended period of time. There were attempts over a lengthy period of time in Mr Morgan's evidence before the High Court deals with this to seek redress. There were, going back to McKay when he was in the late 1800s, making representations as to the unfairness of what had happened and there were several inquiries that ultimately culminated in the

inquiry and report which actually led to the 1977 establishment of the Wakatū Corporation.

ELIAS CJ:
Was there anything in the report that anyone wanted to draw our attention to?

MR GALBRAITH QC:
Well, it has certainly got a – it does identify the unfairness, perhaps, put it that way, because, of course, like an awful lot of unfortunate Māori land it ended up being leased on terms which weren't commercial terms, et cetera, and had to be legislated subsequently to remedy that and the report obviously identifies those sort of things.

O'REGAN J:
But that was more to do with how badly the reserves were administered rather than the fact that the original ones were –

MR GALBRAITH QC:
Yes, yes, it was.

ELIAS CJ:
And you don't have a claim for that?

MR GALBRAITH QC:
No, no, no, no.

ELIAS CJ:
Because that you accept was resolved?

MR GALBRAITH QC:
Yes, yes but that was part of the idea of incorporating Wakatū because Wakatū can then get ahead and try and make a – earn a commercial return for its shareholder which it – that's what it tries to do.

We say under the next heading there's no actual prejudice to the Crown. The documentary is very complete. I mean it's not, it's obviously not total but as we say there, there was a significant engagement by the Crown of specialist historians, a Mr Parker apparently working full-time for around about a year and Wakatū called Dr

Williams and Dr Gould who was contracted for about five months work. So there was a vast amount of evidence that was provided to the High Court and we've only scraped the surface of that in of course the last day and a bit.

In our written submissions we – so that's I think all I was proposing to say about express trust limitation. In our written submissions we deal with this at section 9 and what we say is, in short in 9.1 that, "Equity is reluctant to accept an interest in land can be lost through inaction that it's action not theoretical prejudice which is important, that Māori historically couldn't gain access to the Courts." And we say at 9.2, "The action isn't time barred because the Limitation Act doesn't bar fiduciary duty claims." The Crown will obviously argue that it should be barred by an analogy and so the issue of how the Limitation Act applies to the express trust obviously is relevant to that argument but we say, one, what I've just said about the express trust and limitation but secondly we would say claims against the Crown of fiduciary duty doesn't carry a limitation period with it and as we say and I said before declaratory relief is not prevented by the Limitation Act which isn't intended to bar a constitution claim and the emphasis under it upon restitution should be persuasive that a claim shouldn't be barred by way of analogy if I haven't persuaded the Court on the 21(1)(b) provision in respect of an express trust.

Interest to note of course in Canada, take the *Whitefish Lake Bank of Indians v Canada (Attorney-General)* (2007) 287 (4th) DLR 480 (Ont CA) case default or breach back in 1886, sale of an undervalue, recovery and much more recent times no question of limitation barring the remedy, it would be unfortunate, if I can perhaps put it that way, if the situation was different here.

We've spoken about *Paragon Finance* already which we referred to in 9.3 and we say, as I have said already that there is identifiable properties such as pā or burial grounds with the difficulty which Her Honour the Chief Justice referred to cultivations that would have to be identified that could be then restored under 21(1)(b) exception to otherwise the limitation provisions. So if there were no other questions.

Sorry the Sheehan Committee report, the Sheehan Inquiry report is again in volume 3 of the supplementary bundle, it seems to have all the – and it's behind tab 148 and it deals through the history and it refers to McKay's various reports and I'm not sure we've put all of those in front of you and then it makes the recommendations which it makes at page 54, 6696 of the importance of the lands to Māori and the importance

of the lands to sustaining Māori mana and self respect and obtaining an economic return and then the future administration of those lands, but I don't think it's got anything that's specific to the issue before the Court.

ELIAS CJ:

I suppose it's another source of the historical narrative?

MR GALBRAITH QC:

Yes, yes but to some extent it doesn't go through the full...

ELIAS CJ:

Yes.

MR GALBRAITH QC:

There's some interesting historical – or at least I found them interesting, of McKay's and also the Jellicoe one which I think is in the – which really are interesting, as I say I found them interesting.

O'REGAN J:

Well and they seem to be broadly accurate too don't they?

MR GALBRAITH QC:

Yes it seems, well from my submissions.

O'REGAN J:

And they seemed similar to what we've been given in the present proceedings.

MR GALBRAITH QC:

Except that fortunately you can read it page by page and it also kind of fits together.

GLAZEBROOK J:

So whereabouts is that?

MR GALBRAITH QC:

It's in the supplementary material.

GLAZEBROOK J:

Supplementary is it?

O'REGAN J:

I think it was in the first volume. Yes tabs 2 and 3 of the first volume.

ELIAS CJ:

Thank you Mr Galbraith, yes Mr Goddard.

MR GODDARD QC:

Thank you Your Honour. I'll ask my learned junior to just hand out a road map lest the fact that it's only two pages on, excite undue optimism I should say that it's merely the first instalment and that there's more to come. But I thought that even for an hour today it would be helpful to keep myself on the straight and narrow with some sort of framework.

But I also want to begin by looking at my submissions and it's really to start at my paragraph 1.2 because this is fundamental to both why we are here and why the Crown says that these proceedings should not succeed, why this appeal should not be allowed. The Crown acknowledged before the Waitangi Tribunal, it's acknowledged formally in legislation and it continues to acknowledge in this Court, that it's failed in a number of respects to meet its obligations under the Treaty of Waitangi to the Tangata Whenua Te Tau Ihu including but not limited to the manner in which the native reserves in Te Tau Ihu were established and administered. Those issues, the issues in relation to native reserves were a subset of a much larger set of treaty issues relating to the alienation of customary land in that part of New Zealand as elsewhere and the appropriate forum for resolution of those inextricably interrelated issues are the only workable forum, given their range and complexity is first before the Tribunal and second, in negotiations between the Crown and the property mandated representatives of the tangata whenua of Te Tau Ihu. Those negotiations took place over an extended period and they resulted in settlement agreements between the Crown and representatives of the iwi identified in my 1.3; the four iwi with interests in the areas with which this appeal is concerned; Te Ātiawa, Ngāti Rārua, Ngāti Tama and Ngāti Koata, and the Kurahaupō iwi, Ngāti Apa, Ngāti Kuia and Rangitane. And legislation to implement those settlement agreements has been enacted by Parliament. So the key issue in this appeal is whether, in addition to the claims by the iwi, the hapū and the whānau of Te Tau Ihu

that have been settled pursuant to those settlement agreements and the settlement legislation, the events of the 1840s give rise to private law obligations and in particular equitable obligations in addition to obligations to under the Treaty and the obligations that a Government owes to its citizens and obligations importantly that are owed to and enforceable by the appellants in these proceedings.

ELIAS CJ:

Whether they're in addition depends on what you say the effect of the Settlement Act is and its preservation of these proceedings?

MR GODDARD QC:

Well there are not private law obligations as well as Treaty obligations there's nothing to be determined by the Court and that's really the sense in which I say "in addition".

ELIAS CJ:

Yes, I see in that sense, okay.

MR GODDARD QC:

If we're concerned with breaches of the Treaty and breaches of the obligation the Crown owes to all citizens, including Māori pursuant to the Treaty who were assured of the same protection under the laws as all other citizens, if we're concerned with those, and I know Your Honour has raised this question of public versus private, those obligations which sound in the public sphere –

ELIAS CJ:

I'm just being provocative.

MR GODDARD QC:

– yes and I'm going to respond to that provocation later Your Honour. Then there's nothing that can be the subject of a claim of the kind pursued here before the general Court. The question is, did those dealings breach not only the Treaty which has admitted and acknowledged and for which the Crown has apologised –

ELIAS CJ:

But the law.

MR GODDARD QC:

– and continues to apologise but also breaches of equitable obligations, obligations arising under the law of equity and are those obligations, obligations that are owed to an enforceable by the particular plaintiffs in this proceeding and that's important because of first, the rules on standing in private law claims and second, the settlement legislation and I should when I refer to standings say that I at once accept Your Honour the Chief Justice's point that in the context of a private law claim there is no difference between talking about standing and asking whether the claim is a claim of this plaintiff. A person who has a private law right can vindicate that right before the Courts. A person who does not have the private law right cannot.

ELIAS CJ:

Subject to representative issues.

MR GODDARD QC:

Subject to representative actions but a representative action needs to be brought as such and either evidence provided of the representative status of the claimant or appropriate orders made. And very deliberately the plaintiffs in this proceeding never sought representative status. One could readily expect that that would immediately have produced a significant preliminary argument about who had the carriage of the proceedings and that's an important issue here because the question that really needs to be tackled in the related headings of standing and the Settlement Act is has the Crown settled with the right holder in a way which finally determines these claims, with these proceedings being brought by persons who are not the right holders or do the parties before this Court have rights of their own which can be pursued in private proceedings.

ELIAS CJ:

Well the question whether the Crown has settled with the right holders may be as difficult a question as whether a representative claim could be brought, perhaps even more so.

MR GODDARD QC:

I think the legislation simplifies that significantly and –

ELIAS CJ:

All right.

MR GODDARD QC:

– unlike my learned friend, actually going to go to the legislation and go through it in some detail. And in fact that's one of the things I hope to do this afternoon. I'm going to address the claim in a way which may at first seem back to front because I'm going to start with the settlement and then work backwards but in my submission it's actually the most helpful way to tackle it and I hope it will become apparent as I go.

ELIAS CJ:

Well your principle defence has always been the standing issue it seems to me, and the settlement issue?

MR GODDARD QC:

Those are very important, central elements of the defence yes and that's because again if you let me be clear why that has been so important. The Crown has always been anxious to pursue a good faith settlement with the tangata whenua of Te Tau Ihu. But it's impossible, of course, to simultaneously settle a claim while litigating that same claim in the Courts and that's why when these proceedings were first brought the Crown took the view that it could not safely continue to negotiate a settlement with one group claiming to have the courage of the claim and the ability to settle it while someone else was asserting the ability to pursue that claim in the Courts. But, in particular, following the judgment of the High Court which held that none of these plaintiffs were the right holders, that none of them had the ability to pursue the claim, the Crown decided that it was willing to proceed on that basis and to pursue the settlement. As matters evolved there was an explicit preservation of the ability of these plaintiffs to pursue claims for their own benefit but not on behalf of anyone else because the Crown considers that they have no claims and that the people who have the claims have been willing to come to the table and negotiate a settlement which, as Your Honour put to my learned friend, includes an allowance for these wrongs as with all other wrongs.

So the Crown considers that it's engaged with the people whom it wronged. It's negotiated in good faith a settlement which includes apologies for these very wrongs and compensation for these wrongs, among others. It was seen as inappropriate to preclude the proceedings by simply abruptly cutting them off at the knees, as it were, but the Crown has continued to defend them on the basis that they are simply brought by the wrong people and that it's settled with the right ones.

Having said that, it is also an important part of the Crown's case that the dealings in the early 1940s did not give rise to private law equitable obligations in addition to Treaty obligations and the government responsibilities that the early colonial Government discharged through appointment of a protector of Aborigines. If one looks at the original charter and instructions there's a list of about five office holders to be appointed in the first year of the Government. I think the Government of New Zealand was going to cost about, was it £19,000, £29,000 in the first year? It's become a little more expensive since, even allowing for inflation, and that among the office holders whose salaries were expressly provided for was the protector of Aborigines because this was always part of the public function of the colonial Government, and I will need to come to that a bit later. It responds in part, Your Honour, the Chief Justice's question about the capacity in which this was done. And so there were obligations under the Treaty. There were obligations –

ELIAS CJ:
There were also property rights though which weren't simply under the Treaty.

MR GODDARD QC:
Of course, there were pre-existing property rights and –

ELIAS CJ:
And which were recognised.

MR GODDARD QC:
– Māori were entitled to have those respected. What we have here is a set of dealings that is, to put it mildly, untidy. In fact it's worse than that it's positively wrongful because it's quite clear that the original deeds were, as Commissioner Spain recently said, absurd in their pretentions as to scale and also, fundamentally, it involved transactions with the wrong people, and I will need to go to that in a little bit more detail because as Spain found, Toa, who signed the Kapiti Deed, had no claim to any of the lands with which we're here concerned.

The Te Ātiawa Chiefs who signed the Queen Charlotte deed were resident elsewhere and especially on the basis of the plaintiff's approach to the proceeding which is that property rights resided in smaller units, hapū and whānau in a particular

area. They also were not the right people to sell these lands and we'll see some of that come through in the text of the settlement deed and the apologies.

But this – and it was very much a set of pragmatic decisions many of which did not respect property rights, Your Honour. Again, let me be absolutely clear on this. The early decisions that were made did not, in a number of significant respects, give effect to the property rights of Māori at that time. There were undoubtedly breaches of obligations under the Treaty in relation to protection of property rights but –

GLAZEBROOK J:
I'm just having a bit of difficulty with the split between the Treaty obligation which you seem to be assuming is totally separate from what could be property rights.

MR GODDARD QC:
I don't mean to give that impression. An invasion of property rights could, of course, also, in a timely way, be pursued before the Courts but to the extent, for example, that property rights were defeated by dealings that took place, wrongfully in the 1840s, resulting, for example, in grant of fee simple titles which prevent the customary title now being issued. Again, those are legal wrongs which could have been subject to a range of proceedings but they are not these proceedings, and I'll go to the pleadings on that and second –

GLAZEBROOK J:
No that's all right. It was just –

MR GODDARD QC:
No, Your Honour, so there were steps that could, in principle, have been taken, although I recognise fully the difficulties in obtaining access to the Courts of Māori in those early years, which my friends have referred to. Those difficulties of accessing the Courts and vindicating rights are, of course, in themselves breaches of the Treaty in important respects, and that also comes within the compass of the Treaty settlement.

So an absence of private obligations, and this is where we run into a difficulty that, I think, has become apparent in the last day and a half in these proceedings, and I'll come to it in a moment. The Crown also says that to the extent that it is possible to understanding what duties it is said to have had at the time, and this picks up a

question of Your Honour, Justice O'Regan, what is the content of the duty? Unless one knows exactly what the content of the duty is, if there was a trust what were the terms of the trust? What were the trustees permitted to do with the trust property? What was prohibited? If there was some other equitable obligation, what was its content? One cannot move onto the question of breach. Did the Crown do something it ought not to have done, or really for that matter, in any sensible way questions of limitation or remedy.

And this has been, to put it mildly, a shifting target, and it's continued to move before this Court. And before turning to my 1.5 I just did want to make some preliminary observations about that. The first, and there are six, and then I'll loop back to the substantive argument again.

The first is that as I think has been apparent today, it is difficult to understand the legal environment in New Zealand in the 1840s. My learned friend very candidly acknowledged the difficulty that he's had getting to the bottom of some of this and, certainly, I have not found it easy. Your Honour, the Chief Justice, is probably a few steps ahead of everyone else on these matters –

ELIAS CJ:
I don't think so, although I sometimes wonder whether I'll ever get out of 1839.

MR GODDARD QC:
Yes, but the fact that Your Honour was still asking questions and expressing doubts about these matters and asking to be taken through the cases reflects the very real difficulty of understanding here, today, the environment in which it's said that these duties arose and were breached, and so that's one point that I think needs to be born –

ELIAS CJ:
But they did arise in the context of an established legal system. It may have had all sorts of difficulties, practical difficulties but in theory English law applied to the circumstances applicable in the colony. And there's no doubt that if a European had entered into a transaction with the Crown in which there was an obligation of trust nature that it would have been enforced.

MR GODDARD QC:

At the time.

ELIAS CJ:

Yes.

MR GODDARD QC:

But what I'm talking about is the difficulty here today –

ELIAS CJ:

I understand. I understand that.

MR GODDARD QC:

- of understanding how do people – and if they're European –

ELIAS CJ:

Yes.

MR GODDARD QC:

– who entered into a transaction with the Crown in 1840 sought to enforce it before the Courts of New Zealand today, then they would get short shrift because limitation would be pleaded and if it was an equitable claim would –

ELIAS CJ:

Well they, too, would have to establish that the Limitation Act didn't apply or laches didn't apply. Laches or whatever it is.

MR GODDARD QC:

Or laches or whatever, I'm never quite sure.

ELIAS CJ:

We can make it up.

MR GODDARD QC:

I'm a bit worried that we're doing that on a number of fronts and it's precisely the risk of making it up that I think we need to have appropriate modesty about when we enquire into these events. So too in terms of –

ELIAS CJ:

Well can I just say in answer to that because that's *Fitzherbert* case I think, one of the cases, the Privy Council – no *Nireaha Tamaki v Baker,* the Privy Council did say we shouldn't be too quick to think that 20 years ago people were primitive. There was quite sophisticated consideration given to notions of property at 1840 and indeed before.

MR GODDARD QC:

Your Honour is of course right but a proper understanding of these claims requires us to delve into not just the skeleton of the law which in broad terms I think we do understand from that period but some quite fine grained questions about the authority of particular officials.

ELIAS CJ:

Oh yes.

MR GODDARD QC:

And the status of Crown grants which I think is the point at which my learned friend was expressing a measure of horror about getting to the bottom of things and which I think is a fair response. Second, and even more difficult, and I say this notwithstanding the volume of historical material which has been before the Courts at each level, there are difficulties in ascertaining some of the very significant facts in this proceeding. Some of well revealed by the documentary record but there are others, for example the dealings with Māori in Kaiteriteri at that hui which was the first that the relevant landowners ever heard about, the New Zealand Company or its Tenths that we know very little about and I'll go to the paragraph of the High Court judgment that deals with that and even more importantly, and this hasn't I think had the attention it deserves in part because the question of breach hasn't had the attention it deserves, we know very little about most of the Acts, most of the decisions that are alleged to have been breaches of the equitable obligations owed by the Crown to Māori. Think for example of the reorganisation of the Nelson township. We have no records about the options considered, about the perceived advantages and disadvantages of those decisions. If the question is whether the Governor acted in good faith in assenting to participation in the re-organisation, we haven't heard from the Governor and we have absolutely no record of his thinking in relation to the making of this decision.

If we think of the exchanges, we have no information about the conversations that took place on the ground with the Māori for whose benefit those exchanges were taking place and with the wider Māori groups concerned. So questions of informed consent, questions of whether a decision was made in good faith and what was genuinely believed to be the best interests.

ELIAS CJ:
But we're not really looking at that are we?

MR GODDARD QC:
Well if there's a – if the obligation is a fiduciary obligation, then yes we need to as an obligation to act in good faith and what was genuinely believed to be the best interests of local Māori. If the exchanges were, then on the face of it it's difficult –

ELIAS CJ:
Well I'm not sure why, except for that ground, we go back behind 1845 and then there's a question.

MR GODDARD QC:
This is after 1845. A number of the breaches alleged are exchanged Your Honour.

ELIAS CJ:
Oh the exchanges.

WILLIAM YOUNG J:
And the exchanges are said to be a breach of trust.

MR GODDARD QC:
Yes and yet that –

GLAZEBROOK J:
What I'm not certain about, do we – you say you don't know what discussions were had with the local Māori, one would have thought if they had had discussions those would've been at least documented as having had discussion.

MR GODDARD QC:

There are documents of discussions in relation to the 1844/45 exchanges. Spain records that they were done after consultation with Māori affected and I'll take the Court to that. In relation to the subsequent exchanges, I don't think Your Honour can assume both there would've been records and that they would've been retained, it would depend very much on who created them.

GLAZEBROOK J:

No, no I'm not assuming that, I'm just saying that – I mean you just have to make, when you have a Court case you just have to deal with the documents that you do have, you can't speculate that there may have been discussions, that there may have been free consent or there may not have been, and in any event I think we're not dealing with that or being asked to deal with it at the moment are we?

MR GODDARD QC:

By the pleadings you are, yes, Your Honour.

ELIAS CJ:

By what?

MR GODDARAD QC:

And by the claim.

GLAZEBROOK J:

Well, I don't think Mr Galbraith is saying all of that would have to go back, isn't he?

MR GODDARD QC:

Well, I don't accept that anything should go back to the High Court. There was –

GLAZEBROOK J:

No, I understand why you would say that but…

MR GODDARD QC:

Well, and this was an issue again that was canvassed both in the lead-up to the hearing and during the High Court hearing itself, and it was very clear that this was not a split trial and that all these issues would be dealt with together, including questions of breach and questions of limitation, and it is not, with respect to

my friend's argument, appropriate to say, "Well, let's have another go at the issues that were tried before Justice Clifford," and on which extensive evidence was called. If the plaintiffs have not –

ELIAS CJ:
But we don't have findings of fact on some of those, because of the view he took. I just – because we probably need to be careful not to debate too much and to get on to some of the substance –

MR GODDARD QC:
Yes.

ELIAS CJ:
– but I do have a couple of questions, just a rogue thought, but at the time of the hearing before Justice Clifford there was mention of the fact that some archives in Christchurch were not accessible because of the earthquake. Were they ever checked?

MR GODDARD QC:
I would need to check on that, it's –

ELIAS CJ:
No, I just wondered anything had emerged after the hearing before Clifford J. And the other matter that you will, I think, have to address at some stage is the question of onus of proof, in the sense that if we're taken to the position that we think the Crown assumed obligations, then in matters such as breach I wonder whether you're not into that in the area that Lord Mansfield spoke about, that the party in the best position to know bears the burden and, indeed, into that whole equitable jurisdiction of, you know, *Delamire v Armory* –

MR GODDARD QC:
I see.

ELIAS CJ:
– or whatever. So, you know, the first hurdle it seems to me is, did the Crown gain something which was subject to obligations –

MR GODDARD QC:

It's –

ELIAS CJ:

– and if we're taken to that stage then I'm not sure too much particularity on the part of the appellants in terms of the breaches is necessarily going to be determinative, or, you know, be required.

MR GODDARD QC:

I will deal with that in more detail later. My initial response is that the mere demonstration of the existence of equitable obligations is not and has never been enough to shift any sort of burden, there must also –

ELIAS CJ:

No, but we know that attempts were not reserved, that's accepted.

MR GODDARD QC:

We do not know that, and in fact is not the position in relation to the town sections or the accommodation sections, they were reserved.

ELIAS CJ:

But they're only part of it.

MR GODDARD QC:

And then the question becomes what happens in relation to the rural sections and the fact that those weren't reserved, and I will deal with that later.

ELIAS CJ:

All right.

MR GODDARD QC:

But there has to be a demonstration of breach, and one can't get to breach without demonstrating not merely the existence of some fluffy obligation in the abstract but a particular obligation which has not been honoured, and I will –

ELIAS CJ:

Well, listen to the obligation that's being put, to reserve and preserve the reservations in terms, in the terms of the 1845 Crown grant.

MR GODDARD QC:

I think, yes, that that is one of the ways it's been put, and it's the one I'm going to focus on, because I think that's where my friend's landed. But I would also say this, that in relation to questions of limitation, once the fact that a limitation provision on it, as applies section 21, for example, the 1950 Act, applies because of the lapse of time has been shown, then the burden is in the ordinary way on the plaintiff to show that one of the exceptions applies, and that requires again reference to specific parcels of land or specific assets said to be in the hands of the Crown, since there is now no argument based on a –

ELIAS CJ:

Well there may be a difference between law and equity in that. I mean there is a difference.

MR GALBRAITH QC:

Well the whole provision of 21 of course is concerned with equity.

ELIAS CJ:

It doesn't apply. It just –

MR GODDARD QC:

It's all about trusts and I don't think that we can – and Your Honour had an exchange with my learned friend earlier on about what was easier for the plaintiffs to succeed on and the limitation context trusts or fiduciary duty and Your Honour expressed some surprise at the idea that fiduciary duty would be simpler than trust because surely if you have a trust the high point, as it were, of equitable obligations, I agree with Your Honour that a trust is the high point of the equitable obligations if an express trust claim would be barred and if the plaintiffs are in the position of not getting as far as an express trust but showing that there was some less well defined equitable obligation in relation to the selection - then it cannot be the case, logically, that they are in a better position in terms of limitation. So, by analogy, section 21 would apply as between fiduciary claims and trust claims at the Court of Appeal said,

for example, in *Johns v Johns* [2004] 3 NZLR 202 (CA). I will have to come back to all of this in more detail but that's the trailer.

So difficulties in understanding the legal environment, difficulties in understanding some of the facts. Third, I think uncontroversial point that a lot of water has passed under the bridge. Since 1839, the idea that anyone can be restored to a position that prevailed then or anything like it is fanciful and it's against the backdrop of difficulties in understanding all of those matters and I would say the risk, given the declaratory approach to the common law of applying contemporary standards to a different world, that we have in New Zealand two important features of our legal landscape, the first, limitation statutes in relation to claims before the Courts. They respond to all of these difficulties and, of course, the equitable doctrines of application by analogy in Laches or whatever it's called and, second, because of the importance of a particular category of historical claim, claims by Māori under the Treaty, we have the Waitangi Tribunal which is specifically empowered to inquire into historical matters of this kind in a comprehensive way, unfettered by the rules of evidence, unfettered by pleadings which do matter.

We spent many weeks before Justice Clifford and what we were trying to do was to address the claims as pleaded which is important because some of the arguments being advanced now are outside those and I'll come back to that. But they're not just a pointy-headed, to pick up my learned friend's phrase, affectation of black letter lawyers, they actually are a tool for doing justice but they don't apply in the Waitangi Tribunal which conducts a much more wide-ranging inquiry supported by its own historical researches with extended periods of hearings. I haven't looked back to see how many weeks the Te Tau Ihu inquiry ran for. Of course it was looking at a lot of issues not just issue, but these are extended hearings and a lengthy period then, as experience teaches, for producing a report, a report which importantly is recommendatory in this context, there are other contexts in which they are effectively adjudicative as the majority of this Court said in *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC) but in this context clearly recommendatory and that triggers a political response. Here a negotiated settlement with the representatives of the relevant iwi and hapū and whānau of Te Tau Ihu. And again, that's not an accident that that's the form of response because where a lot of water has passed under the bridge and original positions cannot be restored a measure of reconciliation of past wrongs and contemporary context needs to be achieved.

And the wrongs that we are concerned with here are, in my submission, very much wrongs that can no longer be the subject of reliable adjudication by the Courts given the difficulties I identified earlier. They are claims which are more appropriately dealt with in that other forum and that have been dealt with in that forum and that have led to a settlement.

GLAZEBROOK J:

Mr Goddard, if the Limitation Act doesn't apply or by analogy the laches or whatever we're going to decide is the correct interpretation, these sort of difficulties we can't take into account and just say, "Well, look, it's too hard. We're not going to do it," can we? Or is the argument – sorry, perhaps I should put it the other way. Is your argument that the whole structure set up under the Waitangi Tribunal actually does oust the jurisdiction or the Courts or you don't go that far?

MR GODDARD QC:

No, of course not, Your Honour. But the difficulties I've identified are, as I say, the reasons why we have a law of limitation and a law of laches and if – and are the reason why, with these claims, as with other private claims from the 1840s, the Courts should say, "Well, this is precluded by limitation," or, failing that, if they're in equity by laches.

GLAZEBROOK J:

Well, we could say that but we could only say that if it is precluded by the Limitation Act, couldn't we?

MR GODDARD QC:

Well, there are the –

GLAZEBROOK J:

We can't say, "Oh, well, it looks a bit difficult so we'll decide it –

WILLIAM YOUNG J:

I think you can under a doctrine of laches. If a –

GLAZEBROOK J:

No, laches, sorry, is different.

WILLIAM YOUNG J:

Yes, but the defendant that's subject, subjectively, has suffered forensic prejudice by reason of delay, is entitled to rely on that as part of a defence –

GLAZEBROOK J:

No, no, no, sorry, I understand that. I'm just –

MR GODDARD QC:

And that was my argument, Your Honour.

ELIAS CJ:

Unless they've been so unfortunate as to benefit perhaps.

MR GODDARD QC:

In relation to common law claims, there are hardwired limitation periods and we're not here within –

ELIAS CJ:

No.

MR GODDARD QC:

– section 28 exceptions to those. In the case of equitable claims, there are some hardwired periods and there is also the doctrine of laches and that responds to precisely the sort of concerns that I've been identifying in relation to both forensic prejudice and also very importantly the difficulty of achieving what equity normally requires, which is that all parties are put back in the position they were in and restoration in the context of multi party transactions will often involve two way flows and I will come back to that as well.

GLAZEBROOK J:

Well if the submission is we can't give an effective remedy therefore they shouldn't have any remedy, I'm not particularly attracted to that but if you're saying it's the two way flow issue, then I can understand that. So maybe when you get to it it's better to look at it in that context.

MR GODDARD QC:

I think that's probably right but above all what I say is that the concerns about it being too difficult to do justice to the standard that the Courts rightly hold themselves to –

GLAZEBROOK J:

I can understand that submission.

MR GODDARD QC:

- is a difficulty that informs the equitable doctrine of laches and at the point where the Court feels that it can no longer do reliably what it ought to do, then either one finds if the bonus is on the plaintiff, that the plaintiff has not made out their case or especially in the context of shifting onus, the kind Your Honour put to me, and this is the concept of retrospective justification that Your Honour Justice Young explored in some detail in *Paki (No 2)*, one says well it is no longer possible for the defendant to be required to defend themselves before a Court of law.

GLAZEBROOK J:

I understand that submission.

MR GODDARD QC:

I was, in my preliminary observations, next going to make the point about how this wasn't a split trial, questions of breach, questions of limitation were always for determination by the Courts. It's difficult to do that without reference to specific duties and indeed specific properties and one of the challenges for the Crown as defendant in this case has always been the rather abstract level at which this case has been run in certain respects.

ELIAS CJ:

So what level of certainly would you require if there was – if there had been a transfer to the Crown upon trust and the Crown was still in possession of that?

MR GODDARD QC:

You need to show what the that is and the Crown is still in possession of it.

ELIAS CJ:

Well if the Crown was still in possession of the land and wasn't holding it upon the terms of the trust.

MR GODDARD QC:

Well we haven't even got to that first stage.

ELIAS CJ:

No, no I understand that.

MR GODDARD QC:

But of showing that there is land that was held on these trusts and in respect of which there is an alleged breach which is still held by the Crown. Let me deal, I was going to come to it later, but let me deal because I think it's helpful with the –

ELIAS CJ:

What happened to the land? That's really the point of the question that we asked –

MR GODDARD QC:

Yes and we have to do it category by category.

ELIAS CJ:

Yes.

MR GODDARD QC:

And I'm going to do that later. That's in the missing pages of the outline –

ELIAS CJ:

I see it's –

MR GODDARD QC:

– I'd say that that would benefit from being tidied up overnight to be continued.

ELIAS CJ:

To be continued.

MR GODDARD QC:

But let's take the Auckland Point land, for example. There is no claim in these proceedings that the Crown breached any equitable obligation in relation to that land. It was selected as Tenths, it was not disposed of, it was transferred to the Public Trustee in, well, it was 1882, and there is no claim at all in respect of it, so no

suggestion of any breach in relation to that land. What then happened many years later is that in 1924 the Crown acquired that land under the Public Works Act and paid the trustee the then prevailing market price in the usual way under the Public Works Act. It is impossible to see how there could be any trust in respect of that land, there was no wrongful dealing with it, it was acquired from the then trustee in a lawful transaction authorised by statute. So when we come to the town sections what I'll be saying to Your Honours, there is no evidence of any land being held by the Crown in respect of which there has been any breach of trust, and the Auckland Point land is, with respect, a red herring. It is in the context of a Treaty settlement appropriate to say to the Crown, "What land do you have in the rohe of this iwi that you might be able to transfer back for the historical wrongs?" but that's not how trust law works and they'd say, "Oh, you breached the trust in relation to this land over here, but look, and you don't have that any more, so that's time-barred, but look, there's this other land in respect of which there was no wrong."

ELIAS CJ:

Well, my question is more, what happened to the land outside the town settlements, who eventually disposed of it?

MR GODDARD QC:

Most of it will have been granted to settlers under the New Zealand Companies Land Claimants Act 1851, which provided for the discharge by the Crown of the companies' unperformed obligations in relation to land throughout New Zealand.

ELIAS CJ:

Why should the Crown prefer the New Zealand company settlers over the Māori entitled to the Tenths reservations?

MR GODDARD QC:

The, there are a number of layers of answer to that. At a – I mean, one answer, the short answer, is the land was allocated pursuant to a statutory process which required the Crown to allocate it to certain people who held contractual entitlements to it. There was a legally mandated process provided for in legislation pursuant to which that land was dealt with and dealing with land pursuant to a statute must be, I think –

ELIAS CJ:

Well, if it was required.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Though wasn't there a sort of a litigation process, a Commissioner who heard evidence?

MR GODDARD QC:

There was an inquiry, yes.

ELIAS CJ:

I think you will have to take us to this.

MR GODDARD QC:

But more importantly again, if that – well, this question arose in the context of the limitation issue and what property is still held. There's no…

ELIAS CJ:

Well, it's not just property still held, it's whether under the limitation period the trustee, what benefit the trustee got from disposition.

GLAZEBROOK J:

Well, the answer could well be –

MR GODDARD QC:

There's no –

GLAZEBROOK J:

– that it didn't get any benefit in fact –

ELIAS CJ:

It may not have.

MR GODDARD QC:

Yes, there's no –

GLAZEBROOK J:

– because it was allocated –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– and it's only under the Limitation Act the land or the proceeds thereof, and if in fact there wasn't a sale of the land. Now it's, I mean, I would give the short answer why should they have looked after the settlers rather than the Māori as being, well, of course they shouldn't have and that was, as you say, a breach of the Treaty but it wasn't, and it probably was a breach of trust as well but there was no, there are no proceeds, is that…

ELIAS CJ:

Well, there may be.

MR GODDARD QC:

So, Your Honour's taken my second answer, my more complicated answer, as the short answer. So you can look at it a number of ways. One is that there was a legally mandated process, it was mandated, there was an obligation to deal with this land in certain ways pursuant to the obligations assumed by the company and where a legal obligation under a statute is performed that cannot, I think, be a breach of trust, but Your Honour is also right that –

ELIAS CJ:

If it was an obligation.

MR GODDARD QC:

Which there was, in my submission.

ELIAS CJ:

Well, you'll have to take us to that, I think.

MR GODDARD QC:

But second –

ELIAS CJ:

Because it may be a total answer.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

Your Honour's also right to say – well, let me, Your Honour had my second and third answers in there, in fact. The next one was the claim under 21(1), I can't remember if it's (a) or (b). It's the property or its proceeds that one has to look at and there's no evidence, in fact, I don't think seriously any allegation that particular property or proceeds are held by the Crown, and the third is that that process was in many ways the culmination of a series of treaty breaches which led to the loss of the land and they've been the subject of the settlement. I'll need to deal with that as well.

And the last preliminary point I wanted to make, and these are, each of them has led me into deeper waters so let me try this one, but it is an important point, it's not easy to do justice to the full range and complexity of these issues in a four day hearing as compared with the many weeks, indeed, I think it probably ran to a couple of months we had before Justice Clifford –

ELIAS CJ:

Well, if you need more time, Mr Goddard, you must have it.

MR GODDARD QC:

Well, that may yet be necessary.

ELIAS CJ:

Yes.

MR GODDARD QC:

But I am –

ELIAS CJ:

But that submission is not one I think that we should accede to, that because there is only four weeks –

MR GODDARD QC:

Four weeks would just about do it, I think. It's not just a complaint about the length of this hearing; it's also, and it ties back to the point about –

ELIAS CJ:

This hearing was set down for the period that the parties asked for.

MR GODDARD QC:

Yes, and that's because, certainly so far as I was concerned, I anticipated that what we would be doing is arguing about the legal consequences of a settled body of facts which were not really materially contested in the Court of Appeal and that what we would be doing is what normally happens in a second appeal, which is to be having a more refined and –

ELIAS CJ:

But I think that's exactly what we are doing because the facts are relatively settled, and your submission is that they don't give rise to trust obligations or fiduciary duties because they're too uncertain.

MR GODDARD QC:

The only, only – that's part of it. One of the concerns that has, I think, emerged from the last hour and a half is that there are new arguments – in relation, for example, to the non-extinguishment of customary title, which actually do raise quite distinct issues. I don't think we have everything we need in the record to deal properly with that question and that's because it wasn't live at first instance, but obviously as the different ways in which the argument is framed change, what is relevant factually shifts and we ended up in a rather messy space, but it's just a preliminary observation. Again, it goes to concern about straying too far from the territory traversed below.

So with those preliminary comments, let me turn back to – I think probably rather than going through my introduction in more detail, let me zip very quickly through my

1.5 and then go to the Settlement Act in the time remaining today. So 1.5 of my main submissions –

O'REGAN J:
1.5 of your submissions?

MR GODDARD QC:
Of my main submissions. There are five broad themes to the Crown's response to this claim. First, that as the Courts below both held, the private law obligations contended for never came into existence. Second, and this I think is now accepted also by the appellants, that if private law obligations of this kind had come into existence they would have been owed to the customary owners of the relevant lands, not to the appellants, and, indeed, on the appellant's case, to different groups in different places, and then, as the High Court held and as the Court of Appeal held, except in relation to Mr Stafford, the appellants, the Crown says, have no standing to bring these private law claims because they are not their claims, to pick up Your Honour the Chief Justice's way of putting standing in the private law context. Third, all the claims in respect of these obligations have been settled by the Treaty settlements and are precluded by the Settlement Act. Fourth, the appellants haven't established that the Crown actions about which they complain were inconsistent with the alleged equitable obligations, and we need to go through each of them, because again it's not enough to talk at an abstract level about legally enforceable obligations or about breaches in the abstract, one needs to pin down what obligations and which of the complaints are capable of amounting to breaches and have been shown to be breaches, and then finally limitation issues.

Let me turn then, and because I think it is helpful, to the Settlement Act, and we're in volume 2 of the authorities, the legislation, second legislation volume, it's got a pretty blue cover, under tab 39, and the structure of or the purpose of the Act, section 3, is to give effect to certain provisions of the deeds of settlement that settle the historical claims of Ngāti Koata, Ngāti Rarua, Ngāti Tama Ki Te Tau Ihu and Te Ātiawa o Te Waka-a-Māui. So it's to give effect to provisions that settle the historical claims of those iwi. If we can move past the provisions setting out the framework of the legislation and go straight to provisions 8 to 19 –

ELIAS CJ:
Sorry, how are the historical claims defined?

MR GODDARD QC:
I'm going to go to that, Your Honour.

ELIAS CJ:
Okay.

MR GODDARD QC:
But I want to begin by looking at the historical account, the acknowledgements and the apology to each of the four iwi, because this is the backdrop for understanding what's been settled. So the section 8 – and the way this works is that there are a cluster of provisions in relation to each of the iwi and they are, they have some common themes, but they are also in a number of respects different. But the issue of the Tenths is dealt with in each of them.

So, first, Ngāti Koata, the historical account and the deed of settlement is summarised in section 8, it refers to Koata coming to Te Tau Ihu in the mid-1920s, it refers to, "In 1839 the New Zealand Company signed deeds with other iwi that purported to purchase the entire northern South Island," and that's critical, the 1839 deeds had nothing to do with Koata. In 1842 the Company presented gifts to local Māori upon establishing its Nelson settlement, in 1844 a Crown-appointed Commissioner investigated the company's purchases, Spain of course, he heard only one Māori witness in Nelson before suspending the inquiry to enable the Company to negotiate a settlement, Māori signed deeds of release in return for accepting payments described by the Commissioner as, "Gifts to assist settlement," rather than payments for the land. In 1845, on the Commissioner's recommendation, the Crown prepared a Company grant of 151,000 acres in Tasman and Golden Bays, which would have reserved 15,100 acres for Māori, however the Company objected to several aspects of this grant, in 1848 the Company accepted a new Crown grant for a larger area of land that reserved only 5053 acres at Nelson and Motueka and areas in the Wairau and Golden Bay. So that's very much the issues that we've been looking at.

Then we have negligible involvement in the administration of the reserves, known as Tenths, and a number of other issues in relation to the purchase of land in circumstances that were inconsistent with Treaty obligations. There's reference in item 7 to the reserves created being inadequate for customer use or effective development to the 1883 and 1892 decision of the Native Land Court awarding

ownership of the reserves and Rangitoto Island to individual Ngāti Koata, fragmentation, uneconomic shares, and the result at 9 that by the late nineteenth century Ngāti Koata were virtually landless, with some allocation of land to landless individuals but delays in issuing titles, and then the health and educational and economic adverse consequences of loss of access to the land are set out very briefly at 10 and 11.

Nine, and that's a very long history, the brevity of which makes it nonetheless moving. Nine, the text of acknowledgements for Koata, beginning with the Crown acknowledging that it's failed to deal with the longstanding grievances of Ngāti Koata in an appropriate way and that recognition of the grievances is long overdue. Recognition, acknowledgement that the Crown failed to adequately inform itself of and protect the interests, including the ongoing needs, of Ngāti Koata during the process by which land was granted to the New Zealand Company in 1948, and that this failure was a breach of the Treaty and its principles, and then acknowledgements specifically in relation to the Tenths, failing to ensure the area ultimately reserved was sufficient for the ongoing use and benefit of Koata, and that this failure was in breach of the Treaty and it's principles, the administration of the Tenths, actions and omissions with respect to its administration, which were also in breach of the Treaty and its principles, and at the end of 7, over the next page, after (b), Crown acknowledging it failed to adequately protect the interests of Ngāti Koata when purchasing their land and this was a breach of the Treaty and its principles, acknowledgements in relation to a number of other wrongs relating to, for the most part, land and other matters, 14, the results of those, leaving Ngāti Koata virtually landless in this failure to ensure that Ngāti Koata retained sufficient land, being a breach of the Treaty and its principles, language, loss of opportunity and ongoing impacts. And then an apology is –

ELIAS CJ:

Just pause. In these acknowledgements the closest that affects this litigation is subparagraph (3), isn't it?

MR GODDARD QC:

It – obviously the historical account is a bit more detailed in relation to these matters. It deals with the dealings –

ELIAS CJ:

But in the terms of this acknowledgement it's –

MR GODDARD QC:

The acknowledgement –

ELIAS CJ:

– a failure to ensure the area ultimately reserved was sufficient, it's not an acknowledgement of failure to reserve the Tenths.

MR GODDARD QC:

I think that's really 2, Your Honour, and 3 together.

ELIAS CJ:

But that's the 1848 – oh, I suppose the 1848 –

MR GODDARD QC:

The 1848 grant is a large part of the complaint here.

GLAZEBROOK J:

One of the difficulties, I suppose, is if you're splitting it between the different iwi, there wasn't an obligation to get aside the whole of the Tenths for that particular iwi which might explain the wording.

MR GODDARD QC:

Absolutely, Your Honour. And the point, which I'll come back to when I come to the express trust argument, that the form of trust that was set up which crossed a range of different iwi who had customary ownership on quite different parcels of land was very different in form from the ownership arrangements that existed as a matter of tikanga. So, and indeed that in itself arguably was inconsistent with the Treaty and a breach of it, and we'll come back to that when we look at the express trust and, picking up another one of Justice O'Regan's questions, you know, who was the trust for, was it for all these, all Māori together, so that you could use income from land in the Nelson town to support iwi in Motueka, or were they lots of separate little trusts? And if we can't answer those questions, which we can't, in relation to the express trust claim, then we don't have an express trust, we need to come back to that

tomorrow. But I would say, Your Honour, that the acknowledgements are tailored to the nature of the wrong to each of the iwi.

ELIAS CJ:
Well, except that to some extent, whether subdivided or as part of the whole, there is a complaint that the Tenths were not reserved, and that doesn't appear clearly in this recital.

MR GODDARD QC:
In my –

ELIAS CJ:
You say it's in 2?

MR GODDARD QC:
Yes, and it's well comprehended in it, and –

ELIAS CJ:
Well you may say so but I will just have to flag – it takes a little more convincing of that.

MR GODDARD QC:
I think when we come to the question the question of what's settled, Your Honour –

ELIAS CJ:
Yes.

MR GODDARD QC:
– we'll see that it's clearly captured. The apology is set out to Ngāti Koata, is set out in section 10 and then we move into the cluster of provisions in relation to Ngāti Rārua. Again, historical account which refers to the arrival of Rārua in the North and South Island in the late 1820s, the 1839 deeds and the presentation of gifts to Rārua upon establishing the Nelson settlement, the denial that the 1839 transactions affected a sale of Rārua's land and, three, again reference to the Spain Inquiry and deeds of release, the presentation of gifts, the 1845 grant and the 1848 grant of the smaller area administration and the purchase of the Wairau, for example, in six. The acknowledgments for Rārua in 12.

WILLIAM YOUNG J:

Do I take it that while there will be some differences on the whole it's the same language, the same acknowledgements? I mean they're not all bespoke, as it was.

MR GODDARD QC:

They are bespoke because there are different issues that arise, for example, the –

WILLIAM YOUNG J:

I mean the whole thing isn't, I mean in the whole – each set of acknowledgements is –

MR GODDARD QC:

It was separately negotiated between the Crown on the one part and the negotiators scored the relevant iwi. And there are, for example –

ELIAS CJ:

11.2, for example, is specific to Nagai Rārua.

MR GODDARD QC:

So 11.2 is specific and the reference to the Wairau purchase which we see in 11.6 doesn't have a direct counterpart in the Koata –

WILLIAM YOUNG J:

Sorry, I'm just looking at 11, sorry, 9.1 and 9.2 are basically the same as 12.1 and 12.2?

MR GODDARD QC:

Yes, there is a lot of commonality but there are also specifics and I'm not going to go through them all in detail because it's the commonality, they all refer to the Spain Inquiry, they all refer to the 1845 grant and the reserves under it. They all refer to the lesser amount being reserved in 1848. So there are other significant differences but, and I mean no disrespect to anyone in not going through all of them in the same detail. I wouldn't want it to be thought that I am disregarding either the wrongs that were done to any of the iwi or the acknowledgements given by the Crown or the apology in passing more quickly over the remaining provisions. There's the Ngāti

Tama provisions in sections 14, 15 and 16 and the Te Ātiawa provisions in sections 17, 18 and 19. And what they all have in common, Your Honour, is the explicit reference to the circumstances that gave rise to the allowance of the purchase although it wasn't really a purchase from the right people and the shift from the reservation of 15,100 acres to some 5100 in the 1848 grant.

Then we come to the interpretation provisions in subpart 2 and they're important for understanding the effect of the settlement provisions. On page 42 of the Act historical claims has the meaning given by section 24 and over on page 45, a settlement iwi has the meaning given by section 22. So those are really just signposts and then we come to 22, interpretation iwi and trusts. And if we go over to page 47, settlement iwi means each of the following iwi, Ngāti Koata, Ngāti Rārua, Ngāti Tama and Te Ātiawa o Te Waka-a-Māui and then separately the settlement trusts are defined so the iwi is each of the four groups of customary owners and very importantly each of those terms, Ngāti Koata, Ngāti Rārua and so on, Tama and Te Ātiawa are further defined in section 23.

So if we go to section 23 and we look, for example, at the definition of Ngāti Koata in 23(1), it's the collective group composed of individuals descended from identified ancestors, (b) includes those individuals, so it's just the collective group but also the individuals and (c) very importantly includes any whānau, hapū or group to the extent that it's composed of those individuals. So this is one of the reasons why the Crown says that it doesn't need to be decided where the customary rights reside because whether they were at hapū and whānau level or at iwi level the definition of the settlement iwi includes all those groups and the individuals comprising the groups and the same for Rārua, Tama and Te Ātiawa so all the relevant whānau, hapū, iwi and individuals making up those groups are encompassed within the defined terms. Then historical claims in section 24, "Historical claims means the claims described in subsection (2) includes those in (3) to (6) but not (7). (2) The historical claims are every claim that a settlement iwi or a representative entity had on or before the settlement date or may have after the settlement date, and that (a) is, or is founded on, a right arising from the Treaty or its principles or under legislation or at common law, including Aboriginal title or customary law or from fiduciary duty or otherwise," so it's quite general language.

ELIAS CJ:

Comprehensive language.

MR GODDARD QC:

Yes comprehensive language, arises from – this is a very important qualification, "Or relates to acts or omissions before 21 September 1992," that's the historical bit, "By or on behalf of the Crown or by or under legislation." Now very importantly that does not extend to an assertion of customary title to land. Customary title does not arise from an act or omission by on or behalf of the Crown, it existed before the Crown was here. But if the Crown has wrongfully interfered with or expropriated customary title, then a claim arising from or relating to that wrongful act is a claim that is covered by the settlement. So as we work through this we need to bear in mind that underlying property rights are not affected by this, property rights that come into existence without dependence on any act or omission of the Crown but any claim for breach or any type of equitable claim, including a constructive trust claim that arises from an act or omission of the Crown is a historical claim that is settled.

And then we have a list of, in subsection 3 of certain historical claims which are included. In subsection 3 claims relating exclusively to Koata and then in (a) and (b), "Any other claim to the Waitangi Tribunal including each of the following claims to the extent that subsection 2 applies to the claim and the claim relates to Ngāti Koata or a representative entity." And we have Wai 56, Nelson Lands and Fisheries claim. Wai 56 is the claim relating to the Tenths. Now we need to be –

ELIAS CJ:

Do we have the –

MR GODDARD QC:

The claim documents?

ELIAS CJ:

Yes, well we probably don't need them.

MR GODDARD QC:

It was certainly before the High Court and I assume it will be in the electronic case on appeal, whether it's in the hard copy I'll ask my juniors over –

ELIAS CJ:

I mean presumably it covers a lot more but –

MR GODDARD QC:

Yes now I was about – it covers a lot more, it covers a great deal –

ELIAS CJ:

But it includes the Tenths claims?

MR GODDARD QC:

And in fact it's not only a historical claim but also a contemporary claim –

ELIAS CJ:

Yes.

MR GODDARD QC:

– there are post-1992 issues as well so it's not all of Wai 56 that's settled but all the historical elements including the claims arising out of any wrongful conduct on the part of the Crown, whether a breach of the Treaty or common law obligations or equitable obligations has been settled. And we see that pattern in relation to Koata, Koata-specific claims and then Koata's rights under 56 reflected in subsection (4) in relation to Rārua, subsection (5) in relation to Ngāti Tama and subsection (6) in relation to Te Ātiawa. And what I think is very clear is that all the claims in relation to breach of trust advanced here could not, well I've a concession to make, fall within that definition of historical claims so how are they precluded, they're precluded by section 25 and it's going to take me more than minus 18 seconds which is how long I have until 4 o'clock, according to the clock in front of me, to just step through the different elements in section 25 so I'm in Your Honour's hands about whether you want to do that?

ELIAS CJ:

No that's, fine. We'll take the adjournment now. Tomorrow we need to stop, as counsel have anticipated, at 3.45.

MR GODDARD QC:

Would there be any chance of making that 3.40 so that we have some chance of getting our –

ELIAS CJ:

Your clobber on, yes.

MR GODDARD QC:

Clobber on, the industrial clothing.

ELIAS CJ:

I thought mine were or ours were worse than yours. But that's fine.

MR GODDARD QC:

Yours are worse but closer Your Honour.

ELIAS CJ:

Yes 3.40 is fine. Would you like us to start early as a result?

MR GODDARD QC:

If that's possible. I – or whether we take a one hour lunch, I'm in Your Honour's hands, that would also work.

ELIAS CJ:

Well we'll start at 9.30 tomorrow.

O'REGAN J:

Are you going to deal with section 25 now?

MR GODDARD QC:

I will deal with it first thing in the morning I think is what Her Honour, Chief Justice –

ELIAS CJ:

Well if you're –

MR GODDARD QC:

No we'll start with section 25.

ELIAS CJ:

Yes we'll start with section 25, thank you we'll take the adjournment

COURT ADOURNS: 4.02 PM

COURT RESUMES ON WEDNESDAY 14 OCTOBER 2015 AT 9.32 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour. At close of day yesterday we were looking at the Settlement Act which is in volume 2 of the authorities, the blue legislation volume under tab 39, and we had just looked at section 24 meaning of historical claims and seen that that was a broad – Your Honour the Chief Justice said quite rightly – comprehensive description of claims of a settlement iwi which the Court will remember was defined to include all whānau and hapū and individuals of the iwi founded on rights arising not only under the Treaty but also under legislation and at common law, including aboriginal title or customary law, and fiduciary duty and otherwise, arising from or relating to acts or omissions before September 1992 by or on behalf of the Crown or by or under legislation. A description that very clearly encompasses the claims of Ngāti Koata, Ngāti Tama, in relation to the Nelson Tenths and really just by way of avoidance of doubt. There's express reference in section 24 and each of the subsections relating to each of the iwi to Wai 56, the claim that relates specifically to the Tenths but that's really neither here nor there because the breadth of subsection 1 is clear.

That brings me on, then, to subpart 3 of part 1 of the Act, beginning on page 55, which is titled "settlement of historical claims" and the cross-heading "historical claims settled" and "jurisdiction of Courts et cetera" removed is again an important guide to the meaning of section 25 where, if needed, but the language of the provision is pretty clear. 25 settlement of historical claims final, one, the historical claims are settled. Two, the settlement of the historical claims is final.

ELIAS CJ:

Is "settlement" defined? I see that subsection (2) talks about releasing and discharging. Is the settlement a release and discharge from all obligations and liabilities?

MR GODDARD QC:

That's dealt with in subsection (2), Your Honour.

ELIAS CJ:

Yes, I know, but is that what a settlement is?

MR GODDARD QC:

Yes, yes, and even if that weren't encompassed in that word as a matter of ordinary interpretation which, in my submission, it plainly is, it's a very familiar term, that's spelled out in as many words in subsection (2) of section 25, the settlement of the historical claims is final and on and from the settlement date the Crown is released and discharged from all obligations and liabilities in respect of those claims. So it's spelled out in terms that leave, really, no room for doubt.

Those subsections don't limit the acknowledgements expressed in the deeds of settlement and then subsection (4) is important because it goes on to spell out precisely the consequences of the settlement and release and discharge. Despite any other enactment or rule of law, on and from settlement date no Court, Tribunal, or other judicial body has jurisdiction, including the jurisdiction to enquire or further enquire or to make a finding or recommendation so that will include a declaration.

ELIAS CJ:

Well, not necessarily. You'll have to explain that a bit further. There may be findings which are subsumed in a declaration which would be caught but some declarations might not be finding or posited on findings.

MR GODDARD QC:

I think that all the declarations the Court is being asked to make here necessarily involves making a finding, so I accept in the abstract Your Honour's proposition but I don't think it has any practical consequences here in respect of the historical claims or deeds of settlement or the Act or the redress. Excluded from that in subsection (5) is jurisdiction to interpret and implement the deeds of settlement in the Act.

So if the section finished there, there could be no room for doubt about the position. The historical claims which include all the claims advanced in relation to acts or omissions of the Crown in this case so far as they affect the four iwi and the hapū and whānau are settled. There cannot be any enquiry into the Courts.

Then we come to the subsections that are necessarily relied on by the plaintiffs here. Subsections (1) to (5), the settlement provisions, do not affect the ability of a plaintiff

to pursue the appeal filed in the Court of Appeal or the ability of any person to pursue an appeal from a decision of the Court of Appeal, which is why we're here. But critically (c), the ability of a plaintiff to obtain any relief claimed in the Wakatū proceedings to which the plaintiff is entitled, so that comes back to Your Honour's point about standing and having a claim being co-extensive in the private law sphere.

And then continuing the tendency of this Act to spell everything out, we have subsection (7), which is very important. To avoid doubt, subsection (6) does not preserve any claim by or on behalf of a person who is not a plaintiff. And we then have the definitions that subsection (7) engages in subsection (8). The plaintiff means the plaintiff named in the Wakatū proceedings and the proceedings are the proceedings filed in the High Court so we go to the High Court proceedings. We find three named plaintiffs and they can continue to seek relief to which they are entitled but they cannot pursue claims on behalf of any other person.

WILLIAM YOUNG J:
So are you saying that there's no scope for representative claim?

MR GODDARD QC:
That's precisely what I say.

ELIAS CJ:
But what about a declaration that affects others, is that a claim by or on behalf of a person who is not the plaintiff? The plaintiff is getting what he or she is seeking.

MR GODDARD QC:
A claim for a declaration is a claim obviously and it would normally be precluded by subsection (4). If individually one of the plaintiffs is entitled to a declaration, then it wouldn't be precluded by this provision but they couldn't seek a declaration that they would not have an individual entitlement to –

GLAZEBROOK J:
But it could be a declaration if they were individually entitled to it that would, aside from the bar, affect other people. Because obviously any declaration here would not be a declaration that for instance Mr Stafford alone had been deprived of Trust property if that is what – and obviously the declaration wouldn't be in those terms in any event but it would be a declaration that was of more general import.

MR GODDARD QC:
Yes.

ELIAS CJ:
A declaration as to status and perhaps historic status. For example a declaration that say the 1848 Crown grant was in breach of fiduciary or trust obligations owed by the Crown, end of story.

MR GODDARD QC:
The argument for the bar not applying would obviously be at its strongest in relation to a declaration of that kind which was not going to be followed by any other relief.

ELIAS CJ:
I can understand that entitlement, declarations as to entitlement which would have to be group entitlement. I come up against this argument very, very strongly but I am thinking about a declaration that is of past status in which the plaintiff is interested as a member of the class and which would seem on the face of it not necessarily to be precluded or to be saved by the saving.

MR GODDARD QC:
A declaration that X had happened or that a particular instrument had at the time it was issued been invalid or infringed some rights, that was not coupled with any consequential relief.

ELIAS CJ:
Yes.

MR GODDARD QC:
I think if it was one that could sensibly be sued for by that person without seeking any representative status would be saved by subsection (6). I think that must be right Your Honour.

ELIAS CJ:
Yes.

MR GODDARD QC:

But then of course we end up in the territory of discretion.

ELIAS CJ:

Of discretion yes.

MR GODDARD QC:

And whether in circumstances where the primary right holders have settled their claim and could not themselves seek such a declaration and in circumstances where there has been a formal acknowledgement by the Crown on wrongdoing.

ELIAS CJ:

But not specific, well not very specific acknowledgements of wrongdoing.

MR GODDARD QC:

I'd have to look back to the Tribunal hearings to see whether there was more detail in those.

ELIAS CJ:

No but we'd be looking in the Settlement Act for that wouldn't we?

MR GODDARD QC:

The difficulty with that is that essentially considerations of practicality and the length of what is described here as a summary of the acknowledgments and also perhaps it would be helpful to look at the deeds of settlement which contain more detail.

ELIAS CJ:

Oh yes it would.

MR GODDARD QC:

If Your Honour looks back for example at section 8, Your Honour will see that that's described as summary of historical accounts. There are much more detailed historical accounts in the deed.

ELIAS CJ:

What in the Deed of Settlement? Well is there any acknowledgement for example of breach of trust in respect of the –

MR GODDARD QC:

I'm fairly confident that there is nothing in those terms.

ELIAS CJ:

No.

MR GODDARD QC:

I'm almost certain of that without –

GLAZEBROOK J:

There is to the extent that it was maladministration.

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

GLAZEBROOK J:

So there is – because some of the historical claims were maladministration of trust property and one assumes that the acknowledgements are acknowledgements of that but not explicitly of the failure to place the other property. Is that what you're saying?

O'REGAN J:

There is an acknowledgement I think that the 1848 –

MR GODDARD QC:

The breach of the Treaty and the responsibilities of the Crown.

O'REGAN J:

Well that it also should have included the larger area of land.

MR GODDARD QC:

Yes. There are pretty explicit acknowledgements of wrongdoing in relation to these events. I do not think they are classified legally.

ELIAS CJ:

No and what I'm wondering is whether there is not an interest, a legitimate interest in a – if the Court were to find that there had been a breach of trust and simply declaring that, because one of the problems with the settlement process is that it is in part economic reparation to build the base for the iwi grouping.

MR GODDARD QC:

For the iwi for the future yes absolutely, that's a very –

ELIAS CJ:

Yes, so –

MR GODDARD QC:

And restoration of relationships and all sorts of other –

ELIAS CJ:

Absolutely, so that if there is a plaintiff who has a legitimate and particular interest in a specific acknowledgement of legal status, that maybe something that it would be appropriate to make a declaration about.

MR GODDARD QC:

In the absence of the saving provision that would I think not normally be possible.

ELIAS CJ:

No, no I think that's right.

MR GODDARD QC:

And that's partly because one of the things that one buys with a settlement is the absence of future litigation and the cost and other demands of time and resource.

ELIAS CJ:

But there is the saving because of the concern that a specific dimension was being totally subsumed in the wider wash up and should be ventilated in the Court.

MR GODDARD QC:
As I say I think that's –

ELIAS CJ:
Or shouldn't be prevented from being ventilated.

MR GODDARD QC:
Couldn't be prevented. That is the form of relief in which there is the strong, in my respectful submission the strongest argument for survival. I will I think take the opportunity to reflect further on that and loop back to it when I come to relief in this proceeding but I see the force of Your Honour's question and that is the high point of the argument for preservation. The sort of consequential or downstream process that my learned friend Ms Feint appears to have contemplated in which there would be a reference back to the High Court to enquiry into customary ownership and award substantive relief, it seems to me as plainly precluded by this. It would be as my learned friend acknowledged relief to the customary owners and probably not a single global form of relief. I think my learned friend was edging towards at least acceptance that it necessarily follows from the plaintiff's theory about customary entitlements that there would be multiple separate entitlements.

ELIAS CJ:
Well in this case maybe, although given the terms of the reservation, it at least in theory would seem to be open for a particular plaintiff, say there had been, you know, a small number of tūpuna for example, so that the interest of the particular plaintiff might well be able to be quantified perhaps by investigation by the Māori Appellate Court, it is conceivable that there could be consequential relief and it may be that even 285 tūpuna don't mean that someone who is a descendant couldn't have an identifiable interest. I mean I don't think that is excluded on the wording here.

MR GODDARD QC:
I think it is Your Honour. If those people couldn't sue themselves to obtain that relief, if we take the example of a whānau with customary rights in a particular area of land in Motueka –

ELIAS CJ:
Yes.

MR GODDARD QC:

– for example, they plainly could not now bring proceedings.

ELIAS CJ:

Well, except the whole Native Land Court process was individualisation. One can't – I mean, it's not clear to me that even though the original claim was hapū based you couldn't go through the Māori Land Court procedure and end up with some sort of individual interest. That's all I'm raising.

MR GODDARD QC:

Sorry, I wonder if we're at cross-purposes? I'm not – I'm saying that the consequence of the Settlement Act is that they could no longer do that

GLAZEBROOK J:

Although Wakatū –

MR GODDARD QC:

So I'm not saying –

GLAZEBROOK J:

Wakatū would say that it was – the argument for standing for Wakatū is that it is effectively and has become the 285 people.

MR GODDARD QC:

I'll deal with that later when I deal with standing but in short –

GLAZEBROOK J:

But it –

MR GODDARD QC:

– it's a legal person, separate from the corporators –

GLAZEBROOK J:

I understand that argument although in practice what's happened is those people were effectively put into a corporation.

MR GODDARD QC:

But the corporation was then vested with certain identified property and –

GLAZEBROOK J:

I understand that argument as well.

MR GODDARD QC:

– and this, these rights, are not in that schedule.

GLAZEBROOK J:

Well, no, they're not in that schedule but there is an argument I think that they nevertheless individually as Wakatū, having become that incorporation, should have been vested with the other rights as well.

MR GODDARD QC:

But that doesn't mean that they have been vested with the proposed rights, Your Honour, and if individuals are formed into a corporation and some of their rights are assigned to that corporation, then it remains the individuals who need to pursue the rights that have not passed to that corporation. It's a separate legal person and it's just an inevitable consequence of separate legal personality. In the absence –

WILLIAM YOUNG J:

Well, it's also a representative in a sense of the owners of the reserves that were created. It's not a representative by definition –

MR GODDARD QC:

Generically.

WILLIAM YOUNG J:

– of the owners of the reserves that were never created –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– who might be entirely different people –

MR GODDARD QC:

Yes, Your Honour.

WILLIAM YOUNG J:

– or no doubt overlapping but –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– they would be differently composed.

MR GODDARD QC:

Exactly.

ARNOLD J:

On this question of Wakatū's sort of representative capacity as between it and the 254 people, 283, whichever it is, isn't it the case that the Crown recognised Wakatū as a mandated party who was to be involved in the negotiations for the settlement of these various claims and Wakatū's particular interest was Wai 56?

MR GODDARD QC:

No. Indeed, and there was evidence from this, considerable evidence, from participants in the negotiations on both sides of the table –

ARNOLD J:

Well, if you look at the –

MR GODDARD QC:

– including Mr Galvin of OTS, but the mandate was to the company, with lots of T's in it, the abbreviation.

ARNOLD J:

Yes, the company, but then it had five –

MR GODDARD QC:

It had certain shareholders.

ARNOLD J:

That's right.

MR GODDARD QC:

But again the shareholders were not the mandated representatives, Your Honour, and, in fact, the Crown was insistent, and this caused a road block for a while in terms of acceptance of the mandate, that it would not negotiate with an incorporation as opposed to with the iwi, with the customary owners.

ARNOLD J:

I thought that was resolved on the basis that Wakatū would be involved in the negotiations but the relief would be directed to the members of the iwi or the hapū.

MR GODDARD QC:

I think it was –

ARNOLD J:

I mean, if you look at the terms of negotiation which are behind tab 152, "Wai 56 claimants represented by Wakatū Inc". So that's an agreement –

ELIAS CJ:

Sorry, what page is that?

ARNOLD J:

– between the company as the mandated representatives of five organisations, including Wakatū, and they are to negotiate the settlement.

ELIAS CJ:

Sorry, can I have the reference?

MR GODDARD QC:

Sorry, we're in volume 3, supplementary volume 3, of the respondent's material.

ARNOLD J:

Supplementary volume 3, 152.

MR GODDARD QC:

152, and, Your Honour –

ARNOLD J:

And that attaches the mandate, which is at 151. So all I'm saying is that it does seem that the Crown accepted that Wakatū had a legitimate interest and a legitimate role in the negotiation of the settlement of Wai 56 although, as I understand it, the Crown's attitude was that any relief would not go to Wakatū directly but to the members of the four iwi.

MR GODDARD QC:

And just taking that a step further, I mean, that's essentially right, we see that flow through, for example, in the definition of "claimants" in clause 5.1, which is very – which is the iwi and the individual whānau, hapū and groups of them. So the claimants are the four iwi and their subgroups, not Wakatū, and we then –

ARNOLD J:

But then you look at the recognised tūpuna. Wakatū Incorporation is identified there.

MR GODDARD QC:

On the lists.

ARNOLD J:

On the lists held by these various organisations.

MR GODDARD QC:

And again, when we look at historical claims in 5.6, we see all claims by claimants or anyone representing claimants, so again we're back to the claims of the customary owners. I mean, Your Honour's right to say that the presence of Wakatū effectively, as my learned friend said, is a kaitiaki of this claim, its original filer, was recognised but there was a real sensitivity around achieving some measure of clarity about whose claims they were and with whom any settlement would be reached and to whom any redress would go, and what we see is that balance being struck through the various terms. So – and it seems to me again, just pausing, that it can't be the case that the rights held by Wakatū and enforceable by it in a Court can be affected in any way by its presence at the table to discuss a claim which it's explicitly bringing on behalf of the customary owners. It remains a claim of the customary owners, and

that's what was ultimately settled, and the Settlement Act tracks that. So, I mean, if one imagined, for example, that my learned friend had stood up yesterday and sought an amendment to the statement of claim, and I'll come to the statement of claim in a moment, which added a new paragraph saying, you know, "Wakatū Incorporation sues as representative of," and then listed the customary owners, "as representative of and on behalf of," then, in my submission, an amendment to that effect would clearly be precluded by the Settlement Act because it would be an attempt by a named plaintiff to explicitly sue on behalf of a person who is not a plaintiff, and it cannot be the case that the plaintiffs are better placed without an explicit pleading to that effect than they would be if they sought one. So, and then we have, and I do want to emphasise that this is –

GLAZEBROOK J:
Well, one argument may be that they were always suing as representative right from the start but you would argue, presumably, that that was still precluded –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
– by the Settlement Act retrospectively, effectively?

MR GODDARD QC:
Yes, and that the Settlement Act effectively –

ELIAS CJ:
So it's discontinued the proceedings effectively?

MR GODDARD QC:
The –

WILLIAM YOUNG J:
Except in relation to individual claims.

MR GODDARD QC:
Individual claims, yes.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

That –

ELIAS CJ:

But if it was a representative claim.

MR GODDARD QC:

Then it's been brought to an end to that extent.

ELIAS CJ:

Yes, which is not really what the legislature purported to do or thought it was doing.

MR GODDARD QC:

I think that that's exactly what –

ELIAS CJ:

I thought it didn't want to discontinue the proceedings.

MR GODDARD QC:

Insofar as they related to claims by these plaintiffs.

GLAZEBROOK J:

But if it was the plaintiff as a representative of the 285, or the descendants of the 285 on the original claim, then it has effectively discontinued that, so it's a saving without meaning for Wakatū and the third appellant.

MR GODDARD QC:

And that was a necessary consequence of achieving the primary objective of this legislation which was to settle claims by these customary owners in exchange for the redress providing under the Act, and I was going to just touch briefly on –

ELIAS CJ:

Are you going to take us because I'd quite like to, with the benefit of this discussion, have a look at what was said in the Parliamentary materials.

MR GODDARD QC:

I am going to go back to that, there's only the one passing reference which –

ELIAS CJ:

The Mahuta reference, is it?

MR GODDARD QC:

I was thinking more of the select committee report and the advice it recites.

ELIAS CJ:

Yes.

MR GODDARD QC:

And I will come back to that in a moment.

GLAZEBROOK J:

But, Mr Goddard, did we have much idea of the importance of the Tenths issue as against other issues? Is there –

ELIAS CJ:

Do you mean how it was reflected in the –

GLAZEBROOK J:

Well it's really just in terms of the claims, how important the – looking at it, the Tenths' claim looks actually to be probably the major claim in relation to the particular iwi but it's hard to gauge that from the –

MR GODDARD QC:

That I think would be an incorrect impression but there is no evidence which attempts to apportion the, either the loss suffered by virtue of the various wrongs done over time or –

ELIAS CJ:

Does the settlement deed –

MR GODDARD QC:

– the compensation.

ELIAS CJ:

– not go into that at all? Does it not indicate how the sum was arrived at?

MR GODDARD QC:

No, my understanding is that it doesn't. It's a global settlement.

ELIAS CJ:

Because it's really done against the back of the overall settlement process cap.

MR GODDARD QC:

And issues of comparability with other iwi –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and resources available and all the other constraints that influence the settlement process.

ELIAS CJ:

Yes, it's not really specific to the particular grievances. It is much more predicated on establishing a transfer of economic base.

MR GODDARD QC:

The extent of the grievances is an important element in assessment of the overall compensation.

ELIAS CJ:

Well it gets you over the, gets you through the door.

MR GODDARD QC:

Well it's a little bit more than that, Your Honour.

ELIAS CJ:

Is it?

MR GODDARD QC:
Because it also –

ELIAS CJ:
Well how do we know that though? Because you say there's nothing in the settlement deed which gives an indication of whether it met the particular claims.

MR GODDARD QC:
Well the effectiveness of a settlement has never depended on a comparison, on an assessment of how it's made up or a comparison of how it's been –

ELIAS CJ:
No, well it wouldn't because it gets enacted.

MR GODDARD QC:
But even within the absence of legislation a genuine compromise of claims is effective regardless of the relationship between the face value of the claim and the amount paid.

ELIAS CJ:
Well except someone with standing in the absence of legislation might well be able to say that it was an unreasonable imposed compromise. Anyway, we're a mile away from all of that yet.

MR GODDARD QC:
If they were their rights, yes. I do, yes, I mean I think, I do want to come back to the point I was making in answer to a question from Your Honour, Justice Glazebrook which was whether the legislature understood that claims for the benefit of the customary groups were being precluded and, in my submission, that was and was necessarily the case. The point of this legislation was to settle claims of the customary groups finally. In exchange for the settlement redress was being provided, commercial redress, cultural redress but particularly commercial redress in relation to, well, no, it's really all in relation to land because of the many different facets of land ownership under tikanga Māori. But the whole legislation is meaningless unless in exchange for that redress the historical claims of the collective

groups are compromised and of course the legislation took place against the backdrop of a process of establishing a mandate, of initially a deed and then the initial deed, and there was evidence on all of this, it's in Mr Galvin's evidence and also evidence of some of the interveners, being taken out to meetings of the relevant iwi and voted on to ensure that it had the relevant level of support among those groups. And the reason it needed that support was because they were giving up rights in exchange for the redress that was being provided under the legislation and also with a view to restoring the relationship between the groups and that's an important theme that comes through in the legislation.

So the legislation is pointless. It doesn't achieve one of its central objectives unless all claims by or on behalf of the customary groups are settled and the way that this was explained to the select committee is consistent with that. If we rewind to tab 38 in this authority legislation volume, it's the Bill as reported back. On page 2, and this is a passage that my learned friend took the Court to yesterday, is the heading Wakatū Incorporation. The exclusion is referred to. It was an omnibus Bill in relation to all the claims which is what is now section 25 was then clause 214. The Court commented on the size of this Act and the Bill was truly a monster and then there's a reference to subsection (6), clause 214(6), excluding specified Court proceedings by the Incorporation and others against the Crown, and Wakatū vigorously opposed the inclusion of Wai 56 in the Bill and notes that the Bill settles the historical aspects but the contemporary elements are not settled, and then importantly the Crown negotiated the settlements that led to the Bill on the understanding that it would settle all historical claims of people of whakapapa to the iwi rather than on the basis of shareholding of corporate entities such as the incorporation. We believe it appropriate that redress go to iwi entities that are mandated to represent iwi interests. We recognise there are issues regarding property rights and the Bill as it stands does not extinguish recourse to the Courts. That is a slightly confusing sentence which seems to wrap two things together. One is, of course, that the settlement doesn't affect property rights that do not depend on any act or omission of the Court. That is Your Honour's point in relation to customary rights earlier. It is not affected by those.

And then there's reference to receiving the following advice from the Office of Treaty Settlements in consultation with the Crown Law. The current orthodox position of the Treaty does not give rise to directly enforceable legal obligations without specific statutory authority. In Wakatū proceedings the claims are based around the same

factual grievances that are the subject of the settlement but primarily raised private law claims based on trust and fiduciary duty, not based on the Treaty breach. The ability to prosecute certain private law claims raised in Wakatū may be impacted by extinguishment provisions of the settlements of their extinguishment clause unless expressly preserved. Crown Law advice was sought on this matter and ultimately it was considered improper to obstruct final determination in the appellant Courts and then the only sentence that sheds any light, really, on the drafting, the drafting was developed to specifically apply a preservation clause only to the current litigation and specific parties to that litigation, so that's, again, the not on behalf of others concept.

And this, of course, needs to be read also against the backdrop of the chronology of the proceedings, which is that the High Court had given judgment finding that any interest under a trust of which Mr Stafford personally was a beneficiary could be the subject of proceedings by Mr Stafford but there was no such trust and then turning to the claims and breach of fiduciary duty and other equitable duties that those duties would be owed to the customary owners of the lands and that Mr Stafford had no standing, as it was put in the High Court, to bring claims on behalf of those customary groups, having elected not to sue in a representative capacity and against the backdrop of contested authority to have the conduct of the claim and decide whether to settle it or pursue it and by the time the legislation was passed, argument had taken place in the Court of Appeal but no judgment had been delivered.

So that was the line that was being walked, effectively precluding any attempt to do an end run around the settlement by the collectors, endorsed by their members and obtain relief for their benefit through a claim pursued by these plaintiffs. If they have any personal rights those can be vindicated before the Courts but they cannot bring claims for others.

And as I said earlier and I won't dwell on this because there are other issues we need to reach but this is of course not a one way street and perhaps the easiest way to see that is just to turn back to tab 39 again to the Settlement Act and look at the table of contents and see that after the provisions we've been looking at in part 1, concerned with preliminary matters and settlement of historical claims, we then have part 2, cultural redress and then over on page 8 of the table of contents, commercial redress and the process for transfer of commercial redress properties and deferred selection properties set out certain rights of first refusal provided for in subpart 4 and then some other transitional matters. But this was a good faith settlement intended

to give effect to the responsibilities of both parties under the Treaty and in particular on the Crown's part atone, recognise and atone for its breaches and establish a new relationship with the collective and it's important in my submission that that objective not be undermined in a manner that was not contemplated by the legislation and that would make it much harder to achieve such settlements in the future. I'll come back to that when I look at standing but essentially if an individual rangatira or an incorporation holding certain rights on behalf of some members of a collective group can, by bringing proceedings, effectively preclude arriving at a settlement until those proceedings are resolved. It is going to become a lot harder to resolve genuine Treaty grievances, even when there is very broad based support for the resolution within the collective group, as here.

So that brings me then to the scope of the proceedings that were preserved by section 25. There's a specific reference to the named plaintiffs and to the proceeding, with a proceeding number and because some of the arguments that have been advanced to this Court bear no relationship at all to the statement of claim, so on any view of the preservation cannot be preserved. I think it is important to go back to it and at least have a bit of a helicopter view of the pleading.

ELIAS CJ:
So we're looking at the statement of claim as at the date of the Settlement Act are we?

MR GODDARD QC:
It didn't change from partway through the High Court proceedings, on through until today.

ELIAS CJ:
Mmm.

MR GODDARD QC:
It's the third amended statement of claim that's the relevant one. It's under tab 5 of volume 1 of the case on appeal. It was filed in November 2010 and the High Court hearings took place through really rather a lot of 2011, beginning in March, with closings in November and some further written submissions in February 2012 and judgment was delivered in June 2012. But this was the form of pleading on which the

plaintiffs went to trial. We have the incorporation is the first plaintiff. Mr Stafford is the second.

GLAZEBROOK J:
Sorry what –

MR GODDARD QC:
I'm sorry, volume 1 of the case on appeal, tab 5. Mr Stafford as the second plaintiff and then a trust established after the proceedings were first filed and described as an intended vehicle for the receipt of relief but which in my submission as the High Court and Court of Appeal said plainly cannot have any rights to pursue in respect of these matters. You can't bring an entity into existence for the purpose of exercising someone else's rights in the absence of some sort of representation order. So the third plaintiffs are really a distraction and the defendant the Attorney-General.

The parties are then pleaded in paragraphs 1 through 7. Actually there's a little bit of general background in 1 and 2. The first plaintiff Māori Incorporation and that's pleaded in paragraph 3. Four, the second plaintiff, a kaumatua of Ngāti Rarua and Ngāti Tama descent and an owner in Wakatū Incorporation and a direct lineal descendant of Tenths owners as defined in paragraph 17 and perhaps it's worth jumping to 17 now. Paragraph 17 refers to the lists compiled by the Native Land Court in 1893 of the members of the four iwi who had been living in the Nelson settlement district at the time the land was acquired and the list of original owners is annexed as schedule 1, here after referred to as Tenths owners. So the Tenths owners are the individuals named in schedule 1 as identified by the Native Land Court process in the 1890s. And Mr Stafford pleads that he is a direct lineal descendant of some of the named Tenths owners and identifies those tūpuna. And then the third plaintiffs which I won't dwell on.

In this pleading of the background the formation of the New Zealand Company and then on page 4 Māori tribal interests in Te Tau Ihu and the settlement of four relevant iwi in Te Tau Ihu who occupied the land and acquired mana whenua rights in various areas according to tikanga Māori, paragraph 15 and the investigation of ownership in 16 and 17. There's a pleading in relation to Māori vulnerability in the period and then a pleading of the two deeds, the Kapiti deed with Ngāti Toa and just pausing there, it's common ground I think that Ngāti Toa were not owners of any of the land that is

the subject of these claims and certainly that was Spain's finding and it's reflected in the lists.

So what we have is an agreement entered into with the wrong people at a time when such an agreement was almost certainly legally meaningless in New Zealand, as my learned friend Ms Feint emphasised, before the arrival of English law, meaningless as a matter of the law of contract, as a matter of land law and certainly as a matter of the law of trusts. It's hard to think of a less effective or meaningful document if one could but 21 pleads the paragraph of that deed that is invoked by the plaintiffs and actually if we read this it may save me having to go to the deed. "That a portion of the land ceded by them as suitable and sufficient for the residence and proper maintenance of the said chief, their tribes and families will be reserved by the said governors and directors and shareholders of the New Zealand Land Company and held in trust for them for the future benefit of the said chiefs, their families, tribes and successors forever." The only thing I think I need to, well, two things I need to notice about that, is first there's no specification of what portion will be reserved. The Port Nicholson deed referred to a Tenth, as did some of the other deeds, but the Kapiti and Queen Charlotte ones didn't, so there's no precision about how much. And the second, and this is a theme I am going to need to develop today, is that it was always contemplated that one of the functions of these reserves would be for residence. There was an exchange between my learned friend and the Court yesterday about the Mackay history, and I think it was Your Honour Justice O'Regan who said it seemed broadly consistent with a lot of what we're hearing in these proceedings, and that's right. But there is one respect in which Mackay's view of what was happening bear no relationship to the events of the time, and that is his conception of a separation between occupation and endowment reserves. There is no basis for that distinction in any of the documents from 1839 and the early 1840s, it was always contemplated that reserves would be in part occupied and in part income generating assets.

WILLIAM YOUNG J:
Well, that's the way that the Spain award and the 1845 grant are expressed, because the total of occupation and Tenths reserves are to be 15,100 acres.

MR GODDARD QC:
Of reserves, they don't even use the separate language –

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

– of occupation and endowment. That language does not appear in any of these early documents.

ELIAS CJ:

No, but the early documents – I'm really not sure why we are concentrating on these early documents, I know they're pleaded, so you have that excuse. But really they're overtaken.

WILLIAM YOUNG J:

But the award, and the award itself, the 1845 award and Crown grant say it's a total of –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– 15,100 acres.

MR GODDARD QC:

And that –

WILLIAM YOUNG J:

That's not 15,100 acres plus occupation reserves.

ELIAS CJ:

Well, it excludes, because it's the way it's expressed.

WILLIAM YOUNG J:

No, you've got to look at it. I don't think it does say that.

ELIAS CJ:

Doesn't it?

WILLIAM YOUNG J:

No.

ELIAS CJ:

Okay, well, but that I would have thought is what we need to concentrate on rather than the Kapiti deed. But I, what I'm not sure about is whether the pā, et cetera, were outside of that.

WILLIAM YOUNG J:

I think you have to have a look at the deeds.

MR GODDARD QC:

And that's a separate issue.

GLAZEBROOK J:

Yes, no, because that's a different issue. Because I certainly agree that the New Zealand Company assumed that they would be for occupation and in fact possibly even primarily for occupation. But the issue is whether the existing cultivation and pā are a separate matter which, when I talk about occupation and endowment, I'm talking about occupation in terms of the pā and cultivation sites, which is the slightly, which is…

MR GODDARD QC:

And the legal question in relation to those is whether they were –

GLAZEBROOK J:

Exactly.

MR GODDARD QC:

– purchased at all –

GLAZEBROOK J:

Exactly.

MR GODDARD QC:

– and whether they should have been included in reserves or not.

GLAZEBROOK J:

Yes, yes.

MR GODDARD QC:

And there is also massive ambiguity around that in the early documents.

GLAZEBROOK J:

Absolutely.

MR GODDARD QC:

And I'll need to tease out a little bit of that.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

But again, if we go back to the original scheme – and this important because again the, at the forefront of the High Court proceedings was the express trust claim. That very much dropped to the back of the Court of Appeal proceedings and it didn't feature largely in the submissions to this Court until the Court encouraged my friends to bring it back rather more into the limelight. But it is actually a logical place to start –

ELIAS CJ:

Well, but can't we sort of cut to the chase a little bit faster because there is, of course there is an acknowledgement in the preceding documents that this is going to be the subject of a trust, then there's the 1840 agreement in which the Crown seems to be saying that, "Yes, we'll act as trustee," so that's important context.

MR GODDARD QC:

And it's only as context that I want to look at it.

ELIAS CJ:

Yes, all right.

MR GODDARD QC:

But one of the arguments that the Crown has consistently made, and it was accepted in the Courts below, was that there was never sufficient certainty of intention and objects, which really come together in many ways, and, in relation to some assets at least, subject matter to give rise to an express trust, and it's really to shed light on the vague and shifting objects for which it was contemplated that a trust would be established at some future time that it's necessary to go through a little bit of the background. Because one can't have an express trust unless there is an intention to create a trust with sufficient certainty about that intention to have private law equitable obligations and sufficient certainty about to whom they will be owed, and the basic purpose of the certainty's of course not just to provide a gentle introduction to a trust's course in a university but for the more practical reason that the trustee needs to know what assets they hold on trust and needs to know what they can and cannot do with them, and the Court needs to be able to supervise the trust and therefore needs sufficient clarity about how the assets are to be dealt with, and in the absence of that clarity no express trust can arise. There are then various equitable doctrines that have been developed to deal with the consequences of trusts that fail.

But what I'm going to go through are a few of the background facts to demonstrate is that there was a consistent intention to create a trust of a statutory nature – and I'll need to come back to that – at some time in the future when two requirements were met. First, when land would vest in the trustee and, second, when the objects of the trust, whether persons or purposes or some mix of those, were sufficiently identified, because there's a consistent theme in all the early documents of insufficient information to be able yet to define any trust. And what one also seems in terms of the evolution of this material, and I'll maybe deal with the theme in the hope that I can cut short the reference to it which Your Honour is clearly encouraging me to do, is an initial conception of these reserves as effectively a mechanism for creating a landed gentry among Māori with the chiefs residing in the town sections, that's why they're dotted around the town next door to the settlers, and with property which will enable them to have a measure of social consequence equivalent to landed settlers, and we see discussion before select committees, which seems quaint to modern eyes, of the much greater likelihood of intermarriage if the daughters come with appropriate income and lands, there's echoes of Jane Austin.

ELIAS CJ:

But where does that go? Sorry, where does that go? I mean, I accept that, it's part and parcel of the New Zealand Company proposals.

MR GODDARD QC:

Eccentric plans –

ELIAS CJ:

Yes.

MR GODDARD QC:

– which…

ELIAS CJ:

I mean, they had similarly bizarre notions about setting up a little England society for the settlers.

MR GODDARD QC:

Yes, the whole thing was, with the benefit of hindsight, most peculiar. But, and as Grey said later on, however interesting it might be as some future vision – and we I think can doubt that – completely unsuited to the environment in which the settlers and the Government found themselves in the early years of the colony.

Where it goes is that the plan was an inchoate and uncertain one with a particular focus at the beginning which shifted and changed over time in response to increased understanding of how Māori wished to live and continue to live and in response to the practical realities –

ELIAS CJ:

And the Crown's obligations too.

MR GODDARD QC:

Yes.

ELIAS CJ:

I mean, which the Spain Commission was responding to, and the Company for its part responded to those imperatives by stressing the endowment lands as the most significant feature of the payment for the lands.

MR GODDARD QC:

Yes. The Company also was consistently saying, "But we always meant to buy all the land and have the chiefs live on this town sections."

ELIAS CJ:

But what does that matter?

MR GODDARD QC:

Well, it matters in relation to the evolution of the idea that the pās and cultivations would be excepted rather than included in reserves.

ELIAS CJ:

But they've got nothing until the Crown grant, they've got nothing till then, and the Crown grant is preceded by the Spain Commission –

MR GODDARD QC:

Yes.

ELIAS CJ:

– which is looking to what on the ground is required so that you don't have Māori who are destitute.

MR GODDARD QC:

Yes. The other reason I was taking a bit of a run up to this was to anticipate my answer to Your Honour's question about the effect of the Spain Inquiry on customary rights and the time at which land might become demesne land of the Crown because what I was seeking to show you again, it maybe that I don't need to spend much time on it, is that these so-called purchases were not purchases from the right people and were never in fact capable of being allowed in terms –

ELIAS CJ:

Well that's all accepted and no title is based on them.

ARNOLD J:

Well it sort of is in indirectly.

MR GODDARD QC:

Yes well Spain, Spain –

GLAZEBROOK J:

Well that's the point, they were effectively, they were effectively validated by the Spain Inquiry and the Crown grant.

MR GODDARD QC:

Spain –

GLAZEBROOK J:

I mean it's not that they became effective in law but they did give the New Zealand Company or grant the New Zealand Company land.

MR GODDARD QC:

And what Spain justifies that by reference to is the discussions at Kaiteriteri and the presents that were presented then while noting that actually that wasn't structured as any sort of sale. I mean it seems to me that, let's be clear on this, if Spain had formed his obligations under the Land Claims Ordinance in a way that would normally be expected by any, at least any modern reader of that statute, the finding ought to have been that there was no valid pre-1840 sale and that any transaction that took place were the true owners in 1841 could not be validated under the Land Claims Ordinance because it post-dated the proclamation so it gave rise to no rights. Effectively what Spain did was add two nullities together to get something. It was a very pragmatic decision which had no sound foundation in law or really in the Crown's Treaty obligations, it was a response to the realities on the ground –

WILLIAM YOUNG J:

That there was already a settlement?

MR GODDARD QC:

There was already a settlement, something had to be done and so what we see is a, steps being taken which really created something new out of a mishmash of practical situations on the ground in a wrongful way.

ELIAS CJ:

Well look I accept that which is why I say surely we have to cut to the chase which is the Crown grant had its turns.

WILLIAM YOUNG J:

But it, sorry there are, there were facts on the ground including the identification of reserves and some trust arrangements accepted by the Crown –

ELIAS CJ:

I know, but we know all of that.

WILLIAM YOUNG J:

– before 1845 – no but before 1845.

ELIAS CJ:

We know all of that.

WILLIAM YOUNG J:

But what's the status of those?

MR GODDARD QC:

So let me –

WILLIAM YOUNG J:

What were they trustees of, land scrip?

MR GODDARD QC:

Well I think it's, it's helpful to ask what the settlers had and then to ask what the Crown had. What the settlers on the ground had was a contract with the New Zealand Company to be issued title to certain land and I refer in my outline but I won't go to it, I think, in 6.6 to the prospectus for the second settlement in February 1841, a prospectus that a financial markets authority today would I think struggle with, but it does have the merit of brevity. But what it provides for is that you pay a certain amount, you get script, it entitles you to select certain sections, there's the wonderful ballot system and then selection of particular land on the ground and then the settlers went into possession, so what did a settler in Nelson have, once Nelson

was identified as the second settlement which actually came later still, that was late 1841. They arrived in 1842, they selected their sections. What they had was a contractual right to be, have a title conveyed to them from the New Zealand Company, a vendor which itself at that stage had no title to the land and meanwhile they took possession. So they had possession which is of course itself a matter of English land or a form of interest in land but distinct from title. It's possible – and they had some contractual rights. The Crown did not, well if one looks at the ballot process, Māori were never party to a contract to take certain sections, they didn't have a contract with the New Zealand Company to acquire these sections, the Company was just administering its entitlements with a view to delivering that to them effectively, they would say, I suspect as a matter of their honour as gentlemen, and when the Crown under the 1840 agreement said that it would take over responsibility for reserves, not using and I emphasise language of trust in that agreement but we would assume responsibility for the reserves for Māori. Under the agreements that then existed, not the Nelson agreements because they hadn't been entered into and the chronology seems to be getting a bit confused at points on Monday; it had a practical ability as Government to insist that reserves be created or it wouldn't grant lands.

ELIAS CJ:

What does the language of, "Reservation of lands for the benefit of natives," what does that mean if it isn't.

WILLIAM YOUNG J:

Is that the 1840 agreement?

ELIAS CJ:

Yes.

MR GODDARD QC:

It's a – could and in relation to some land simply did mean non-grant to the company leaving customary title in place or it could mean the establishment of a whole range of other arrangements in which the land would be either vested in Māori or administered by some person for their benefit.

ELIAS CJ:

But it doesn't mean that the Crown will be the beneficial owner?

MR GODDARD QC:

No, but the Crown, well it might mean that the Crown held full legal and equitable title but were subject to a statutory regime requiring it to hold certain assets separately.

GLAZEBROOK J:

It's not a statutory regime, there's no statue at all there.

MR GODDARD QC:

But that's what was being looked forward to Your Honour.

ELIAS CJ:

Well it may have been.

GLAZEBROOK J:

Well show us in 1841 where it's being looked forward to.

MR GODDARD QC:

Yes I will. From 1839 in fact, that's what I was going to back to.

ELIAS CJ:

But there was, there was but so what, if it wasn't implemented the Crown is still saying we are reserving this land for the benefit of the natives.

MR GODDARD QC:

We will be reserving the land for the benefit of natives.

GLAZEBROOK J:

But it reserved –

MR GODDARD QC:

These were reserves to be made.

GLAZEBROOK J:

Well no but it actually did reserve it, it did administer it and it did pay income.

MR GODDARD QC:

The "it" is what we need to be clear about Your Honour and that is why I was pausing to ask what the settlers had, what interest through to the time which –

WILLIAM YOUNG J:

So they had a contractual claim or land scrip as they tended to call it?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

So what did the Crown have in relation to the identified reserves?

MR GODDARD QC:

It had no, as far as I can tell, legally enforceable rights in relation to the reserves. It had the practical power as Government to insist that reserves be made out of any grants that it made.

ELIAS CJ:

Well it had a contingent, it – under the legislation when it came in, it had contingently if the grants were made, it had the interest provided by that legislation.

MR GODDARD QC:

The legislation doesn't create an interest, the legislation gave rise to a power to make grants in response to findings by the Commissioner and in discharge of its responsibilities under the Treaty the Crown could be expected to reserve land for the benefit of Māori.

ELIAS CJ:

Well that is the political trust theory.

MR GODDARD QC:

It's not the political trust theory Your Honour because the political trust theory at its height and at its misconceived height was that customary rights –

ELIAS CJ:

Yes.

MR GODDARD QC:

– were a matter of political obligation, moral obligation, not legal obligation, that is –

ELIAS CJ:

Well I thought that's what you were saying, that this land was when the Crown –

MR GODDARD QC:

What I was saying. No the customary rights that were legally enforceable rights but what's being claimed here is not customary rights, it's an interest under a trust –

ELIAS CJ:

Yes.

MR GODDARD QC:

– of some kind. That drives us immediately to asking where in terms of the principles of equity the trust came from. It can come either from an expressed declaration of trust or from one of the equity's various remedial responses to other situations. In terms of an express trust we have to go through the ordinary inquiry into certainties of intention and the vesting of the assets. The trust doesn't arise until the asset comes into the hands of the trustee and my short point is that although there was a setting aside of certain sections that would become reserves when title vested in the Crown and although there was de facto administration of revenue from the land by the Bishop effectively, not the Crown –

ELIAS CJ:

Well on the invitation.

ARNOLD J:

Well hold it, the Governor appointed the trustees in 1842, didn't he –

MR GODDARD QC:

Well lets go –

ARNOLD J:

– including the Bishop.

MR GODDARD QC:

– to, perhaps the quickest way to do this because as my learned friend, Ms Feint, said the judgment really is a very impression, the High Court judgment a very impressive survey of the facts and the circumstances.

ELIAS CJ:

I would like to look at the primary documents myself but –

MR GODDARD QC:

Well let's do that. So I am torn between responding to the Court's desire to make progress and, but I'm very happy to go to the primary document so I think this is an important one.

ELIAS CJ:

Well we have to go to the critical primary documents, don't we?

MR GODDARD QC:

So if we look, and I think this helps me also to answer Your Honour Justice Glazebrook's question. If we look at the letters from the Colonial Secretary to the Chief Justice Bishop and Chief Protector, they are in volume 7 of the case on appeal under tab 49. So Your Honour Justice Glazebrook said to me, "Where in 1842 does it talk about statutory trusts?" This letter provides quite a nice snapshot –

GLAZEBROOK J:

Sorry –

MR GODDARD QC:

So volume 7 of the case on appeal, Your Honour, sorry, the key documents volume.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

The top 30 although like most of these numerical labels I'm not sure it actually adds up when you count on your fingers.

ELIAS CJ:

We haven't been taken to many of them so they can't be that key. What –

MR GODDARD QC:

They are pretty key but they are also all found in at least three places, helpfully.

ELIAS CJ:

Yes, all right.

MR GODDARD QC:

So we've hear got the first arrangements of any kind that were made in relation to this and if we – the first point, we have the Colonial Secretary writing here to the Chief Justice and integral letters to the other two intended trustees, "In the formation of the settlements at Port Nicholson, Nelson, New Plymouth, the New Zealand Company reserved one-eleventh." So again, just pausing there, we have one-eleventh not one-tenth and it's very clear from the prospectus for Nelson that it was to be one-eleventh as well. I've provided the reference to that document which is in here for the benefit of those chiefly with a view to their preservation of civilisation and social advancement. And then Her Majesty's Government has also directed that, "Where sales are effected of lands acquired by purchase from the aborigines, they must be carried to the credit of the department of the protector of aborigines."

So we've got again, I want to pause here, we've got a department of state, the Department of the Protector if Aborigines. So we've got again, I want to pause here, we've got a Department of State, the Department of the Protector of Aborigines and I took the Court yesterday to or at least referred to the appointment of the protector as one of the first officials to constitute a fund for defraying the expenses of that department and other charges that may be recommended by the protector and approved of by the executive Government promoting health, civilisation, education and spiritual care. So that's again a fund for the benefit of Māori but not a trust in the orthodox sense, one might think. "With a view to the most efficient administration of this property for the benefit of the native race, it appears desirable that all the reserves so made, or to be made by the Company, and any monies which may prove from time to time to be disposable out of funds so set apart, after paying the expenses of the Protectors Department." So it goes first to the department and then we look for surplus, "should be vested in one set of trustees possessing the confidence of the Government and the New Zealand Company. I am therefore

commanded by the Governor to acquaint you that His Excellency proposes when the reserves made by the company shall have become legally vested in the Crown," so there is no intention to create a trust now, there's an intention to create a trust when the reserves are legally vested, "to submit to the legislative council a bill for vesting them and the surplus fund from time to time to arise from the land sales and three trustees, namely the Bishop, Chief Justice and Chief Protector of Aborigines for the time being to be applied by them in the establishment of schools for the education of youth among the aborigines and in furtherance of such other measures as may be most conducive to the spiritual care of the native race and to their advancement in the scale of social and political existence. It is intended to provide that the funds should be expended in the promotion of these objects in the settlement or district from they may respectively arise and such an application of these funds under a board of management so constituted will, his Excellency has reason to believe, meet with general approval. Until these objects can be carried into effect under the authority of a legislative enactment," so there's the contemplation, Your Honour, of doing this by statute, at a future time, "the Governor requests that you will avail yourself of the opportunity afforded by your periodical visits to the company settlements to direct from time to time the disposal of any funds that may have arisen from the reserves and to collect any information respecting them that may be desirable. The gentlemen who have hitherto had the management of the reserves at Port Nicholson will be directed to give up the trust into your hands." So –

GLAZEBROOK J:

So is the argument that if they had become vested in the Crown and there hadn't been a statute, the Crown could have done what they liked with them?

MR GODDARD QC:

The Crown would have, would not have been free to do what it liked with them. It would have had obligations under the Treaty and it would have had obligations of a public law nature and –

GLAZEBROOK J:

Well, it says it doesn't have direct obligations under the Treaty –

MR GODDARD QC:

No, I think Your –

GLAZEBROOK J:

– legally enforceable obligations under the Treaty.

MR GODDARD QC:

Well, I think Your Honour is adopting a reasonably strongly positivist conception of what a legal obligation is which limits those –

GLAZEBROOK J:

Well, it's the one that's been put to us by the Crown that the Treaty does not create legal obligations.

MR GODDARD QC:

No, Your Honour, the –

GLAZEBROOK J:

Well, I think I've read it in the submissions.

MR GODDARD QC:

Yes, that the Treaty doesn't create obligations enforceable before the Courts, but it's quite wrong to think of the law as limited to matters which can be enforced before the Courts. There are large parts of the law of New Zealand which are given effect through other mechanisms. Much of the law relating to the conduct of Parliament, for example, to take one very familiar example.

ELIAS CJ:

Well, that's quite different.

MR GODDARD QC:

Well, it's not really, Your Honour, and again –

ELIAS CJ:

Well, yes, it is, because it's not within the sphere of Court supervision but it's expressly excluded by constitutional doctrine and ancient statutes. But that's…

MR GODDARD QC:

But there's a whole panoply of public law constraints on what governments do –

ELIAS CJ:

I – well, okay.

MR GODDARD QC:

– that are not enforceable through the Courts. Think of the Auditor-General process, the Official Information Act 1982, a whole range of mechanisms which –

GLAZEBROOK J:

Well, the Official Information Act is enforceable in the Courts.

MR GODDARD QC:

In some circumstances and not others, and then that's spelled out in that –

ELIAS CJ:

But this is all a public law argument that you are running here and we really need to concentrate on the property interests.

MR GODDARD QC:

And my short point there is that one cannot –

ELIAS CJ:

If the land comes to the Crown with this background why would equity not recognise that it's held on trust?

MR GODDARD QC:

Equity would not recognise that it's held on an express trust because there is no sufficiently certain declaration of trust.

ELIAS CJ:

Well, all right, look at it another way, what authority does the Crown have to have this land?

MR GODDARD QC:

The Crown doesn't need –

ELIAS CJ:

Yes, it does.

MR GODDARD QC:

– authority to hold land and administer it for the benefit of subjects, but to the extent that that's required –

ELIAS CJ:

Yes, it does to the extent that native title is not cleared. So it has to have obtained it as demesne lands and off we go to the 1841 Ordinance and what it means. I'm not sure…

MR GODDARD QC:

But it's my submission, Your Honour, that the Crown had not at this time acquired these lands as demesne lands and I don't think –

WILLIAM YOUNG J:

And never –

GLAZEBROOK J:

Nobody suggested it has.

WILLIAM YOUNG J:

– and you would say never did except for the 5100 acres.

MR GODDARD QC:

Until 1848, yes.

GLAZEBROOK J:

No, no, but nobody's suggested it has at this time –

ELIAS CJ:

No.

GLAZEBROOK J:

– because this is only background as everybody agrees.

ELIAS CJ:

Yes.

ARNOLD J:

But what is the –

MR GODDARD QC:

But it's –

ARNOLD J:

In that penultimate paragraph of that letter, it says, "To enable these objects to be carried into effect under the authority of the legislative enactment. Until that can be done" –

MR GODDARD QC:

"Until".

ARNOLD J:

Sorry?

MR GODDARD QC:

Which is important, Your Honour.

ARNOLD J:

Yes. "Until that can be done we ask you to direct from time to time the disposal of the funds that are being generated by the reserved." Now on your analysis by what authority can the Crown direct the Bishop to take control of the funds generated by the reserves and direct their disposition?

MR GODDARD QC:

The general power to protect the interests of the aboriginal inhabitants as they are referred to, for example, in the 1841 charter and instructions and the – yep, and that's essentially the source of that authority.

ARNOLD J:

So even though the Crown has no rights to the land at this point?

MR GODDARD QC:

Like the settlers.

ARNOLD J:
Like the settlers, that's right.

MR GODDARD QC:
And the settlers were in possession and they were generating revenue and they were taking advantage of that. One can –

WILLIAM YOUNG J:
Well, there must have been a trust at least as far as the money was concerned but there's –

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
– there's money which comes into the hands of – who did it come into the hand of? Who actually got the money that – it was rather intermittent, wasn't it? People would come and –

ARNOLD J:
Well, they appointed Thompson, didn't they, to collect?

MR GODDARD QC:
The Bishop did.

ARNOLD J:
The Bishop did?

MR GODDARD QC:
Yeah, so the money was coming into the hands of the Bishop and –

ARNOLD J:
So it was impressed with the trust in his hands, wasn't it?

MR GODDARD QC:
I think that the argument for a trust of some kind – and I don't think it's an express trust – but a trust of some kind is at its strongest in relation to the money that actually

came into the hands of the Bishop but that's not the land and that's the claim that's being made here so, again, the Court has said to me, "Pay attention to the property interests." That's what I'm actually trying to do in a way that the plaintiffs' case doesn't. The plaintiffs' case conflates the administration of money by the Bishop in the 1842/1844 period with the existence of some sort of trust of the underlying lands at a later stage and there's the world of difference between saying that an asset that actually comes into someone's hands, particularly someone who's not the Crown and doesn't have the various capacities that the Crown has to protect the interests of different sections of the population cannot be, for example, used by them for their own personal purposes.

GLAZEBROOK J:

But if you say as to the Crown, "We do not have this land at the moment legally, but in the meantime we want you to administer it as if we did have it and as if a trust was in existence, when we get the land we intend to put in a statutory trust," if you don't put in a statutory trust are you able to say, "There's no express trust. We had an intention to put it into trust. We actually effectively did have it in trust over that period before we owned it," can you seriously say that there isn't actually an express trust so leaving aside the uncertainties et cetera, so say, "We decide we're going to put this in trust when we get it. We're going to put it in a statutory trust when we get it and we're doing it for the benefit of the natives. In the meantime, you will administer this as if we already had it and do exactly what you're supposed to do," are you suggesting that if there wasn't a statute that that's not sufficient intention to give rise to a trust?

MR GODDARD QC:

Yes because you can't answer that question separately of the uncertainties.

GLAZEBROOK J:

Yes, I understand that. So you do accept that the statute is a red herring, then?

MR GODDARD QC:

No, because the statute sheds light on the time at which there was an intention to bring some sort of trust arrangement into existence. I'm absolutely free to, if I declare a trust, decide when I will declare it with effect from, so what we're trying to understand is when did the Crown, if ever, intend a private law trust to come into existence and for whose benefit and with what assets? What this tells us very clearly

is that there was an intention only to create a trust when the land is vested and that that trust will be established by legislation and we also need to –

GLAZEBROOK J:
Well, I'm not sure about that. Yes, there was an intention that it would be established by legislation but I'm not certain that we intend to establish a trust when it's vested in us and we intend to do it in this way, whether you can get out of having a trust and say, oh, well, we're not going to do it that way so ha, ha, we don't have a trust and we're free to do what we like with the land subject to wishy-washy Treaty of Waitangi political obligations.

WILLIAM YOUNG J:
This is slightly beside the point because in relation to all the land that was administered in this way save for what was effected by the reconfiguration of the Nelson Settlement Trust were declared. Once the land was vested, it was held by the Crown in trust for …

MR GODDARD QC:
What I'm going to do, Your Honour, when I make my way through some of these preliminaries and perhaps I should do that slightly faster is go separately through the town sections, the accommodation sections, and then the rural reserves that were not created because critically any land about which this might be said came into the ambit of the regime and then what we're concerned with is was there a failure to put additional land in at the start and we need to look at the interpretation issues arising out of the Spain report and the grant to understand whether that was required, and were there any unauthorised dealings with it. But again we can't sensibly answer the question about whether the dealings that took place such as the exchanges were authorised or not unless we understand what the terms of any regime on which the land was held were and again part of what I need to do a little bit of background to shed light on is to confirm that some of the suggested restrictions just were never contemplated. Indeed, the uses of reserves for occupation, for example, were consistently contemplated throughout the documentary record and of course we can't call the witnesses because quite a lot of time has elapsed and they are no longer with us, so we are confined to such documents as we have.

I do want, though, just also to sound a note of caution about this term "trust" because we do use it today in a way which is normally more limited than the way in which the

term was used in the 1840s. We need to be a little bit careful about language, I think. Now, this has come up in a number of New Zealand decisions in relation to what it means in a statute to refer to trusts, but just a couple of striking examples. Perhaps the best is the 1846 – so exactly contemporary with all of this – charter and instructions and if I could just ask the Court to go to volume 1 of the authorities, the pink legislation volume where we have the 1846 charter and instructions. I have received some instruction myself overnight and the legal force of the different instruments and the significance of things being issued under the Great Seal as opposed to the signed manual and cygnet so I am tentatively in a position to help the Court with that if it's required. I think the short point is that the charter is legally effective and will be given effect by the Courts but the instructions were not of legal force so far as persons other than the Governor and the Crown were concerned, and indeed they were private until a little bit later in the piece. They weren't always in relation to all economies published and they couldn't be pleaded in the Courts as a source of or limitation on legal authority. They were, of course, binding on the Governor as between the Governor and the Crown but it was a matter for the Crown to invoke any limits not the third parties in the Court.

ELIAS CJ:

Is there any imperial authority on this because frankly some of that colonial judicial stuff is not enormously persuasive.

MR GODDARD QC:

I would be delighted to share with the Court the references that I've been given, not all of which I have had a chance to read overnight.

ELIAS CJ:

I would have thought under these documents we now have where you can go back to 1840 and look at the text then in effect I've done a little bit of that but not on this point.

MR GODDARD QC:

I'm not sure that it matters for this case, ultimately, so if it does I'll go there but that was just a very potted version of my understanding of the relative status. There's no doubt that the charter has legal effect and is the source of the Governor's powers and indeed the powers of such Government institutions as there were in New Zealand at the time.

ELIAS CJ:

The instructions to recognise my property, however, must be at least relevant to whether the Crown was operating under fiduciary obligations or indeed trust obligations.

MR GODDARD QC:

Yes, and in my submission they point against any conclusion that there were private law equitable regimes as opposed to prerogative functions of protection in pursuance of the Governor's responsibilities to the aborigines and in the discharge of the Crown's obligations under the Treaty.

ELIAS CJ:

This diversion, which you keep harping on about, may well be anachronistic in itself. A modern public law drew on equitable principles in substantial part and that's quite clear if you read some of the seminal 20th century case law and some of the important theoretical articles. But, so I'm just slightly concerned that it is a talisman that you can wave in the face of the Court.

MR GODDARD QC:

I think it's a little more than that, and one of the fascinating –

ELIAS CJ:

It's all about power.

MR GODDARD QC:

It's about power –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and it's about how power is controlled –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and power can be controlled in a number of mechanisms. Power can be controlled through the Courts, but the Courts are just one mechanism for controlling the exercise of public power. There is also accountability to the –

ELIAS CJ:

Well, that's all accepted. But we're talking about power over property –

MR GODDARD QC:

Just –

ELIAS CJ:

– and that's really where equity has – anyway, look, there's no point in talking in those generalities.

MR GODDARD QC:

But let me just –

ELIAS CJ:

You go on, you were taking us to something in…

MR GODDARD QC:

I just wanted to go very quickly to the – we've got the Charter initially and then beginning on page 6001, the Queen's Instructions under the Royal Sign Manual and Signet –

ELIAS CJ:

Sorry, what tab are we looking at?

MR GODDARD QC:

Under tab 8 of the authorities, volume 1, pink one. So we've got the Charter, the 1840 Charter, and we've got the Instructions, and I just, in order to sound a note of caution about language, wanted to draw the Court's attention to on page 6009, chapter 13, on the settlement of the waste lands of the Crown, which after making various practical directions in relation to the preparation of charts and the establishment of registries, and in 6 referring to lands not claimed or provisionally registered as held by settlers or Aborigines, "Shall thenceforth be and be considered

as vested in us and as constituting the Demesne Lands of us in right of our Crown within the New –

ELIAS CJ:
Sorry, I can't find that.

MR GODDARD QC:
Sorry, on 6010, Your Honour, paragraph 6.

ELIAS CJ:
Oh, 010, sorry. I thought you said 009.

MR GODDARD QC:
Yes, sorry, I did at the start of chapter 13 and then I jumped to paragraph 6 and I didn't make that clear –

ELIAS CJ:
I see.

MR GODDARD QC:
– so that's entirely my fault. So paragraph 6 on page 6010, "All lands not so claimed," that is by settlers or by Māori or provisionally registered by the time so to be limited, "shall thenceforward be and be considered as vested in us and as constituting the Demesne Lands of us in right of our Crown within the New Zealand Islands." And then it's paragraph 12 further down that page that I want to draw attention to. "All the lands so ascertained as aforesaid to constitute the Demesne of our Crown in New Zealand are and shall be holden by us, our heirs and successors, in trust for the benefit of our subjects and especially for the benefit of such of them as have settled or as shall hereafter settle within the said islands." That's a very orthodox use of the term "trust" in the 1840s, it does not mean a private law equitable trust.

ELIAS CJ:
No, but it's not an indication that the property is held to the use of people, if one were to use the older form. So it's, I totally accept that.

MR GODDARD QC:

And nor, in my submission, are many of the other references we see to trusts –

ELIAS CJ:

Yes.

MR GODDARD QC:

– in the early correspondence, including in relation to reserves, this is my point, that it's a reference to being held for the benefit of and to be administered by the Crown in the exercise of its –

ELIAS CJ:

But, "For the benefit of our subjects," is really quite a different concept than held to the use of identified people.

MR GODDARD QC:

But if we go back, for example, to the letter we were in, the 1842 letter, I mean, it was very much held on these trusts for the benefit of Māori to be pursued in these ways, so it's the same sort of –

ELIAS CJ:

Well, of the Māori sellers.

MR GODDARD QC:

Well, of the, no, of the native race, not just of the sellers.

ELIAS CJ:

Oh, sorry, which one are you talking about, the Instructions?

MR GODDARD QC:

That letter to the Bishop, for example, and the Chief Justice.

ELIAS CJ:

Oh, but that in context only could be a reference to the vendors of the lands.

MR GODDARD QC:

Well, it was a reference to dividing up the management into districts, which is not owners of particular lands but a district-wide administration of funds for the benefit of Māori within the district, so –

WILLIAM YOUNG J:

But it might also be, but the only vendors at the time of those Instructions were Ngāti Toa –

MR GODDARD QC:

Also.

WILLIAM YOUNG J:

– who didn't own the land.

MR GODDARD QC:

So if it was a reference to vendors then it was completely the wrong people.

GLAZEBROOK J:

Well, no –

ELIAS CJ:

Well, it was all contingent on the –

GLAZEBROOK J:

– I think we're looking at the residents of the settlements of Port Nicholson, Nelson and New Plymouth, which is quite clear from the top. So what they were saying is that you were looking at those settlements and then you are applying those funds for the benefit of the Māori in those settlements.

MR GODDARD QC:

For the benefit of the natives, chiefly with a view to their preservation, civilisation and social advancement, yes, which is –

GLAZEBROOK J:

Which has to be a district-by-district issue.

MR GODDARD QC:

Well, that's what they go on to explain.

GLAZEBROOK J:

Exactly.

MR GODDARD QC:

But it's still district-wide and not small parcel-by-small parcel, ownership-by-ownership, so there's –

ELIAS CJ:

But that's why they need the statute.

GLAZEBROOK J:

Well, wouldn't they need the statute?

ELIAS CJ:

Yes.

MR GODDARD QC:

But –

GLAZEBROOK J:

Well, possibly, but I think they were also thinking, they weren't thinking in terms of that very limited customary ownership, they wouldn't have understood that at the time.

MR GODDARD QC:

No, I think that's right, Your Honour. There is a close parallel in the way that land held by the Crown for the benefit of all subjects is described in these Instructions and the way in which land held for the benefit of natives is described in this letter as an example of a whole series of communications throughout the period, and there's no reason in my submission to think that any difference in legal status or legal arrangement was contemplated. In each case there are mechanisms of accountability, including reaching back to London, which was invoked again and again to the Secretary of State and to Parliamentary committees, there were inquiries at several points into the way in which the colony was being administered and

Aborigines dealt with in the colony, and those were meaningful forms of accountability outside the Courts for the exercise of public power, and it's public power we're concerned with, not private equitable duties and it's, to use Your Honour's term, an anachronism to assume that references to trust are references to private law equitable trusts.

I'm conscious that I, we've been going for little over an hour and a half already. How does Your Honour want to organise the morning?

ELIAS CJ:
No, we'll take the adjournment at 11.30 if that's all right.

MR GODDARD QC:
Absolutely, Your Honour.

ELIAS CJ:
Thank you for enquiring.

MR GODDARD QC:
I didn't want to presume on the Court's –

ELIAS CJ:
No. I didn't make other arrangements, otherwise we might have.

MR GODDARD QC:
– tolerance for this. So that's a little linguistic point. Let me, without going to it then, just take, see if I can go very quickly through section 6 of my road map and then rewind. Actually, I got distracted from the pleaded claims, didn't I, but I think it's probably worth while we're looking at some documents to go through it.

So in my section 6, 6.1, the New Zealand Company Instructions to Wakefield, I've provided some page references where what the Company was saying is, "We intend to create some trusts, probably on a legislative basis, once we know more about the situation in New Zealand and how we can benefit Māori." So it's forward-looking, it talks about, you know, it happening at some future time. The 1839 deeds, with all their problems, are touched on at 6.2. 6.3, the proclamation and the Treaty come along, and the Charter and Instructions from 1841, which are the ones of course in

force up to 1846, make explicit provision for the role of the Governor and the Governor's offices in the protection of Aborigines, as it's described. I don't think I need to go to the reference I had provided, pages 13 to 14 of the Charter deal with the high-level guidance in relation to protection of Aborigines and the official protection being committed to one principal officer, and page 28 just sets out the early officers of the colony, including the Protector of Aborigines, who was to be paid the same amount as the Attorney-General and substantially less than the Chief Justice, or even the Surveyor-General for that matter, the Attorney isn't named.

ELIAS CJ:

Sorry, what paragraph are you referring to?

MR GODDARD QC:

I'm in my road map.

ELIAS CJ:

Oh, road map, sorry, I thought it was submissions.

MR GODDARD QC:

Sorry, just scooting through the key documents and identifying why I provided these references without going to everything.

ELIAS CJ:

Yes.

MR GODDARD QC:

And if the Court wants me to pause and go to anything –

ELIAS CJ:

No, that's…

MR GODDARD QC:

– please do tell me that I ought. So we've gone through the 1839 Company Instructions, the deeds, the Proclamation and the Treaty and the Charter Instructions which followed.

The select committee hearings that took place in July 1840 with witnesses from the New Zealand Company appearing before the Parliamentary Committee and being questioned about the reserves shed fascinating light on what was envisaged at the time, much of it, as Your Honour discussed with me earlier, of a somewhat bizarre nature, but it does shed light on what was intended, and in particular makes it very clear that at that time there was no even tentative view about how these trusts would be established and the purposes and/or persons for whom they would be established and I could perhaps have noted also in 6.4 the Halswell Instructions when they were sent out by the Company which are in case on appeal volume 7, tab 42, also convey that uncertainty in explicit terms.

The 1840 agreement that Your Honour the Chief Justice has referred to on a number of occasions is in volume 7 under tab 43. There's I think common ground that it's a political arrangement rather than a contract and I will come back to that when I talk about limitation but it is important to bear in mind that it was being entered into in late 1840 and that this preceded any arrangements being entered to with the actual occupants of the Nelson area and what clause 13 of the arrangement said, "Then also understood that the company had entered into engagements for the reservation of certain lands for the benefit of the natives. It is agreed that in respect of all the land so to be granted to the company, that's the ones to be granted following the Pennington enquiry, reservations of such land shall be made for the benefit of the native by Her Majesty's government in fulfilment of and according to the tenor of such stipulations." So that's not saying we are going to do exactly what the Company contemplated, it's saying that some commitments have been made and that you the company will no longer administer reserves as you were intending to but rather the government will make reservations for the benefit of the natives would could take any of a range of legal forms. There's no commitment to trust at this stage. It could simply be retention of customary title, it could be a range of forms of statutory administration or it could conceivably be a trust in fulfilment of and according to the tenor of such stipulations. The Government reserving to themselves in respect of all other lands to make such arrangements as to them shall seem just and expedient for the benefit of the natives.

GLAZEBROOK J:

Well the tenor is such stipulations they said they were going to hold them on trust, are you saying that the New Zealand Company didn't mean trust?

MR GODDARD QC:

The New Zealand Company also meant a statutory administration regime and that was they'd introduced the Baring Bill into the imperial parliament to create a statutory administration regime and the select committee material and the instructions to Wakefield I think, which I've referred to in my 6.1 all refer to legislative provision for the administration of the reserves.

GLAZEBROOK J:

So they could do what they liked with them if the Bill didn't go through? If it was a valid contract and they'd said they'd hold them on trust for the natives, if because they meant a legislative solution that if they didn't have a legislative solution they weren't holding them on trust.

MR GODDARD QC:

I think we need to be careful about time periods here. In 1839 the assumption that there was some sort of valid contract obviously didn't work, the whole thing was an arrangement of –

GLAZEBROOK J:

Well at the time the New Zealand Company thought it had a valid contract didn't it?

MR GODDARD QC:

It's hard to know what –

WILLIAM YOUNG J:

Not by late 1840.

GLAZEBROOK J:

No, no at the time it entered into it, sorry at the time it entered into it.

MR GODDARD QC:

1839, I think that's rather doubtful. I don't think the New Zealand Company could seriously have believed that the law of contract was in operation in New Zealand in 1839 let alone the law of trusts.

ELIAS CJ:

But they regarded it as a treaty didn't they?

MR GODDARD QC:
Yes, so not a private –

ELIAS CJ:
They were entering into a treaty, but it's the same thing. Treaties are contracts.

MR GODDARD QC:
But not contracts enforceable before the domestic Courts and there were no Courts of New Zealand to which it could be referred.

ELIAS CJ:
Yes but – well all right. As you say there's a whole world of law that never sees the inside of Court Mr Goddard.

MR GODDARD QC:
Yes a very large part of it.

WILLIAM YOUNG J:
It was a stepping stone to later acquiring title.

MR GODDARD QC:
Yes it was a practical step to it and in many ways what had happened was that anticipating that colonial government might be extended to New Zealand, there was something of a race out to New Zealand by Wakefield to try to establish some facts on the ground which would provide the foundation for what was effectively a political argument for the grant of land.

ELIAS CJ:
But the New Zealand Company was actually trying to get the rights of colonisation, it wanted to charter and all of that was still on the table I think.

WILLIAM YOUNG J:
Not by the time of this agreement.

ELIAS CJ:

Oh no not by the time of this agreement but earlier.

MR GODDARD QC:

What we see in the select committee hearings in July 1840 is that after the committee had begun its enquiries but before it concluded them news of the proclamation reached London.

ELIAS CJ:

Yes.

MR GODDARD QC:

But this was expected, it had been known in what was a reasonably small London society for some time and I think it was Professor Williams' evidence but I'd need to check back, suggesting that the timing of the Tory's expedition was not entirely an accident in terms of trying to get some facts on the ground before the usual colonial proclamation preventing direct dealings with the natives came into force in New Zealand. This is the other thing that does complicate chronologies here of course is that email didn't work very well then and –

ELIAS CJ:

The time lag, it was amazing, yes.

MR GODDARD QC:

So things were happening in February 1840 in New Zealand but no one in London taking steps knew about it until well into July and Halswell, I think it was Halswell who got shipwrecked on the way out to perform his task as well. So that was a rather slow –

ELIAS CJ:

It might've been Spain I think.

WILLIAM YOUNG J:

I think it was Spain wasn't it?

MR GODDARD QC:

Spain sorry. So that time lag has to be allowed for as well and we do see events happening in parallel at various times, slightly disconnected from each other but so the position of the Company was that it was establishing really a political claim to favourable treatment in relation to land and using that as a lever to deal with the colonial office and the government and exercise influence in various ways and the select committee enquiry was one of those avenues to seek political advantage and it goes through very illuminatingly how little was known, how vague the intentions were, that there was an expectation that at some stage there would be some sort of statutory regime providing for the administration of the land for the benefit of Māori and still at that stage quite a strong theme in the Company's picture of how the reserves would work, that there would be some sort of rights to income and there's a comparison with the position of married women given by Wakefield to the committee that they would have the full use of the annual income without of course being able to deal with it in any way, spectacularly combining multiple forms of discrimination all in one sentence. So that I think deals with the select committee hearings.

ARNOLD J:

Can I just ask, in the 1847 Loans Act, in the preamble it talks about the Company having acquired or become entitled to large tracts of land in New Zealand. Now what's that referring to?

MR GODDARD QC:

That's referring to the claims which had been accepted in principle and possibly in some cases given effect to in grants but I'm not just sure of the exact timing in New Plymouth.

WILLIAM YOUNG J:

There are three settlements.

MR GODDARD QC:

There are three settlements. So we're talking about Wellington, New Plymouth and Nelson and the entitlement that's referred to is the entitlement that was first sought to given effect through the 1845 grants that were not accepted and subsequently given effect in 1848 in relation to Nelson and I just can't remember the exact dates of the other.

ELIAS CJ:

It's after 1850 in the case of the, well certainly the Porirua litigation, that part of the country I think.

MR GODDARD QC:

But the language of entitlement also turns up in that Act and the 1851 Act to describe the position of the settlers who had contractual rights against the company to be issued titles in due course.

ARNOLD J:

It does tend to suggest that the New Zealand Company was seen as having something more than simply a political claim to favoured treatment.

WILLIAM YOUNG J:

But 1845 it had an entitlement to 151,000 acres and was prepared to accept it.

MR GODDARD QC:

Absolutely, there had been a finding of the Commissioner that it was entitled to be granted land at Port Nicholson and at New Plymouth, although the Governor didn't accept the recommendation at New Plymouth.

So there's then, as I say, after all of this including after the 1840 agreement the prospectus for the second settlement, the location of which wasn't even identified and one has to marvel at the ability to sell sections in a, you know, land on the other side of the world in a settlement, the location of which is not even specified and the fact they were able to sell about half is the miracle, I think, not that the other half didn't sell.

And then late in 1841, November, selection of Nelson as the second settlement by Captain Wakefield and the Kaiteriteri hui which was the first discussion with the owners on the ground about the intention of settlers, the desire of settlers to establish a settlement in the Nelson area which is not recorded in any contemporaneous written material we have, oral traditions, and we have some secondary accounts but, for example, the extent to which reserves were discussed and what was said about them in terms of proportions and purposes is far from clear.

And the potential to become confused about tenths and elevenths also should not be underestimated. We kept getting stuck on that through the trial with many witnesses, of course, if you take a tenth of what's existing it becomes an eleventh of the whole.

WILLIAM YOUNG J:
Well what was the layout of the Nelson settlement, was that elevenths or tenths?

MR GODDARD QC:
Elevenths, and that was explicitly provided for in – so it's explicitly provided for in the prospectus.

WILLIAM YOUNG J:
Yes, I know it's provided for in the prospectus.

MR GODDARD QC:
And the layout is consistent with that.

WILLIAM YOUNG J:
And were those plans part of the award?

MR GODDARD QC:
Yes, so I'm going to come to that when I go to the town sections, for example, but it seems to me that you can't interpret the text separately from the attached plans and that to suggest that arising out of the Spain award which has a plan showing the number of sections an entitlement number than was shown –

WILLIAM YOUNG J:
So what, it shows 100 out of 1100 sections, does it?

MR GODDARD QC:
It shows a hundred and the rest of the sections are marked. I haven't counted them but I assume that they are the full complement.

WILLIAM YOUNG J:
Well I mean, presumably there are the 900 sections or a 1000 sections?

MR GODDARD QC:

Yes. I think if we look at the Tuckett plan which has the sections numbered, from memory, there are 1100 sections in total in the town. I will check that over the morning adjournment.

WILLIAM YOUNG J:

But on the other hand, isn't 15 – it's 15,100 acres as identified by Spain, isn't it?

MR GODDARD QC:

As an aggregate amount.

WILLIAM YOUNG J:

Out of 151,000?

MR GODDARD QC:

Which is –

WILLIAM YOUNG J:

Okay so the arithmetic –

MR GODDARD QC:

So the arithmetic doesn't work.

WILLIAM YOUNG J:

– so it's the impossible trident, it doesn't work.

MR GODDARD QC:

But what is very clear is that in describing the reserves that are to be set aside there are 100 sections coloured the relevant colour in the town and it's very hard to see how you can argue from that document that what was being reserved was those plus another 10 that were not shown on the attached plan.

Applying absolutely orthodox principles of interpretation in which you read a document as a whole and try to make sense of it as a whole you can only get to one place in relation to both the Spain award and the grant, for example, on the town sections and the accommodation sections. Where it gets messy, Your Honour, of course is the rural ones because they're not shown because they haven't been

allocated and, indeed, all we have is very general boundaries within which they would be allocated at some time in the future. I'll come back to that.

So then we have the initial arrangements, my 6.9 of my road map. Sorry, 6.8, 1842 settlers arrive and the town sections and accommodation sections are selected and we've got detailed accounts of that process happening and the hundred town sections and 100 accommodation sections being selected in accordance with the order of priority determined by the ballot in London back in 1841. And the settlers were exercising that right of selection pursuant to their scrip, pursuant to their contract with the company but there's no record of any contractual arrangement between the company and the Crown in relation to the ballot entitlements, the scrip entitlements that the company had effectively set aside for Māori. Obviously there's no contract when the company first made that decision to proceed in that way in 1841 and simply, through its own officers, drew the relevant entitlements out of the hat and nor is there any suggestion in the documents or elsewhere in the evidence that there was any contract.

So what you had was a de facto exercise of a selection power by a Crown official acting probably under the authority of the protectorate although that's also less than completely clear, selecting sections that would become the reserves consistent with the company scheme. But at that point, at the point of selection of town sections it's hard to identify any legal right that existed to select those and the plaintiffs never have and that's important, I think, because that flows through when we come to the rural sections, there was no legal entitlement there was only a de facto power to make a selection which would then be given effect in a grant which was itself the exercise of a public power.

GLAZEBROOK J:
Weren't they doing that just in accordance with their agreement with the New Zealand Company that they would be the ones that would administer those reserves?

MR GODDARD QC:
Absolutely it was contemplated by that but that of course –

GLAZEBROOK J:
No it's not just contemplated –

MR GODDARD QC:
It's not a contract.

GLAZEBROOK J:
– by that that's what they said they were going to do and that's what they did, or you mean a legal power outside of that?

MR GODDARD QC:
Well an arrangement of this kind creates no legal property rights, I mean the Court said, "What are the property rights?" And I'm trying to track the property rights.

GLAZEBROOK J:
Okay, I understand, it's just that clearly that's what they were –

MR GODDARD QC:
Oh yes.

GLAZEBROOK J:
– acting under the authority of and that's what was contemplated.

MR GODDARD QC:
I don't think it's quite right to say that's what they were acting under the authority of because the arrangement wasn't the source of any authority for the Crown to engage in this, it just intimated that this is what it was going to do and it did it pursuant to the prerogative powers the same ones pursuant –

GLAZEBROOK J:
Well so it had an authority to do it if it was acting in accordance with prerogative power.

MR GODDARD QC:
Yes but not a property right. You can't –

GLAZEBROOK J:

No I'm not, it's got nothing to do with it being a property right, is it, at this stage? I don't think anyone is suggesting it's a property right at this stage, are they, because everybody agrees this is only background?

MR GODDARD QC:

Except that if this is not a property right then when we come to the rural reserves, for example, the position remains the same and that's important to the argument about whether there can be a trust in relation to the never selected rural reserves. So I'm very comfortable with what Your Honour has put to me but I just want to emphasise that that has downstream consequences which are important.

Then we come to the initial arrangements for administration of the reserves pending establishment of a statutory trust. These are described in some detail in the paragraphs of the High Court judgment. I've taken the Court to one of the documents discussed by the Court. At this point, as I said before, there was no title to land in the Crown.

ELIAS CJ:

So what are the documents? Just say what they are you don't need to take us to them. You said – I hadn't appreciated there were a number of documents that bear on this.

MR GODDARD QC:

So there's the correspondence from the Colonial Secretary –

ELIAS CJ:

To the Bishop.

MR GODDARD QC:

– to the Bishop. The Bishop's communications with the people on the ground –

ELIAS CJ:

Setting up as agents to – yes.

MR GODDARD QC:

– and, for example, saying to the agent, you can give my personal guarantee to people who take leases.

ELIAS CJ:

Yes.

MR GODDARD QC:

And the reason he needed to do that was that there was no trust in existence –

ELIAS CJ:

Title.

MR GODDARD QC:

– there was no title, he had no legal authority. So he was personally engaging responsibility pending the establishment of some other framework. And then the correspondence that followed in relation to the departure of, first, the Chief Justice and then others from the role and there's quite an important, in terms of shedding light on the understanding at the time, a document under tab 53, it's the only one I am going to go to, of volume 7. It's a note from Connell who was Colonial Secretary, we think, at the time and we'll check that, yes, one of the Governor's staff anyway and it's not as if it was a big staff, to the Attorney-General after the Chief Justice resigned saying, "Will the resignation of the Chief Justice affect the further operation of the trust," there's a transcript over on page 3349, it's not easy to read the palimpsest of legal advice written between the lines on the handwritten version. "No, it is only a proposed trust as yet, it has not yet been legally formed." And then, "Inform the other trustees a successor is at present unnecessary."

So the understanding in 1843 was certainly that there was no trust even though practical steps were being taken on the ground by the Bishop to administer land for the benefit of Māori. And we have in 1844 the Bishop resigning because the Governor bluntly informed him that he did not recognise any trust and he considered his position was untenable, and that's described in the High Court judgment as well.

Then we get to another important step in the administration of these lands which sheds considerable light on the thinking at the time although it never became operative, and that's the Native Trust Ordinance of 1844.

I see it's 11.30, I wonder if before –

ELIAS CJ:
Yes, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.51 AM

MR GODDARD QC:
Your Honour I was going to go next to the Native Trust Ordinance 1844 which is of interest because it's the last formal expression of how the Crown intended to apply the proceeds of these reserves before the events of 1845. That's in the authorities' bundle, legislation bundle volume 1 under tab 7, the Native Trust Ordinance of 1844 and I should just say at once as I note in 6.10 of my road map that section 28 of the Ordinance provided that it wouldn't come into operation until it received the Royal confirmation and until that confirmation was gazetted and that never took place.

WILLIAM YOUNG J:
Why was that provision in, that was an unusual provision in ordinances for this time I take it?

MR GODDARD QC:
Yes and I don't know.

ELIAS CJ:
But some of them were, didn't take effect until the royal consent was signified didn't it?

MR GODDARD QC:
Some and others came into effect but were reserved and could be disallowed subsequently. That was the normal mechanism –

ELIAS CJ:
Yes, yes. Or they could all be, they could all be –

MR GODDARD QC:

– so you didn't need to say that in order to provide for disallowance and I think His Honour –

ELIAS CJ:

That's right, no. No but you might not bring it into effect because it was a bit embarrassing if you'd been operating under it, as a number of –

MR GODDARD QC:

And we saw that where some of the land claims decisions where Commissioners set out and made inquiries under the 1842, was it, amendment which was then disallowed with the result that it had to be done again.

ELIAS CJ:

I think the Supreme Court Ordinance was disallowed. But there must have been some saving or other.

O'REGAN J:

I hope so.

MR GODDARD QC:

Different Supreme Court Sir. Our constitutional – yes arrangements no longer involve a wait of six months to find out whether legislation is or is not effective, fortunately.

So this Ordinance made by the Governor with the advice and consent of the legislative counsel in June 1844 recites the concerns about colonisation which prompted the establishment of reserves refers to, "Provision having been made for the appropriation of certain lands and monies for the purposes aforesaid. And expedient for the better administration of the said lands and monies, that trustees should be appointed and in whom the same shall be vested with the powers and under the restrictions hereunder expressed, be it therefore enacted. In one trustees and their powers, section 1, for the purpose of effecting the objects herein before mentioned the persons herein after named," it's horrible drafting, "Shall be and are hereby appointed trustees," that is to say we've got the Governor, Bishop, the Attorney-General and Mr Spain so –

WILLIAM YOUNG J:

Can I just pause there. This wouldn't have applied to the trust contemplated in relation to Nelson because they're not trusts for the, or necessarily for the education and advancement of the native race are they. Or is this –

MR GODDARD QC:

This was a purpose trust to which these assets were going to be applied as I understand the position.

ELIAS CJ:

Well they might have been.

WILLIAM YOUNG J:

I wonder. Would an endowment for a particular group of people or occupation reserves for particular group appear to be within this?

MR GODDARD QC:

No I don't it would have been within this but then the terms in which the Bishop was asked to mind the shop until something was established were very close to these terms and didn't involved occupation by anyone either, even though there was occupation happening on the ground.

WILLIAM YOUNG J:

Right.

MR GODDARD QC:

And what we see under subsequent legislation with powers which will have a focus of this kind, is that the trustee is nonetheless decided to lease at a nominal rent to occupiers some of these lands, so we saw the hybrid function with a fairly broad approach being taken to statutory frameworks.

So we have with a few tweaks the group of trustees contemplated in the earlier communications back in 1842, a reference to the trust property vesting in the trustees in section 3. "4, the trustees should be styled the trustees for native education and improvement in New Zealand," and then, "All property, real or personal which shall from time to time be granted, conveyed by us, bequeathed or given to the trustees to be held by them upon the trusts hereinafter declared." And that is as Your Honour

said to apply and expend the rents and the establishment and maintenance of schools, “For the instruction of the native people in the English language, a systematic course of industrial and moral training and English usages and English arts,” presumably such as overcooking vegetables and –

ELIAS CJ:
I don’t think it can be assumed that all the lands reserved were to be placed within this receptacle at all because as you say there the different purposes.

MR GODDARD QC:
We don’t –

ELIAS CJ:
We don’t know?

MR GODDARD QC:
No.

ELIAS CJ:
No.

MR GODDARD QC:
But –

ELIAS CJ:
It is true that at the time education was thought to be the most beneficial thing that could be done to help advance Māori.

MR GODDARD QC:
Yes and just moving forward to what clearly was applied to –

GLAZEBROOK J:
What point are you taking from them?

MR GODDARD QC:
What I was taking from it was that it does –

ELIAS CJ:

It was a future trust.

MR GODDARD QC:

That it was a future trust, that it was a statutory regime that was contemplated. We're told repeatedly there is going to be a statute, there is going to be a statute and –

ELIAS CJ:

But there'd have to be a statute if the Crown had come into possession of land that was Māori land and was to be held for the benefit of Māori, there'd have to be some statutory regime to enable specific trusts such as for educational purposes and to set up the, well the trustees might have been set up in some other way but –

MR GODDARD QC:

It's the most sensible way of setting up a group of trustees –

ELIAS CJ:

Yes.

MR GODDARD QC:

– or any sort of management regime in relation to the assets in providing for things like pay, what powers they would have –

ELIAS CJ:

Yes.

MR GODDARD QC:

– so that they could exercise those with confidence and people dealing them, with them would know –

ELIAS CJ:

And to be –

MR GODDARD QC:

– what they could do and also to impose restrictions, so it was always likely that there was going to be some sort of statutory regime, I agree and what we see here is the

first attempt at a statutory regime. Your Honour's quite right to say that we don't have any contemporaneous record of exactly what assets were intended to be brought under this but there was nothing else made at the time and it is consistent –

ELIAS CJ:

Well they were looking also to the addition of land identified by Māori to come into the trust, isn't that, there a provision in there for half –

MR GODDARD QC:

Half-caste children.

ELIAS CJ:

– caste children.

MR GODDARD QC:

Sections 10, yes.

ELIAS CJ:

Yes and they looked to specific identification.

MR GODDARD QC:

The earmarking of that and then if the particular people and their descendants fail it comes back to the trusts, for example –

ELIAS CJ:

Yes.

MR GODDARD QC:

– section 11. Yes, so there's a statutory regime which reflects the – I don't think it's possible to go further than to say that it reflects the exchanges that had taken place about the need to put in place some sort of statutory regime. It reflects the emphasis on –

ELIAS CJ:

Well, the intention to use a statutory regime.

MR GODDARD QC:

That's right, and it reflects an emphasis on education and other beneficial purposes of a kind which looks very much more like a charitable purpose trust, in fact, than a trust for persons as Your Honour I think was really putting to me a moment ago, and which was capable of being brought into force by gazette but which never was, and this was happening at the same time that Spain was conducting his inquiries in a way which would be expected to result in the issue of a grant and for the first time titles becoming available to the Crown in relation to reserves in the Wellington and Nelson settlements.

O'REGAN J:

Does this contemplate that the trusts will be separate trusts for each area or –

MR GODDARD QC:

No.

O'REGAN J:

It's just one great big global trust?

MR GODDARD QC:

Yes, subject to the discretion, of course, of the trustees to apply assets in different ways in different areas but there's no mandated partitioning of resources.

O'REGAN J:

So that's not really giving effect to what Spain was contemplating, is it? Well, I suppose this is before, isn't it?

MR GODDARD QC:

This is before Spain –

O'REGAN J:

This is before Spain, yes.

MR GODDARD QC:

– so I think – we come to Spain shortly. Spain didn't really contemplate any particular application of the reserves, and that's unsurprising because that wasn't his job. He was there to work out what, if anything, should go to the company. He had

no authority to determine how reserves would be managed or for what purposes the assets would be used. He had no ability to declare any trusts on behalf of the Crown. That was completely outside his bailiwick, and we see that in the report. All sorts of intentions are attributed to Spain, identifying things as occupation reserves, it's suggested in the pleadings and in *McKay* but he actually didn't do that, and he had no power to designate reserves for particular purposes. It simply wasn't his role.

O'REGAN J:
And was this legislation still up in the air at the time of the Spain report? It was still – it hadn't been gazetted but there hadn't been anything done to say it was never going to be gazetted?

MR GODDARD QC:
Certainly at the time that he conducted his inquiries in August of 1844 it I think couldn't have been known what the pleasure was in London of this ordinance.

O'REGAN J:
So he was probably thinking about this as being the regime, because he was one of the trustees.

MR GODDARD QC:
Yes, he – it would be unusual not to be aware of legislation which named you, I think, and so this was, as Your Honour says, very much the backdrop against which he was carrying out his functions but more than that we don't know, and, again, that goes to the difficulty of ascertaining some circumstances that we would expect to know in relation to a more modern dispute.

So we have that legislation and then just a few months after that we have Spain, having done his inquiry in Wellington and had his conversations and the meetings to which my friend took the Court about how those would be approached, holding his Court in Nelson in August 1844 and then eventually reporting in March 1845, and I think it's worth just looking at a couple of aspects of that. So the key documents volume, volume 7, tab 59, is one of the various places in which we find Mr Commissioner Spain's report, and Spain begins by referring, part 1, Nelson, refers to the various deeds, Kapiti and Queen Charlotte deeds, and then on page 3408 of the case on appeal, page 55 of the compendium, two paragraphs from the bottom, after referring to the inquiries conducted in Otaki and elsewhere in the

North Island, he says, second paragraph from the bottom, “Such being the stated evidence on the company’s claim to land in the middle island, I opened my Court at Nelson to investigate the case on the spot on the 19th of August last perfectly willing to entertain the claim of the Ngāti Toa chiefs, whom I have already named, so far as I was assured of their actual residence and cultivation,” and, of course, Spain goes on to find that they were the conquerors but had never occupied these lands and had no rights to them or to sell them.

In the bottom paragraph there’s a reference to Mr Meurant, the interpreter, having gone ahead and had conversations with the natives, and that there existed a favourable disposition in the minds of those in the neighbourhood.

Over on the next page there’s a reference to enclosing a copy of the minutes of the proceedings in the Court and a further payment ultimately agreed of £800 which – gets slightly ahead of himself, the original transactions referred to, and then, “After a schedule herewith enclosed so showing the appropriation of goods of various descriptions, the amount of money £180 15 shillings, to the natives of the above districts, put in and proved on this occasion, substantiated by concurrent testimony of several gentlemen who witnessed the transaction, from this testimony it appears that late Captain Wakefield immediately on his arrival with the preliminary expedition assembled the resident natives of the several districts in the immediate vicinity of Nelson,” that’s the Kaiteriteri hui, “informed them he was about to take possession of the land by virtue of a purchase made by Colonel Wakefield at Kapiti but that as it was customary on such occasions to make presidence to the resident natives he was ready to give them certain articles of merchandise which they were to receive on the distinct understanding that such goods were not to be regarded in the light of a further payment for the land but merely as presents.” So this is what Professor Williams referred to as an attempt to regularise the completely irregular sale by, and by Toa. Spain goes on to say, after reference to the memory of Captain Wakefield and his liberal and judicious policy, “At the same time it may be remarked the distinction thus sought to be drawn between a further payment for land and a present was somewhat too fine drawn for the conceptions of the natives. I think Captain Wakefield carried his assumed position too far in claiming the land under a purchase from the conquerors only and not admitting to some extent the title of the natives whom he found in actual possession. Thus while he made them presents to conciliate their friendship and goodwill and in a manner reconcile them to parting with their land, he refused to admit they are titled to any of it and

consequently was at no pains to procure from them any acknowledgement of the receipt of the presents or any declaration in writing of the lands which they then virtually consented for such consideration to alienate. Had this been done, I have little doubt that the resident natives would have regarded and acknowledged the transaction as a regular sale and disposal of their lands. As it was, an over-anxiety not to compromise the company's title under the original alleged purchase in some measure counteracted the beneficial results of the otherwise judicious course adopted, and this is that fine line that Captain Wakefield was attempting to walk, and really he couldn't enter into a subsequent purchase, of course, under the 1841 Ordinance.

It refers then to the evidence of Te Iti and the course that the evidence took and that an adjoinment was then sought. That was granted. Then a few, about a quarter of the way up from the bottom, "Next morning, however, Colonel Wakefield applied to me to me to suspend my inquiry and to allow him to compromise the matter by authorising Mr Clarke to negotiate with the natives for the receipt of a further payment. To this I immediately consented and went myself among the assembled natives accompanied by Mr Clarke and Mr Meurant who had much conversation with many of them, the general tenor of which was favourable to the terms of the settlement we were anxious to accomplish," and that led to the further payment of £800, and there's again reference to the distribution of goods by Captain Wakefield but no deeds being signed, and at the foot of the page, "I was satisfied from all the evidence the natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the land treated of, more particularly as it appeared that they had at the time stipulated for the retention of a certain portion of a large wood at Motueka as well as the retention of their pās and cultivations, and I found that the conditions as regarded Motueka had been in a great measure complied with by the allotment into native reserves of a considerable portion of the big wood in that district." So again just pausing there, it's absolutely clear that Spain considered that one of the purposes of the reserves that he was identifying was to make provision for cultivated lands which Māori did not wish to part with. This report simply cannot be understood as requiring a strict distinction between those categories of land he explicitly contemplates, the cultivated land being in reserves.

Then there's ongoing discussion of that and perhaps also if we come down, after a more detailed discussion of the arrangements that were entered into, about a third of the way down the page, a paragraph beginning "By this arrangement." "By this

arrangement the boundaries of the several districts were finally and definitely agreed upon, the natives received a further remuneration. Their pās and cultivated lands were secured to them and one or two exchanges of the reserves for their use and benefit were affected by Mr Clarke at their instance and in compliance with their wishes." So there's a number of important things that drop out of that. The first is that Spain understood the award that he was making to secure the pās and cultivated land to Māori and this was being done by including those in the reserved sections that he identified.

Second, there were some exchanges at this time. They were exchanges which were described as being carried out at the instance and in compliance of the wishes of Māori, of local Māori and that goes both to this question of consultation that Your Honour the Chief Justice put to me in relation to some of the exchanges because these among the exchanges complained about in the pleadings to which I will return, I distracted myself earlier. And second, it again reflects the point that the reserves that Spain was identifying included land which Māori specifically wished to retain for cultivation and use by them.
There is that at the foot of that page, page 3410.

GLAZEBROOK J:
I don't necessarily read that as saying the pās and cultivated lands were included in the reserves. Where do you get that from?

MR GODDARD QC:
It's explicit at the top of the page where Spain refers to the conditions as to retention of the large wood had been in great measure complied with.

GLAZEBROOK J:
Well no but that's just a retention of those, it doesn't say they were included in the reserves.

MR GODDARD QC:
Well it does there Your Honour by the allotment into native reserves of a considerable portion of the big wood in that district. So that's explicitly what he's saying. He's saying I've complied with their desire to retain –

GLAZEBROOK J:

Well no but that's the large wood I don't know – it doesn't say that the pās et cetera are included in there, does it?

MR GODDARD QC:

The point about securing their pās and cultivating lands to them emerges from reading this together with his award which I haven't yet come to and the attached plans.

GLAZEBROOK J:

Oh, okay so it's nothing specifically in here, apart from in respect to the great wood?

MR GODDARD QC:

Yes exactly Your Honour.

GLAZEBROOK J:

That's fine.

WILLIAM YOUNG J:

Also in the middle of the page there's a swapping of – natives receive further, their pās and cultivated lands were secured to them and one or two exchanges of reserves for their use and benefit reflected by Mr Clarke at their instance and in compliance with their wishes and that presumably, although I guess it's not entirely clear, refers to the same thing.

MR GODDARD QC:

Yes that's cultivated land which was being swapped into the reserves in exchange for other land. So settlers had been allocated some lands –

GLAZEBROOK J:

No well that's what I'd assumed that was, that was just saying well we want that land rather than this land.

WILLIAM YOUNG J:

And pās as well as cultivated land.

MR GODDARD QC:
Which included cultivations.

GLAZEBROOK J:
Yes.

MR GODDARD QC:
I think those lands didn't have – there was no evidence of pās on those lands.

WILLIAM YOUNG J:
Well in the middle of the page, "Their pās and cultivated lands were secured to them and one or two exchanges of reserves for their use and benefit reflected by Mr Clarke."

MR GODDARD QC:
The evidence on location of pās I think didn't suggest that they were located on these exchanged sections, so –

WILLIAM YOUNG J:
Oh I see, okay thank you.

GLAZEBROOK J:
All I thought that meant was you got your pās and you also got some things you wanted by exchanging the things you'd been given for other things.

MR GODDARD QC:
But the things that were wanted were the cultivated lands at Te Maatu.

GLAZEBROOK J:
No I understand that, it's just that basically instead of having this section reserved, you've got this section and you wanted that because your cultivations were on this one, not that one.

MR GODDARD QC:
Exactly Your Honour. So what that illustrates again is that certainly one of the purposes of the reserves as Spain understood it was to include cultivated lands.

GLAZEBROOK J:

I didn't ever have any problem with that, the endowment but I did think there was a distinction between what they were talking about in terms of pās and cultivated lands that was –

MR GODDARD QC:

I don't think that's a distinction that the plaintiffs have ever drawn, they've treated pās and cultivated lands as being in the same category that should have stood completely outside the sale and what we will then see when we look at what was awarded –

GLAZEBROOK J:

It's a bit confusing to be honest, isn't it?

MR GODDARD QC:

It is and the maps, is that there is a complete division of the area between the reserves and what's granted to the Company. There's no other category.

GLAZEBROOK J:

Right.

MR GODDARD QC:

So necessarily if the pās have been secured they must be in the land identified as reserves.

GLAZEBROOK J:

And we know that they were in the area that we're looking at presumably.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

And not outside of it, although in some instances they would've been outside of it but that's probably irrelevant anyway.

MR GODDARD QC:

That's exactly what I was going to say Your Honour. To the extent that we're only concerned with them to the extent that they were within the area. If they were secured to them it can only have been because they were included in the land that Spain identified as reserves because he did not have any third category of land that remained in customary title and was outside both the grant to the Company and the reserves. So an attempt to build an edifice of strict separation between that category of land, whether it's just pās and pā and urupā or pā, urupā and cultivations and reserves and the granted land just does not work on the basis of this document because that third category is not present.

GLAZEBROOK J:

But in terms of the reserves they were intended to be held by the Crown as reserves for the inhabitants.

MR GODDARD QC:

Not if they were intended to be brought under the 1844 ordinance which seems likely in August 1844 but we don't know for sure.

GLAZEBROOK J:

Well for the natives in any event.

MR GODDARD QC:

Yes but that's quite different and that again is really important when we talk express trusts and even when I talk about express trusts in those general terms, what of course the plaintiffs need to show to succeed is not just some express trust but the express trust they plead and I'll come back to that. It's actually difficult, and I would say impossible to spell out the terms of any express trust up to or including this period but certainly the express trust that was pleaded here has no foundation in any contemporary document. I don't think I need to go through the rest of the report. The minutes of this –

ELIAS CJ:

Sorry is that right? If you're not coloured by your focus on the educational trusts under the 1844 ordinance and you take a document like this at face value, isn't it a trust for their benefit?

MR GODDARD QC:

Who's "their" though Your Honour. Have we got one trust for everyone in this area of 151,000 acres or do we have separate trusts of separate lands for people in Nelson and people in Motueka? How can you apply the land? Is it as to income only or what can you do with capital?

ELIAS CJ:

Well that may need to be identified and I understand that but it's certainly, this is certainly not an indication that the objects are simply limited to educational trusts.

MR GODDARD QC:

No, it's completely up in the air. My submission about this, far from saying that it's limited to education –

ELIAS CJ:

Well it's not really up in the air, it's for their subsistence, it's for their living, it's so that they will be, as you indicated, perhaps even in the community.

WILLIAM YOUNG J:

But what you're saying is the formulation of it is up in the air.

MR GODDARD QC:

Yes.

ELIAS CJ:

Well I understand that, I understand that argument but I'm just saying that it is for their benefit.

MR GODDARD QC:

But it's never been sufficient to establish a discretionary trust of the kind contended for.

ELIAS CJ:

Well we haven't got onto the law yet. I don't know when we are going to get onto that but…

MR GODDARD QC:

I am hoping to –

ELIAS CJ:

Yes.

MR GODDARD QC:

– but the inquiry into whether an express trust was declared is essentially a factual inquiry, I don't think the law is very hard in relation to what the requirements are for the declaration of an express trust, it's never been seriously contested in this proceeding to date, and nor I think are the requirements for a *Chirnside v Fay* [2007] 1 NZLR 433 (SC) category 2 fiduciary duty seriously contested.

ELIAS CJ:

I think you might be better to look at…

WILLIAM YOUNG J:

Well, I'd actually like to get my head around the rest of the award.

ELIAS CJ:

Yes, yes, I agree, I'm not trying to interrupt the discussion about the award, I was just reacting to the view that there's nothing in the contemporary documents which indicates what the nature of the trust was to be.

MR GODDARD QC:

Not in sufficient detail to bring an express trust into existence, that's all I'm saying.

ELIAS CJ:

I understand that argument, yes.

MR GODDARD QC:

Yes. So the report as opposed to the formal award then goes on to talk at the foot of page 3410 about the transaction at Kapiti being, "As enormous an extent as the claim which was advanced under, it was preposterous in principle," a phrase that I particularly like and which was plainly right and goes on to show, discuss that mere conquest doesn't establish title, as opposed to conquest followed by occupation, and what that meant is that Toa could not sell this land but the local residents could, and

some history in relation to the movements, discussion of the Wairau, which was not encompassed in this award, indeed what Spain goes on to find is that it was controlled by Toa and hadn't been sold, and then proceeds, he proceeds to make his award, over on page 3413, "I feel convinced I can say nothing further which can better explain to Your Excellency my arguments and conclusions on this important subject than what I have already stated. Therefore, I, William Spain, Her Majesty's Commissioner, do hereby determine and award that the directors of the New Zealand Company and their successors are entitled to a Crown grant of 151,000 acres of land in Nelson, which are divided as follows: Wakatu or Nelson District, 11,000 acres already surveyed; Waimea District 38,000 acres already surveyed; Moutere District 15,000 acres already surveyed; Motueka District 42,000 acres partly surveyed; the remaining quantity required to be selected from the portions of land coloured red in the plan number 1 annexed – and we'll come to the plans in a moment – Massacre Bay District, 45,000 acres partly surveyed again; remaining quantity to be sectored from the portions of land coloured red, which several districts and quantity of land contained in each is particularly described and referred to in the enclosed schedule of the land required for the settlement of Nelson as put into my Court by the agent to the Company and which said lands are more particularly delineated and described upon the accompanying plans marked number 7, saving and always excepting as follows." So what's granted is the land shown on the plans with these exceptions: "All the pās, burial places and grounds actually in cultivation by the natives situated within any of the four described lands hereby awarded to the Company as aforesaid, limits of the pās to be the ground fenced in around the native houses, including the ground in cultivation or occupation around the adjoining houses without the fence, and cultivations, as those tracts of country which are now used by the natives for vegetable productions or which have been so used since the establishment of the colony, and also excepting all the native reserves upon the plans hereunto annexed marked number 1A, 1B, coloured –

GLAZEBROOK J:

Well, that does seem to have a cumulative effect, doesn't it, and also excepting seems to be on top of that.

WILLIAM YOUNG J:

But it is the last bit though, isn't it, "The entire quantity of land so reserved for natives being one-tenth of the 151,000 hectares"?

MR GODDARD QC:

Yes, and the question is, does the "so reserved" refer to the whole of the exceptions, pās, cultivations and native reserves, or does it just refer to –

GLAZEBROOK J:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

– the native reserves marked? And the Judge held that it was the latter, it was just the reserves, and that pās and cultivations were separate. It says, "And also excepting any portions of land within any of the lands hereinbefore described to which private claimants have already or may hereafter prove before the Commissioner of Land Claims a title prior to the purchase of the New Zealand Company," and we see that language picked up in the grant, the 1845 grant, as well.

Now we know that the two categories of saved and excepted land were not mutually exclusive because we know from Spain's report that significant areas of cultivation were included in the native reserves. What we don't know for sure just from reading this award is whether he contemplated that there might be pās, burying places and grounds and cultivation outside the reserves. If there weren't, then we don't need to worry about the distinction that the Court's just put to me because it's describing the same land in two ways. If there were, then we get into the problem which was part of the category of reasons that the company gave for rejecting this grant, and it's probably worth dealing with this now rather than going separately to the grant. What the New Zealand Company wanted a grant for, of course, was as a route of title from which it could then convey title to particular parcels to settlers operating under a deed system where what you had to do to show your title to land was to trace back to a valid Crown grant in respect of a particular section, and putting to one side the one tenth versus one eleventh issue, which was one of the concerns raised in relation to the Nelson settlement, the other striking problem with this form of grant was that in the partly surveyed areas you couldn't know whether or not this conveyed title to a particular bit of land. Because of the possibility of other early land claimants coming along and establishing a claim, you couldn't be sure of any section as a secure route of title because of the exception without identification, and if there were

pās and cultivations outside the reserves, and if that was a separate exception, then also you had the difficulty that whatever happened to have been cultivated at some time between establishment of the colony and the execution of this was excepted and no one buying a section from the company –

GLAZEBROOK J:
Did somebody mention that?

MR GODDARD QC:
The company complained about all of these things –

GLAZEBROOK J:
Yes.

MR GODDARD QC:
– later and it said, it said, and in my submission rightly so, "This is completely useless to us as a conveyancing document, the grant," and it was. You couldn't establish a chain of title to any section in the settlement based on a grant in these terms, which is what was granted. And the Court asked my learned friend some questions about balancing and said, menacingly, "Perhaps that a question we should put to Mr Goddard." I think it's pretty plain that this was a balancing exercise. It was a claim that had to be evaluated by the Commissioner hearing both parties reaching a decision, which he did for better or worse, and the Governor then had to decide whether or not to allow it and exercised a separate judgment in the light of the recommendation, and it wasn't by any means a rubber stamp. We saw that at New Plymouth, for example, where the grant wasn't made in conformity with the recommendation.

But the Governor having been told, "Well, what you've done doesn't work for the basic purpose for which it's been. It is useless as a conveyancing instrument," was, in my submission, still absolutely acting within his powers and still operating within that framework of balancing rights and interests in saying, "Right, then, we'd better make it more specific so that without prejudicing anyone's expectations in relation to what is to be granted and what is to be reserved we produce a document that is consistent with its legal purpose and normal conveyancing practice," and that's what happened between 1845 and 1848 and –

ARNOLD J:

So the 1848 grant didn't refer to the possibility of prior or the old claims?

MR GODDARD QC:

Exactly, Your Honour.

ARNOLD J:

They've gone. But the pās, burial place, and were they referred to or not?

MR GODDARD QC:

No, no, also not referred to.

ARNOLD J:

Right.

MR GODDARD QC:

What happened was there's a process of making inquiry about whether there were any pās or cultivations, and I refer to that in my 6.15(a). Mr Parker's evidence goes through the various communications we have about the steps that were taken to investigate locations of pās. The Court saw that memorandum from Swainson saying, "We'd better select reserves and find stuff out." Now the plaintiffs are very critical of the inquiries that were undertaken. Let me be more – there is a reference to pās, burial places and native reserves which are more particularly delineated and described upon the plans, so my learned friend's right to say that there is a reference but they were all specifically identified, there was no generic exclusion, which was what I –

ARNOLD J:

So that's under tab 66?

MR GODDARD QC:

That's under tab 66, yes. I am grateful to my learned friend.

WILLIAM YOUNG J:

Mr Goddard, you were going to try and correlate the Spain award to the maps.

MR GODDARD QC:

Yes, and I am –

ELIAS CJ:

He was diverted, and he's going to go back to that but he really should complete this bit.

MR GODDARD QC:

I keep diverting myself. I am…

ELIAS CJ:

But he needs to complete this bit and then we can go to the maps.

MR GODDARD QC:

Sorry, I am in about three nested parentheses, I think, at the moment, which is never a comfortable place to be. But let me just be clear in His Honour's, the question from Justice Arnold, there is reference to pās, burial grounds and native reserves but, Your Honour, they are all specifically delineated on the plans, there is no generic exclusion, which is what I meant to say.

ARNOLD J:

Yes.

GLAZEBROOK J:

So basically they've undertaken an inquiry that they thought was adequate and then delineated the –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– the particular aspects?

MR GODDARD QC:

And the conclusion that was reached was that there were none outside the reserves that had been made, and following a few more exchanges which took place in the period 1845 through 1848. Now the plaintiffs are critical of that. They may be right,

they may be wrong. It's hard to know at this remove in time but the short point is that an inquiry was undertaken and if it was careless then that would give rise potentially to some sort of claim if there was a trust against the trustee for negligence but it would be time barred. I'll come back to that when I come to limitation to avoid a further parenthesis.

So back in the Spain report, what we have as well as the report is the series of maps that were attached to the report of the Spain inquiry and in the map book these are maps 589 to 593.

And if we go to 589 we see the plan number 1 referred to. This is the whole plan and it's not very easy to read but what we have is blown-up enlargements of it in the following pages showing the various districts, the outlines of the sections, and then over at 591 we have the reserves shown and the key is not very easy to read on this map but as we work through the pile –

ELIAS CJ:
Is this the one with "22" on it or are you looking at…

MR GODDARD QC:
I'm looking at tab 591.

WILLIAM YOUNG J:
9506 number 22, isn't it?

MR GODDARD QC:
No, it's got ML913 at the bottom left-hand corner.

ELIAS CJ:
Yes. Right, thank you.

MR GODDARD QC:
And –

GLAZEBROOK J:
I'm sorry, I might be in the wrong one.

ELIAS CJ:

It's at 9505, it starts, and that's Nelson, and then the one I was looking at is Motueka.

MR GODDARD QC:

Yes. And if we look at – and under the settlement of Nelson, New Zealand, showing the sections selected for the native reserves, 1844, the text immediately under that reads, "The allotments coloured green are those selected for the native reserves. The sections coloured red are those agreed to be given as native reserves in exchange for others in the same district." So we've got green and the red exchange sections that Spain refers to as having been chosen in consultation with Māori in August 1844. And then, yes, over page, we have Motueka and 593 is also part of that.

So when one works through those plans what one finds is a number of reserve sections. They are also listed in a schedule, 100 in the town, and 100 suburban sections and exchanges made to ensure that those included the cultivated –

WILLIAM YOUNG J:

Well, 100 out of how many?

MR GODDARD QC:

The division was done based on the plan in the prospectus so 100 out of 1100.

WILLIAM YOUNG J:

1100, okay. So where was the final – in relation to the rural sections, the plans don't give any indication of what was, where the native reserves were to be.

MR GODDARD QC:

No. The Spain ones don't, because there'd been no selection at that stage. Indeed, it doesn't even show what the company's lands would be with certainty. There's just a wider area within which certain areas are to be chosen.

ELIAS CJ:

Do we have that map? You said there's a wider area within which…

MR GODDARD QC:

Yes, it's one of these but it's quite hard to read them on this scale and at this quantity, but back, I think, where it talks about the remaining quantity required to be selected from the portions of land coloured red in plan number 1, there is some – actually, I'm not – 594, so one sees some areas, I think, shaded slightly redder than the rest which are the areas. So again, going back to the text of the formal award, we have the areas where a survey has been completed, so the Wakatū or Nelson district, 11,000 acres, Waimea, Moutere. And then when we get to Motueka district, 42,000 acres partly surveyed, the remaining quantity required to be selected from the portions of land coloured red. So as I understand that, Your Honour, what's being said is there's been some survey of some of the Motueka land, some sections are shown, the rest is in, as we can see, not divided up into sections. It's just in amorphous, a –

ELIAS CJ:

So if I look at 9508, that thing, that corner thing at the top, is that unsurveyed? Is that part of the land available to them from which they can select sections?

MR GODDARD QC:

I think so but maps are not my strong point and I'll check that over lunch. You are addressing your questions to someone who gets lost in the Hutt Valley.

ELIAS CJ:

No, well, of course, what I'm particularly interested in was what sections were subsequently selected and what happened to the available, you know, balance.

MR GODDARD QC:

Yes. Well, what we know from this is that there was an area larger than 42,000 acres in Motueka shaded in red from which the Company was to make further selections to bring its allocation in that district up to 42,000. Once that had been done and the other areas that the company was to select had been firmed up, there would then be the selection process for rural sections for both settlers and the reserves contemplated by the original scheme of settlement, excepted as my learned friend Mr Galbraith said yesterday, the Company actually needed more than 151,000 acres to go with the original scheme for the Nelson settlement which involved 221,000. But this was all yet to come, and so there was no designation of any

reserves so far as the rural sections were concerned in the Spain report, indeed not even designation of exactly which land would be the Company's land.

ELIAS CJ:

No designation of the area within which they were to be selected?

MR GODDARD QC:

Yes, that was the red.

ELIAS CJ:

So where's that map.

MR GODDARD QC:

That's this map, I think.

ELIAS CJ:

That's this one?

MR GODDARD QC:

Yes.

ELIAS CJ:

This one at 9508.

MR GODDARD QC:

Oh, this one my learned friend Ms Feint tells me was attached to the grant rather than the Spain one, but it used the same language about selection within the shaded area. The –

ELIAS CJ:

So at the time of the grant the selections – now I'm getting totally –

MR GODDARD QC:

Hadn't happened.

ELIAS CJ:

Had still, still hadn't happened.

MR GODDARD QC:

Of the rural sections, that's right. So –

ELIAS CJ:

Given the effect of the Land Claims Ordinance, did that mean that the Crown was obliged to provide the sections when selected, within that area? How did the Crown hold it at that stage?

MR GODDARD QC:

Which land, Your Honour?

ELIAS CJ:

The lands not selected.

MR GODDARD QC:

Well, there was a two-stage process in which first of all the land that the company was to have –

ELIAS CJ:

Yes.

MR GODDARD QC:

– would be selected, and then within that there would be selections by the settlers, and –

ELIAS CJ:

But the Company hadn't even selected.

MR GODDARD QC:

So at this stage, both the Spain award stage and the 1845 grant stage, even what the Company was to have in the partly surveyed districts had not been selected. An area was designated within which they would choose a specified quantity of land, but what that would be was not known. And then once that was firmed up a process of survey, which carved it up into 150 acre sections, and then a selection process was run where people in the order of ballots drawn back in 1941 in London would get to say, “I want this one,” and then when it was your turn as number seven you’d put your hand up, “I’d like this one, please,” would happen, and that would produce an

identification of both each settler's sections and the native reserve sections if – that's what was contemplated, it didn't happen, and I need to deal with the consequences of that, but that's what was contemplated at this stage. But Your Honour will immediately see, I think, why I say that there could be no trust of particular plots of land as native reserves under –

ELIAS CJ:

No, but the, if these are now all Crown demesne lands, one would have thought that they are impressed with a trust at least for purposes of selection, that was really the point I was driving at.

MR GODDARD QC:

Obviously at the time of the Spain report they're not Crown demesne lands and –

ELIAS CJ:

No, no, but you say that the selections weren't made until after the grant, so there's certainly demesne lands from the time of the Crown grant.

MR GODDARD QC:

I say –

ELIAS CJ:

There's, arguably they are from 1845.

MR GODDARD QC:

I say from the 1848 grant, because the 1845, A – and I know Your Honour expressed a lack of enthusiasm for this argument but it wasn't delivered.

ELIAS CJ:

Null and void, you say, yes.

MR GODDARD QC:

But more importantly – and this is a simpler path I think to the same conclusion than the niceties of the law of deeds and whether the seal of the colony was the same as the Great Seal, which in my submission it wasn't, but it would be nice not to go there – is that in 1867 and again in 1883 the 1845 grant was deemed to be void ab initio to all intents and purposes, so it cannot be treated as having had any legal effect.

WILLIAM YOUNG J:

And just a related point, the land – on a Crown grant being made following a Commissioner's report the land goes from being held by the Crown by its radical title but subject to customary land to being the land of the grantee.

MR GODDARD QC:

Once the grant is effective, yes, Your Honour.

WILLIAM YOUNG J:

So is there an intermediate period when it's demesne land of the Crown? Well, it depends on what you make of clause 1 of the 1841 Ordinance.

MR GODDARD QC:

It does, and it also depends on whether the view that was taken by some colonial officials about the effect of a purchase on customary title, independent of the issue of a grant, is or is not correct –

WILLIAM YOUNG J:

So who – did some colonial officials think that the purchase would extinguish native title even though not confirmed?

MR GODDARD QC:

Yes. So, for example, there are some indications at the time, although there were also disagreements, to the effect that – and this is the scenario that Her Honour the Chief Justice I think identified yesterday – where there was, for example, a pre-1840 purchase of 10,000 acres but the Commissioners recommended the maximum they could recommend of 2560 acres in a grant, what happened to the remaining 7440 acres, and there was correspondence at the time in which the Governor said, "Presumably it stays within customary title," and Lord Stanley, I think it was, wrote back and said, "No, no, I think because there was a valid abandonment by the natives of their customary title to the purchaser it becomes demesne lands of the Crown," but I don't think there's any authoritative –

ELIAS CJ:

It was certainly treated, I think, as demesne lands of the Crown, that's how the Crown obtained an awful lot of land that it later sold.

MR GODDARD QC:

But whether that was right is…

ELIAS CJ:

Yes, whether it was correct in law, yes, that was my question. I think not.

MR GODDARD QC:

Well, I think, it seems to me a very odd –

ELIAS CJ:

Yes.

MR GODDARD QC:

– proposition that a transaction which an ordinance provides is wholly ineffective except insofar as it's confirmed by the Crown is confirmed in part and then is treated by the other part as having some effect, to my simplistic 2015 legal mind that make no sense at all, but much was done in the 1840s on a different hypothesis.

WILLIAM YOUNG J:

Was the land in this sort of middle slot every subject to later purchases when the Crown assumed title or not, assumed demesne title?

MR GODDARD QC:

When Your Honour talks about, "In this slot"…

WILLIAM YOUNG J:

Okay, well –

MR GODDARD QC:

Sorry.

ELIAS CJ:

Well, it granted it.

WILLIAM YOUNG J:

Okay, and in case you postulate it there's seven and half thousand acres that was the subject of a transaction that's been upheld but only two and a half thousand acres, all right? So that's the land that's in the middle slot, it's…

MR GODDARD QC:

The seven and a half?

WILLIAM YOUNG J:

Yes. Okay, now, how did the Crown make a deal with land like that? Did they say –

ELIAS CJ:

They granted it.

MR GODDARD QC:

The Crown proceeded to grant it.

WILLIAM YOUNG J:

They granted to other people?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Well, it may well be that that they did think that it extinguished customary title and therefore it became demesne land.

MR GODDARD QC:

Yes, I think they –

GLAZEBROOK J:

That may well have been the thinking at the time, rightly or wrongly.

MR GODDARD QC:

Exactly, a number of very influential –

GLAZEBROOK J:
So the transaction itself, even if not upheld, was a transaction that was nevertheless valid to the extent that it –

ELIAS CJ:
Well, the transaction was effectively upheld. There had to be some fairly fancy footwork here and the Kaiteriteri were absolutely critical to that it seems to me on Spain's report.

MR GODDARD QC:
Well, there are other problems with that because – I mean, Your Honour's certainly right to describe it as fancy footwork. The other fancy –

ELIAS CJ:
Well, you said that effectively for in terms of Captain Wakefield and what he was doing, because he couldn't have a second purchase –

MR GODDARD QC:
No.

ELIAS CJ:
– because you couldn't.

MR GODDARD QC:
So he added together two completely invalid things, the purchase from someone who didn't own the land and something which wasn't a purchase after the date on which you could no longer do purchases with some people who did own it, and magically this –

ELIAS CJ:
Well, it may have been a cession at that stage, because on the view that was taken there was a that, by the local people, that they were satisfied with the terms that were offered which included the reserves, of course, and the exchanges at Kaiteriteri.

MR GODDARD QC:

When Your Honour says "which included the reserves, of course" we need to bear in mind that we have very little information about exactly what was discussed at Kaiteriteri –

ELIAS CJ:

What was explained, yes.

MR GODDARD QC:

– as it, it isn't satisfactory and it's not the sort of evidence on which one would normally reach any conclusion in a civil proceeding.

ELIAS CJ:

But the reserves are absolutely critical to, surely, to Spain's eventual approval of the sale. If the sale had been found to be, as perhaps it should have been –

MR GODDARD QC:

Invalid.

ELIAS CJ:

– with the wrong people, invalid, then on that basis the land must have had to remain with the native owners, but he really kisses it better and says that it is valid, the – as to the limits, those are largely prescribed by the policies adopted by the Government.

MR GODDARD QC:

Yes, and with a – again, my friend took the Court yesterday to that meeting, my learned friend, Ms Feint, to the meeting in Wellington where this was sorted out in relation to Wellington.

ELIAS CJ:

Yes.

MR GODDARD QC:

And there was the discussion about wholly excluding the pās and cultivations and then having the reserves, but what is also absolutely plain is that Spain wasn't proceeding on that basis in Nelson because he blessed and gave effect to exchanges of sections which were designed to ensure that –

ELIAS CJ:

Yes, but the outlines of what he approved as having been –

MR GODDARD QC:

Yes.

ELIAS CJ:

– "We'll treat this as a valid sale," it was the exchanges that had been, the gifts and so on, plus the deal that was struck including the reserves, whatever they were.

MR GODDARD QC:

But the legal basis was wobbly at best and the maths didn't work.

ELIAS CJ:

Well, it may not have been. It may not have been because if he was satisfied that in the end sufficient consideration had passed to the actual occupiers…

MR GODDARD QC:

But you couldn't do a deal with the actual occupiers after 1840 and –

ELIAS CJ:

Well, I know, in theory, but…

MR GODDARD QC:

Well, that's why I say that legally I don't think – I cannot –

ELIAS CJ:

I see.

GLAZEBROOK J:

Well, he was really dealing with a very practical situation where the New Zealand Company hadn't, in effect, made it clear that you couldn't actually suddenly send these settlers back.

ELIAS CJ:

But he was dealing –

GLAZEBROOK J:

So you had to do something about this purchase.

ELIAS CJ:

But he was dealing also with Māori on the basis of what was equitable, you know, that that, what was it, fair and equitable –

MR GODDARD QC:

Yes, the justice and good – yes, yes.

ELIAS CJ:

Yes, justice and good –

MR GODDARD QC:

Just and –

ELIAS CJ:

– conscience. So that's what he satisfied himself of, that that threshold has been passed, therefore the agreement is going to be treated as valid to the extent that –

MR GODDARD QC:

Yes.

ELIAS CJ:

– it's appropriate to do so bearing in mind the Government policies.

MR GODDARD QC:

That is the flavour of what he's doing.

ELIAS CJ:

Yes.

MR GODDARD QC:

It's not consistent with the statute which was to inquire into the original pre-1840 –

ELIAS CJ:

Yes.

MR GODDARD QC:

– purchase and the justice and good conscience of that purchase, and there's only one answer that you could properly give to that which was that it was ineffective. So it's quite clear that he's operating in a way which is, again, put kindly, parallel to his formal jurisdiction, and there was the reference to an arbitration and to compositions with natives. So he seems to have operated both as some sort of mediator or facilitator and then in the light of that exercised his formal powers in a way which if it was challenged in judicial review proceedings before this Court today I wouldn't want to be trying to uphold. But –

WILLIAM YOUNG J:

Can I just ask, because I think I know the answer on the basis of what you've told me but I want to get it clear, there must be land in the area of the Nelson province which was not the subject of the –

ELIAS CJ:

Purchase?

WILLIAM YOUNG J:

– 1848 agreement, 1848 Crown grant.

MR GODDARD QC:

The 1848 Crown grant was massive in extent.

WILLIAM YOUNG J:

But it included Wairau?

MR GODDARD QC:

Yes.

O'REGAN J:

Yes, and it included land that had never been purchased by anyone.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:
All right.

MR GODDARD QC:
1.7 million acres, my learned friend reminds me.

WILLIAM YOUNG J:
All right, so I take it the land that was not taken up by the New Zealand Company was simply reallocated later, possibly under the 1851 statute?

MR GODDARD QC:
Some of it will have been, other parts will just have been treated as demesne lands of the Crown and disposed of on other bases at a later time.

WILLIAM YOUNG J:
All right, okay.

MR GODDARD QC:
But that's the 1848 lands outside the Nelson area that is the focus of this claim and this proceeding.

It is – if there were a trust of land which was not reserved in 1845, and there are huge problems with that in relation to the – I mean to go through the different categories when I reach that, which I promise I will – then those will have been granted to the New Zealand Company in 1848 and that would be a breach of trust and on ordinary limitation principles, the land having left the company, time would start running in respect of that breach of trust and the claim would be time barred. There is the additional complication that, of course, the company failed to issue any titles to anyone with the result that all the land when it failed came back to the Crown –

ELIAS CJ:
And the Crown issued the titles.

MR GODDARD QC:
– in 1850, and then I need to deal briefly at some stage with the fact that it went out again. In answer to Your Honour, the Chief Justice's question from yesterday about

that, and dropping down another parenthesis, the Crown was required to grant that land where there was a subsisting contract in place, which will have been true of some of that land but not all of it, and it was not required to do so where there was not. So it was a matter of obligation where there was a contract with the company, otherwise it wasn't a matter of obligation, but actually – and that potentially has a bearing on whether there it was a lawful act or a breach of trust, but what it doesn't have a bearing on is the fact that either way the land left the possession of the company and the exception to section 21 would start running again in respect of that further breach. So for limitation purposes it doesn't matter.

ELIAS CJ:

All right, so what's the reference to that? Just give me the reference, not – you don't need to take us to it. You said it was an obligation in respect of some –

GLAZEBROOK J:

And also just do we know how many more were sold between 1845, I think this must be the right date, 1845 and 1850? Is there anything in the –

MR GODDARD QC:

Anything that was happening in that period would have been sales by the company.

GLAZEBROOK J:

No, that's what I mean, sorry, because –

MR GODDARD QC:

No.

GLAZEBROOK J:

– because they would have been obliged to – because under the – if there had been more sales by the company, what you're saying is if there was already a contract in place at 1850 then the Crown was obliged to allocate title to those settlers.

MR GODDARD QC:

And we –

GLAZEBROOK J:

So there were – no, there were contracts at 1845 with settlers and then presumably the New Zealand Company kept issuing contracts or not between 1845 and 1850?

WILLIAM YOUNG J:

There weren't many after 1843, were there?

MR GODDARD QC:

I don't think there were. I think Your Honour's right. I think – I don't know if we have the exact figures but things weren't –

WILLIAM YOUNG J:

Sort of stem the enthusiasm for settlement.

GLAZEBROOK J:

Things weren't moving.

MR GODDARD QC:

Things weren't going well.

GLAZEBROOK J:

It was just a question. So in fact we can take it that everything that was allocated was already allocated as of 1845?

MR GODDARD QC:

I think we can proceed on the basis that the vast bulk was –

GLAZEBROOK J:

Unless there's something relatively negligible but…

MR GODDARD QC:

One of the things we do know, for example, is that in 1847 only about half the scrip had been sold and that's what produced the reorganisation of the town.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

So we know that of the thousand allotments available to settlers, there were, what, some 530 that had been sold and that meant that you had straggling out sections in the township, so it was consolidated with a view to making the settlement more successful. We know a little bit about that but not as much as again one might wish. So it seems unlikely against that backdrop that sales were booming following 1845.

WILLIAM YOUNG J:

And there was sort of trouble elsewhere in New Zealand.

MR GODDARD QC:

Yes. Indeed. So – and that's an important part of the backdrop against which we need to look at things like the reorganisation of the town, the future of which, you know, was to some extent in play. It's 1 o'clock.

ELIAS CJ:

Yes.

MR GODDARD QC:

I think I'm most of the way through item 6 in my road map. I'm going to zip –

ELIAS CJ:

How many more – you threatened us with a few more road maps. How many more are there?

MR GODDARD QC:

There's one more road map which is four pages long.

ELIAS CJ:

All right.

MR GODDARD QC:

And I haven't finished this one because I need to go back to items 3 and 4, which I distracted myself from.

ELIAS CJ:

Yes, yes. All right, thank you. We'll take the adjournment and resume at 2.15.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.19 PM

MR GODDARD QC:
So, Your Honour, I'm going to spend an hour and 20 minutes climbing out of nested parentheses.

ELIAS CJ:
Yes. We did have a slight disagreement about who put you in them, but I think we decided in the end that you put yourself there.

MR GODDARD QC:
I think that's fair. I think there may have been the odd temporary parenthesis that I was invited to inhabit by members of the Court, but the basic problem is of my own creation and I'm still a bit puzzled about how I got there. Anyway, let me now try to dig myself out of it. I can zip very quickly through the rest of the factual material, I hope.

I've look at the Spain report and displayed my incompetence with maps, I have had some assistance, although it's sitting lightly on me, from junior counsel. I think the map I should have taken the Court to in relation to the shading in the Spain report is the one in tab 589 of the map book, and I am told that the Golden Bay area, formerly Massacre Bay, on the sort of left around the middle of the page, is a shaded part that's partly surveyed, from which some sections were to be selected, and that at sort of 3 o'clock up from that is the Motueka District, that's apparently what some of that fine text says, although my optometrist services –

WILLIAM YOUNG J:
Just pause there a minute.

MR GODDARD QC:
At least while I'm talking about maps there's nothing I'm going to say that's really likely to assist Your Honour and I'll try to keep it brief for that reason. As I am told that then in the very fine print at 3 o'clock up from that the red shaded area is the Motueka District partly surveyed, but I don't think that we need to pause too much on those too much except to note that what the award is saying is that in those areas the

Company is to select a certain quantity of land and that once that had happened in all the relevant areas one would expect the Company to proceed to the selection process which would result in the settlers selecting and someone –

O'REGAN J:
Potentially it contemplated the possibility that there would have been enough land there and still some left over, which would have remained in Māori ownership, is that right or not?

MR GODDARD QC:
To get the 151,000 –

O'REGAN J:
Yes, yes.

MR GODDARD QC:
– although that wasn't all the land to which the Company aspired in its settlement.

O'REGAN J:
I know, but if the 1845 had stuck there would have been some spare land, wouldn't there?

MR GODDARD QC:
That is implicit in the text as I read it.

WILLIAM YOUNG J:
Sorry, and you say that that land would have gone back to Māori and would have been, as it were, snaffled by the Crown?

MR GODDARD QC:
I don't think I need to take a view on that and I don't know.

WILLIAM YOUNG J:
You don't know the answer.

ELIAS CJ:
But what happened to it?

O'REGAN J:

Well, the grant never came into it.

ELIAS CJ:

No, no, I know this never came in, but sorry.

O'REGAN J:

Yes.

MR GODDARD QC:

Yes. And then the 1848 grant –

O'REGAN J:

Just included everything.

GLAZEBROOK J:

Snaffled it all.

ELIAS CJ:

It just took it all.

MR GODDARD QC:

– included all of this and more.

O'REGAN J:

Everything as far as the eye could see.

MR GODDARD QC:

Yes, that's basically right.

ELIAS CJ:

And then it came back to the Crown after 1850.

MR GODDARD QC:

And then it came back to the Crown, yes, and then it went out again, either under the 1851 Act or through the grant process subsequent to that. So, that's the, that's the Spain Inquiry and maps.

Then 6.12 in my road map, that was followed by the 1845 grant, which is in volume 7 under tab 60, there's a recital about one of the Commissioners having reported, “The New Zealand Company is entitled to receive a grant of 151,000 acres of land,” which is the standard recital that was used in relation to these and that produced the finding in *R v Clarke* [1849, 1851], VII Moore, 78 (PC), Your Honour the Chief Justice I think referred to in the Privy Council that a grant was invalid because the report of the Commissioners was invalid, but we don’t need to sit on that, except to notice that when we, the 1848 is different – and after referring to that report it sets out, “A grant of 151,000 more or less, situate at or near,” certain descriptions of which the descriptions and boundaries are as follows, and again we see reference to some areas that are surveyed, others that are partly surveyed, with the remaining quantities to be selected from the portions of the land coloured red, and that was the plan I took the Court to earlier that my learned friend Ms Feint pointed out. And then, “Saving and always excepted as follows,” and there follows the same exceptions for pās, burial places and grounds actually in cultivation, with the limits of pās and cultivated grounds defined, “And also excepting native reserves marked on the plan hereon endorsed and coloured green, the entire quantity of land so reserved for the natives being one-tenth of the 151,000 acres hereby granted, and also excepting portions of land to which private claimants or any private claimant may have already proved a claim,” and then there’s a new part which was not in the Spain award, “And also excepting and reserving all those pieces or parcels of land which have been set apart as Government reserves for public purposes –

GLAZEBROOK J:
Those must be those – were they red I think on the map that Ms Feint took us to?

O’REGAN J:
Yellow I think they were.

GLAZEBROOK J:
Were they yellow?

MR GODDARD QC:
Yes.

GLAZEBROOK J:

Whatever they were, remember we were noticing that they seemed to be full sections –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– and we weren't entirely sure what they were for.

MR GODDARD QC:

That's right, Your Honour.

GLAZEBROOK J:

So…

MR GODDARD QC:

So those have come in to –

GLAZEBROOK J:

And presumably though the Crown is saying, "Those are ours" –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– by this?

MR GODDARD QC:

Yes. So that's a clear example of something which is excepted from the grant and which the Crown subsequently will have treated as demesne lands of the Crown and owned by it as a result of being reserved, excepted from a grant, and –

ARNOLD J:

But there must have been some prior process by which those reserves were identified. I mean, presumably the New Zealand Company didn't put them in there out of the goodness of its heart.

MR GODDARD QC:

No, I think that's right, there must clearly have been some dialogue between the colonial Government and the Company in the course of laying out the town about where the jail would be and where the wharves would be and things like that. The Company will originally have contemplated doing all that itself, or some of it at least, but of course by the time Nelson was laid out the Crown had proclaimed sovereignty and will have had some involvement.

And the grant attached maps which are included in that map book, and I'll just identify them but not spend significant time on them – 591, the tabs which my learned friend Ms Feint helpfully directed us earlier has a series of maps in relation to first of all the whole of the area, and then we've got some enlargements of various parts, and over on page 9512 an insert in relation to the town showing the town reserve sections. And the points that I specifically make in relation to that grant in 6.12 of my road map are first of all that the exchanges that Spain had approved are omitted, it's common ground that they were left out. That appears to be a simple error, there's no suggestion that there was any deliberate decision not to give effect to those. Second, that there are no distinctions between different categories of reserve in this grant, there's no identification separately of occupation reserves and endowment reserves.

GLAZEBROOK J:

You mean in the maps?

MR GODDARD QC:

Or –

GLAZEBROOK J:

Because it's the same wording as in the Spain report in the grant where the pās and the – and also excepted native reserves?

MR GODDARD QC:

Yes, so that gets back to that three categories point –

GLAZEBROOK J:

I understand.

MR GODDARD QC:

– I discussed with Your Honour earlier. So once we get into the reserves they are not subdivided but yes, Your Honour's exactly right, there is that separate reservation in relation to pās and cultivations, and then it says, "And also the reserves," and then there's that language about the total, which is confusing, but –

GLAZEBROOK J:

Yes, exactly.

MR GODDARD QC:

What is again clear is that occupied lands were included in the reserves and the Governor must have known that because Spain was quite explicit about the cultivated lands in Motueka having been included in reserves in order to give effect to the desire of Māori to not part with those, and the exchanges which were designed to bring those in.

And (c), my point that – the text referring to one-tenth. Now it's one-tenth of the total so in theory you could have different proportions in relation to town and accommodation sections and I suppose rural and make up the gap, but there clearly was a gap because when we look at what's marked out in relation to the town it's the 100 sections, not 110, and so likewise for accommodation.

And the fourth point I already touched on in the context of looking at the Spain report. This is really hopeless as a conveyancing route of title because you couldn't point to any section anywhere in the land encompassed within the grant and say, "We have secure title to that and therefore we can issue to the various settlers or, for that matter, to," yes, "to the settlers any particular section."

Various things then played out, and that grant was prepared, it was entered. There's gruesomely detailed evidence from Mr Parker in, I think, his supplementary brief about the different registers that were kept for different purposes at the time. It was entered in a register of deeds prepared. It was signed. It was sealed, and it was sent to Wellington on a ship and there was a notification in *The Gazette* that it was available for delivery but it was never accepted, it was never delivered rather a copy of it was made and sent to London for howls of protest to be made at various levels. So that was happening. While that was all playing out, Grey, Governor Grey, effected the Wairau purchase.

WILLIAM YOUNG J:

So what date was that? I seem to have lost my volume 1 of the case. I'm just looking at it in relation to the 1847 Act and I know there's a time problem but that's dated the 23rd of July – that was approved on the 23rd of July 1847.

MR GODDARD QC:

In London.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

Yes. I don't know when exactly the Wairau purchase – 18th of March 1847, the purchase.

WILLIAM YOUNG J:

And so that was purchased by the Crown for the Crown.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But then under the 1847 Act the land becomes vested in the New Zealand Company?

MR GODDARD QC:

No. I think the – well, it probably did under the 1847 Act but then the Crown also granted it under 1848. The plaintiffs in their submissions run together those two dealings and they were quite different because the 1847 Imperial Act vested the demesne lands of the Crown within a defined area in the company for a three-year period for certain purposes. It was time bounded, whereas quite separately from that the 1848 grant was a grant forever to the company to hold in its own right and not subject to the various trusts and restrictions described in the 1847 legislation.

WILLIAM YOUNG J:

Can I just ask you, because this is where we are, just to look at section 14 of the 1847 Act?

GLAZEBROOK J:
Where do we find it?

ELIAS CJ:
Where are we?

WILLIAM YOUNG J:
Volume 1, the –

MR GODDARD QC:
Volume 1 of the authorities, the blue one – no, the pink one, sorry.

GLAZEBROOK J:
What tab?

WILLIAM YOUNG J:
It's tab 9.

MR GODDARD QC:
Sorry, Your Honour, section –

WILLIAM YOUNG J:
14.

MR GODDARD QC:
– 14. Yes.

WILLIAM YOUNG J:
There must have been an issue at this stage as to the validity of a grant to the New Zealand Company.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
And it then said it is expedient that all such doubts be removed so be it enacted that all grants of land to the New Zealand Company or to any other body corporate,

et cetera, which have been or shall be made and issued before the expiration of six calendar months after the passing of this Act, and which have been or shall hereafter be accepted by the said company or other corporate body, shall be deemed to be good and valid grants according to their terms. It rather suggests that acceptance was seen as essentially to efficacy.

MR GODDARD QC:
Yes, and that's consistent with the normal rules in relation to delivery of deeds.

WILLIAM YOUNG J:
Well, it's not so much delivery because, I mean, the deed could be handed to the –

GLAZEBROOK J:
It's certainly consistent. If you don't accept the land, you don't get it. But whether it means that the grant is ineffective to become the demesne lands of the Crown, I mean, that's really the point, isn't it?

MR GODDARD QC:
Well, there are a number of different issues running, I think. The simplest answer in relation to the demesne lands of the Crown point is the subsequent invalidation, the declaring of the deeds to be void ab initio for all intents and purposes which must include any effect they might otherwise have had on underlying customary title. So I do think that the simplest route to understanding the ineffectiveness of the 1845 deed to vest any rights in the company –

GLAZEBROOK J:
Well, it would be, but the difficulty with that argument is that that means that if the 1848 Act grant hadn't been accepted then it would have reverted to customary title, which can't be right because Spain had already decided that the Māori vendors, and I know they weren't the same people, but the Māori vendors had had a fair deal. So it's, it would make no sense for it to go back to customary title where they could then get another fair deal and sell it again.

MR GODDARD QC:
But that scenario couldn't arise, Your Honour, because the event that triggers the avoidance for all purposes of the 1845 grant is the issue of a subsequent grant which encompassed all the land in the 1845 one. So it's only because –

GLAZEBROOK J:

No, no, but your argument must be that if somebody doesn't accept a grant the land would have reverted to the customary owners. I'm just saying that can't be right. I would have thought it reverted to the Crown and that, in fact, the Crown can't grant something which it doesn't own in the first place, so it must have in fact owned the land before it granted it.

MR GODDARD QC:

It should have, which is not the same thing as saying that it did, and I think it's common ground –

GLAZEBROOK J:

Well, it must have thought it did and therefore it must have thought it had it in order to grant it. But having already decided that that purchase was fair, why would there be a reversion to the Māori owners?

WILLIAM YOUNG J:

Well, it might have been on the basis it was decided it was fair but only if the purchaser created particular reserves, and if there wasn't a purchaser prepared to create those reserves then perhaps it wasn't fair.

GLAZEBROOK J:

But the Crown had already agreed to create the reserves and was creating them and had created them.

WILLIAM YOUNG J:

Well…

MR GODDARD QC:

I think if –

GLAZEBROOK J:

At least in relation to the town sections definitely.

MR GODDARD QC:

Well, the reserves had been – the sections that were to be the reserves had been identified although it's quite clear that, you know, in 1842, for example, where the

Bishop was building hostels and things like that, there was no title to the underlying land. There was at most some sort of possessory interest.

GLAZEBROOK J:
Well, do you say under the 1845 grant, assuming all had gone according to Hoyle, whoever Hoyle was –

ELIAS CJ:
Or is.

GLAZEBROOK J:
– that in fact the whole of the acreage would have gone to the New Zealand Company?

MR GODDARD QC:
Not –

GLAZEBROOK J:
What would have happened to the reserves? The reserves –

MR GODDARD QC:
No, not the reserves.

GLAZEBROOK J:
– were supposed to be remaining –

MR GODDARD QC:
The reserves –

GLAZEBROOK J:
– with the Crown.

MR GODDARD QC:
Upon the grant coming into effect the reserves would have vested in the Crown as demesne lands of the Crown, but that depends on the grant coming into effect. There is an argument, which I prefer to avoid the detail of, it's dealt with or it's touched one, I should say, in the Court of Appeal decision, it was dealt with in more

detail in the High Court judgment, about the time at which a grant becomes effective. But what we have is the legislated deeming provision that tells us to disregard the 1845 grant for all intents and purposes, and that means for example –

ELIAS CJ:
Because it's a substitute grant.

MR GODDARD QC:
Yes. And then there's a whole lot of provisions in the legislation about the potential for ante-dating grants in some circumstances in order not to disturb earlier dealing, but that's not done, as we'll see in relation to the 1848 grant. So what we are required to take from the two grants is that there was no legal consequence from the 1845 grant and that we start from the 1848 one, and that's deliberate in terms of dealing with the title consequences in the area.

GLAZEBROOK J:
Yes, you're conflating again. I was trying to just get you to answer on 1845.

MR GODDARD QC:
And – sorry, I meant to. Which was to say –

GLAZEBROOK J:
Because the facts –

MR GODDARD QC:
– if it had been excepted –

GLAZEBROOK J:
Well, even if it, if it hadn't been excepted are you saying that it would have reverted to customary ownership? Because that doesn't make any sense to me and I'm sure it wouldn't have made any sense to Her Imperial Majesty, she would have thought it was hers, as she did in 1840 – as she showed in 1848, because she snaffled it again, and more.

MR GODDARD QC:
And granted it, yes. I –

GLAZEBROOK J:

Actually, that's probably – that's inappropriate language, but, well, she snaffled more certainly under the 1848 that didn't come within a sale.

MR GODDARD QC:

But it was re-granted in a different form. The Crown clearly proceeded on the basis that it was in a position to make a further grant of all the land comprised in the 1848 grant, as a consequence of what had gone before, whether rightly or wrongly, it certainly proceeded on that basis, but we are directed by statute to then treat the 1845 grant as wholly void and of no effect, and it seems to all intents and purpose and, you know, void ab initio, and I don't for myself understand how one can consist with treating it as void ab initio to all intents and purposes whatsoever, which is the language of the statute, how one could treat it as having any effect on any customary title or as a route of establishment of any trust. If someone had received a grant of that kind and declared an express trust of it, of the land comprised of it, if a settler had, you know, done a family settlement, as people did in the nineteenth century, and then there had been a subsequent grant of the land, which was not ante-dated, then that express trust would have been wholly ineffective because you would be required to proceed on the basis that there had been no legal title in that person at the time they declared the trust, and the only question would be whether the assets subsequently acquired in 1848 became subject to the equities that had been declared in, say, 1846, because it was an asset received in substitution for what was intended to be the trust property. But if there'd been a dealing in it in the interim and the grant was made to someone else, which also happened in some cases, then the trust would simply be wholly ineffective. And if that would be true of an express trust it seems to me it must be true of, created by a settler, it must be true of any express trust created by these dealings or any other form of trust.

GLAZEBROOK J:

So, whereabouts is that void ab initio wording, where is…

ELIAS CJ:

Section 10, is it?

GLAZEBROOK J:

Whereabouts is it, sorry?

ELIAS CJ:

Tab 18.

WILLIAM YOUNG J:

The 1866 Crown Grants amendment.

MR GODDARD QC:

So we go to tab 16 first of all, tab 16 is where this first takes place, and to section 10 of the Crown Grants Amendment Act 1967. All we see in section 10 is, "Whereas part of the passing of the Crown Grants Act 1966, Crown grants were occasionally issued under the authority of the Governor for the time being in lieu of previous grants for the same lands either cancelled or intended to be cancelled," which is a polite way of saying, "We got ourselves into a muddle at times," I think, or – "Be it enacted, and is hereby declared and provided that every grant purporting to have been cancelled," and this is the critical one, "and every grant whether formally cancelled or not of the land comprised in which a new grant has been duly issued by any such Governor and recorded in a proper office for the record of the same," and in both cases prior to the passing of the said Act, "shall be deemed to be and to have been absolutely void ab initio to all intents and purposes whatsoever," sorry, "whatever", which is as thorough a retrospective unravelling or something as I have ever seen. And that's repeated in the Crown Grants Act 1883, which is under tab 19, and in that Act it appears in section 20.

ELIAS CJ:

And where do we find just in this again the – is there a formula of words in the 1848 Crown Grant that this springboards off?

MR GODDARD QC:

No. The whole point was that there wasn't often an explicit cancellation or an explicit override.

ELIAS CJ:

No, so that's why it's under, a new grant has been duly issued.

MR GODDARD QC:

Which includes all the land, and it's –

ELIAS CJ:

Which includes all the land.

MR GODDARD QC:

And it's common ground that it does.

ELIAS CJ:

Yes.

MR GODDARD QC:

It's pleaded and admitted. So –

ELIAS CJ:

But you can't set it aside simply because of the prior existence, but you might on the basis that it doesn't carry into effect an express trust is the argument, is "an" argument. I understand all your arguments on that, but what I'm saying is that it, just trying to fit it in with the overall argument addressed to us.

MR GODDARD QC:

And where it fits is to say that one of the many reasons why no trust of lands can have come into existence in 1845 is that the 1845 grant either never came into effect –

ELIAS CJ:

No, but it's only evidence, it's nothing to do with whether it was effective or not.

MR GODDARD QC:

Well, the plaintiff's case is that it brought the trust into existence by vesting the trust property in the Crown. Because to have a trust you have to have two things: you have to have a declaration of trust –

GLAZEBROOK J:

Which it probably did, I think, as we've agreed.

MR GODDARD QC:

No…

GLAZEBROOK J:

I mean it, leaving aside the 1848, if it had just carried on, the Crown certainly would have thought it vested the land in itself.

WILLIAM YOUNG J:

What land?

GLAZEBROOK J:

They –

ELIAS CJ:

Well, that's the other –

GLAZEBROOK J:

A whole 151,000.

ELIAS CJ:

Well, that's attainable, is the answer to that.

MR GODDARD QC:

So if we take a town section shown as a reserve as an example, my primary argument is that the grant has had no separate impact over and above whatever impact a purchase might have had, and I say these purchasers had none, unless and until confirmed. But – so there's an alternative argument, either that the 1845 grant never did anything at all or that it's deemed never to have done anything at all. And I think the Court understands those arguments, and one of them is a highly technical argument about delivery of deeds and what effect, if any, they have before that, they're a different – but I understand, Your Honour, I think what Your Honour Justice Glazebrook is saying to me is that effectively the simple preparation of the grant and making it available for delivery, acceptance in the registry, is an assertion by the Crown by demesne title in respect of the land, whether the grantee ever accepts the grant or not, and I think…

ELIAS CJ:

Well, it has to be, because otherwise they can't grant it.

MR GODDARD QC:

How you can grant. So I think that is certainly…

WILLIAM YOUNG J:

Well, it may be an assertion of radical title and an assumption of most statutory processes –

ELIAS CJ:

No, it's not.

GLAZEBROOK J:

No, it's not.

WILLIAM YOUNG J:

– or customary title has been extinguished.

MR GODDARD QC:

Yes, it was entitled to grant. I do think –

WILLIAM YOUNG J:

I mean, there are all manner of ways of looking at it.

ELIAS CJ:

Well, that's ahistorical, in my view.

MR GODDARD QC:

What I think –

GLAZEBROOK J:

Well, it certainly is ahistorical because they did treat it as their own, that they could then put another grant in in 1848.

MR GODDARD QC:

I think – yes, all I should add to that is that the difficulty of puzzling our way through this is an illustration of why we have limitation rules and I'll come back to that.

GLAZEBROOK J:

If, however, you – effectively they were treated as demesne lands and the Crown had assumed responsibility as a trust why would that not be carried through into the 1848? It certainly was in relation to the town sections.

MR GODDARD QC:

I don't think there's a problem in relation to 1848 because the lands that were reserved there either went into the 1856 or were dealt with in ways which, in my submission, were consistent with the terms on which the lands were held.

GLAZEBROOK J:

But there was an awful lot of land which they could have, nevertheless, in terms of the rural sections under that grant that they could have used to – or do you say it all went to the New Zealand Company with no possibility of reserve? I suppose that's another …

MR GODDARD QC:

In 1848, yes.

GLAZEBROOK J:

Yes, so could the Crown actually – I suppose the Crown could do what it liked.

MR GODDARD QC:

In the exercise of its public powers it could have decided, it could have decided not to make the 1848 grant at all. It could have made huge reserves in places that were never contemplated, completely departing from the tenths scheme and that would, I think, in my submission have satisfied the Crown's obligations under the Treaty.

ELIAS CJ:

Sorry, what powers is it exercising there? I might have missed a beat.

MR GODDARD QC:

Assuming that the land was the Crown's to grant, which is a leap in itself but not one that we need to be troubled about today because we're not concerned with what happened to customary title in relation to land outside the Nelson settlement and comprised in the 1845 grant as I understand these proceedings, there is no assertion of any claim to lands outside the 1845 grant lands here, so we don't need – although

the point is made in the pleading in passing and in the submissions that there were problems in relation to extinguishment of customary title, this is not this case as we'll see when I climb up one parenthesis and go back to the pleadings. That is the one I got myself into. I still, as I say, can't quite remember how I ended up in the facts half way through the pleadings, but never mind.

So what we have happening between 1845 and 1848 is the company objecting to the 1845 grant. The Governor then directed to accommodate that so far as possible and the objections were, in my submission, wholly reasonable and what then followed was a process which did continue the balancing of trying to produce a form of grant which was legally effective as a route of title for subsequent conveyancing but which also respected the intended exclusions for the benefit of Māori of occupied lands and/or reserves, categories that at the least overlapped, and that's why we see a process of inquiry being undertaken into whether there were pās and cultivated lands outside the reserves. The answers coming back – correct or not, but coming back to the Crown offices saying no there aren't, separately in relation to different categories at different times, that's all summarised in the evidence of Mr Parker that I referred you in 6.15A.

That then leads to the 1848 Crown grant and perhaps just turn briefly back to that in volume 7 of the case on appeal, and there are just a few things to note about that. One is that the recitals no longer refer to the inquiry by the Commissioner. It's tab 66. So that's the 1848 grant. It just recites that whereas the New Zealand Company is entitled to receive a grant within the territory of New Zealand of land here and after particularly mentioned and described, so we've no longer got references to Commissioner Spain's inquiry as we had in the 1845 grant, and in much more general language.

ARNOLD J:
So they're entitled to receive. That's, what, an entitlement determined by the Crown?

MR GODDARD QC:
Yes. And then what we see are the locations of this land which are now much more extensive than before due to the extraordinary reach of territory in this, and then about 10 lines down, "All which block is delineated on the plan numbered 1 and its accompanying schedules annexed hereto and coloured red, saving and always accepting and reserving all those pieces or parcels of land which have been set apart

as Government reserves for public purposes, more particularly delineated and described upon the plans numbered 3, 4, 5 and 6 and the schedules respectively attached to each of these plans annexed hereto and coloured yellow," so that's the yellow Government reserves, and also excepting and reserving all the pās, burial places, and native reserves situated within the said block of land hereby granted to the New Zealand Company as aforesaid, which are more particularly delineated and described upon the plans annexed hereto numbered 2, 3, 4, 5, 6 and 7 and the schedules and coloured green," and then the usual formal language about the land going with all the rights thereto belonging to hold to the New Zealand Company.

So what we have now is a grant of a much larger tract of land including all the land in the 1845 grant and with all the excepted land being shown on the plans, which means it works as a route for conveyancing, as a route title for conveyancing whatever the more fundamental constitutional objections that might be made to the extent of the lands so granted.

And at this point, any land that was not expressly reserved vested in the New Zealand Company, land within these boundaries. And if matters had stopped there then that would have been the point at which all land not reserved and shown on a plan attached to this grant left the alleged trustee, the Crown, and time would start running in respect of any breach of trust if there was a trust, or rather equitable obligation. We then need to deal and I will deal shortly with the consequences of the re-vesting of the lands in the Crown in 1850.

So then 6.16 the Company failed in 1850 and how that played out is described in the High Court judgment and it's helpfully summarised.

Your Honour the Chief Justice asked me about the basis for my submission earlier that some land was granted by the Crown under the 1851 Act as a matter of obligation where there was an entitlement and Your Honour asked for the references and I think I got distracted again, but if Your Honour might want to note beside this entry that there are two places to look for that. One is in the 1847 Act, which is in the authorities volume 1, tab 9, section (19) and the other place to look is the 1851 Act which is authorities volume 1 tab 10 generally but most particularly section (7), which makes it clear that the Crown is required to grant land that the Commissioner finds a claimant against the Company has an entitlement to. But of course –

ELIAS CJ:

But that doesn't necessarily exhaust all the land.

MR GODDARD QC:

No, and that's why I said –

ELIAS CJ:

Which is really what I thought you had been saying yesterday which is why I queried it but it's simply an obligation to award the – or to grant the land that a Commissioner finds is due?

GLAZEBROOK CJ:

And in fact probably not much more than had already been sold in 1845 is what you were saying, so possibly about half of Nelson.

MR GODDARD QC:

That's probably about right but what I said yesterday which led me down a path that I didn't probably need to go down was, well, if there was a statutory obligation to grant it, it could hardly be described as a breach of trust and I think that must be right, which is yet another reason why one would have to conduct this inquiry section by section.

GLAZEBROOK J:

Although those sections nobody has suggested, that had already been sold in 1845, no one was suggesting that those sections were anything to do with the Māori reserves, because those sections – because it had already been mapped out on the plan.

MR GODDARD QC:

But the plaintiffs are claiming in their claim that if any of that land has found its way back to the Crown for any reason whatsoever in the intervening 150-odd years then they have a claim to it. But that can't be right.

GLAZEBROOK J:

No, but those bits can't be – the ones that just went to the settlers who'd already purchased it were absolutely nothing to do with the tenths, logically, so whether they'd come back or not would have made no difference. It's only the tenths land, if

it's gone out and come back, that's of relevance to the plaintiffs' argument, I would have thought.

MR GODDARD QC:
The plaintiffs make two complaints. They make complaints in relation to the land that was identified as tenths but they also say that out of what was left more tenths should have been reserved.

GLAZEBROOK J:
I understand that but all I'm saying is that if nothing further was sold then there wasn't anything further – there was ample – actually, no, because maybe they still had sold more rural land, is that the point that's being made, at least in the initial – at least if you didn't include Wairau –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
– that they couldn't have done both the reserves and the –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
So – no, you probably are right, in terms of the rural land.

MR GODDARD QC:
But what I said earlier this morning about limitation I think is important, and I'll just footnote it again here while we're talking about this –

GLAZEBROOK J:
No, no, no, I understand, but –

MR GODDARD QC:
– which is –

GLAZEBROOK J:

– don't jump ahead on limitation. Just do limitation when you get to it.

MR GODDARD QC:

Right, I'll do that. So –

O'REGAN J:

Close brackets.

GLAZEBROOK J:

Yes, close both brackets now.

MR GODDARD QC:

Yes, no more brackets.

GLAZEBROOK J:

No, we do understand that it's subject to limitation arguments but…

MR GODDARD QC:

The no more brackets principle is a good one, to go up, not down. So that brings me to the end of this extended parenthesis, 6.17, the Native Reserves Act 1856. It's worth just pausing to look at the statutory regime that this land did ultimately end up being held under. The Native Reserves Act 1856 is in volume 1 of the legislation under tab 11.

"An Act for the management of lands set apart for the benefit of the aboriginal inhabitants of New Zealand." It refers to lands having been reserved and set apart. It's expedient the same should be placed under an effective system of management. Note one of things that's striking about this Act is that the term "trust" I think occurs nowhere. The focus is on a system of management of the reserves pursuant to a statute, and we have are not trustees here but in subsection 1 "Commissioners of Native Reserves" and the ability under section 2 to have different Commissions and different districts, and the ability of the Governor to frame and establish rules for the conduct of business by the Commissions.

6, the Commissioners were given the power to manage two categories of native reserves. Native reserves where native title has been extinguished, and that's

section 6, and native reserves where native title has not been extinguished, and that's section 14, and I think some of the confusion that arose in relation to a subsequent Act and references to land held under different provisions and the suggestion that there was overlap stemmed from the fact that the different limbs were relating to the land held on those two different bases. So it's worth just bearing in mind that these Commissioners had the power to manage under section 6 land where native title had been extinguished and, in relation to that land under section 6, the Commissioners have and exercise over the lands full power of management and disposition subject to the provisions of the Act, and, subject to such provisions, may exchange absolutely, sell, lease or otherwise dispose of the lands with a view to the benefit of the aboriginal inhabitants for whom the same may have been set apart. And then there are some restrictions on sales or leases over 21 years without the consent of the Governor.

There's provision in section 8 for the Commissioners, with the Governor's approval, to set lands apart as sites for churches, chapels and burial grounds, and also by way of special endowment for schools, hospitals or other eleemosynary institutions and the ability to transfer the land to persons or of various kinds as trustees of such endowments.

And then provision for application of moneys that come to the hands of the Commissioners except in respect of special endowments being applied by Commissioners for the benefit of the aboriginal inhabitants for whose benefit such lands may have been set apart in such manner as the Governor of the said colony may from time to time direct.

So this is not a normal equitable trust. This is a statutory regime with significant Crown ongoing control as to how the assets will be managed and revenues applied.

ELIAS CJ:
It's really though about control and management and – rather than – it doesn't purport to change the status of the land.

MR GODDARD QC:
Well, the land we're talking about at present is land where native title has been extinguished –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and one of the things it permits for –

ELIAS CJ:

But it's reserved.

MR GODDARD QC:

It's reserved but it can be –

ELIAS CJ:

And it can be transferred to trustees, which does suggest that the Commissioners who have that power are in a similar position vis-à-vis the land.

MR GODDARD QC:

They're in an analogous position of –

ELIAS CJ:

Yes.

MR GODDARD QC:

– responsible management but their responsibility is –

ELIAS CJ:

Well, it's not just management, is it? It's – anyway.

MR GODDARD QC:

Well, I think it is, Your Honour, because title is not vested in them. They don't have title, the Commissioners.

ELIAS CJ:

But they can't apply it as they see fit. There's –

MR GODDARD QC:

No, they –

ELIAS CJ:

It's subject to the use which is specified and which they're empowered to implement.

MR GODDARD QC:

Which takes us to cases like the Hutt Raceway case and *New Plymouth District Council v Waitara Leaseholders Association Inc* [2007] NZCA 80 which say that it's a source of confusion rather than enlightenment to think of statutory regimes of this kind as if they were also charitable trusts or private trusts, that what you've got is a trust in the sense that the responsible person cannot use the assets except for the purposes and in accordance with the restrictions in the statute, but most of the other rules of equity, for example, the ability to apply cy-près, the ability to replace trustees, all those things don't apply. It's a separate –

ELIAS CJ:

Who says that?

MR GODDARD QC:

The Court of Appeal in a judgment delivered by Justice Arnold in *New Plymouth District Council v Waitara Leaseholders Association*.

ELIAS CJ:

Have you got any –

WILLIAM YOUNG J:

Nothing better?

ELIAS CJ:

– older cases?

MR GODDARD QC:

Following –

GLAZEBROOK J:

I mean, that would depend on the terms of the statute –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– though, won't it?

MR GODDARD QC:

Yes, it does.

GLAZEBROOK J:

So it's not that generally a statutory trust can't, or a statutory regime of this kind doesn't have those obligations; it's that you must look at the terms of the statute in order to work out whether there are those obligations or not.

MR GODDARD QC:

Of course. But –

GLAZEBROOK J:

And I'm sure Justice Arnold didn't say anything different.

MR GODDARD QC:

No, I don't think he did, and, in fact, His Honour said that in relation – reached different conclusions in relation to two different categories of land in that case although expressed significant doubt about, one was the town improvements and one was harbour and I can never remember which is which, but one of them there were some cases directly on point that suggested they were charitable trusts and Your Honour said, "We don't need to decide this but if we did they would need a careful look," and in relation to the other category Your Honour said, "This is not a trust in any equitable sense. This is a statutory regime for management and administration of the assets." So you have to look at the statutory regime. And all I need to say here again is that what we have here is a statutory framework which makes perfect sense in terms of what had always been contemplated as a regime for administration of the reserves, and, importantly, it is not a regime that could be brought into existence in these terms as a private trust. This picks up Your Honour, the Chief Justice's point that you'd expect to see a statute for the sort of breadth and range of applications that are contemplated because it's not a straightforward trust for persons, but nor is it a charitable purpose trust.

ELIAS CJ:

There's pre-existing status of this land which is not directly addressed in this. This is of the land that's been reserved. This statute simply deals with how it's to be managed.

MR GODDARD QC:

Yes. What we also have in here in section 14 is the ability for Commissioners, the Commissioners to also be appointed to manage land at the request of Māori which, in respect of which native title subsists, and without the loss of customary title, and then it's not the category of land where – well, actually, some of the land we're concerned with was administered under the section, although the reason for this is not entirely clear, and I hope not to have to get into the detail of that.

So, that's where it ended up, and it's accept by the plaintiffs that once the land was under that statutory regime any challenge to dealings with it would have to be framed in terms of the statute, and although the pleadings refer to certain dealings in the 1860s those are no longer challenges that are pursued before the Courts, which means in effect that the last dealing that is challenged is the grant to the Bishop of land for the school in Whakarewa in 1853, and I'll come to that, realistically probably tomorrow.

So, that brings me to the end of my section 6. I'm going to spend five minutes now just looking at some significant aspects of the pleading, which is the point at which I got myself distracted many hours ago. We were in volume 1 of the case on appeal under tab 5, we'd looked at the parties, noticed in paragraph 17 the definite of Tenths owners by reference to the individuals listed in schedule 1 – oh, yes, it was at the point where I looked at paragraph 21 and said, "We can read this and that means we won't have to go to the Kapiti deed," and then we did. So now I'm back where I was when I got lost. And then the various factual events through the early 1840s are pleaded, and most of the facts are not in issue though their legal consequences are. There's a reference to the Spain Commission in paragraph 41 and following, and the Spain award, and then in paragraph 50 the Crown grant, the 1845 Crown grant is pleaded, and then in paragraph 54 the first set of complaints about administration of the reserves is set out, beginning with the Spain re-designations in 54.1 and running through various events through to 1850 in the Loans Act, the 1848 Crown grant, diversion of land to the Crown. Paragraph 63 and following, failure to reserve one-tenth, there was an allegation that the Nelson settlement on completion comprised

approximately 172,000 acres that didn't really go anywhere either on the facts or as a claim, that I've left. But we then get, after tracing the subsequent history – oh, 65 sets out the reasons why there was less than a tenth, 66, 1853 Grey, grant to the Bishop of 918 acres, and the we don't need to worry now about 66.2 and 3 because they happened under the statutory regime and are not challenged in these proceedings, then the vesting in the Public Trustee in 1882.

So then we get to the causes of action, and this is what I want to just identify briefly. First cause of action: breach of trust, shortfall. This is where the trust is first pleaded, the express trust, and we find this in paragraph 74. In the period between the execution of the 1840 agreement and the date of the 1845 Crown grant and express trust came into existence. It's said to have been declared by the Company's declared intention to hold Tenths Reserves in trust for Māori as set out in paragraph 69, the 1840 agreement and the terms of the Spain award and the 1845 Crown grant. So that's where the declaration of trust is said to be found. The trust property is said to be the 15,100 acres awarded as Tenths Reserves, including the town and suburban sections as comprised in 1845 following the exchanges. The short point is if that's as they stood in 1845 following the exchanges, still hard to see how some of those exchanges can themselves be breaches of the trust, I'll come back to that, "With the remainder of the Trust property to be selected from the land vested in the New Zealand company by the 1845 Crown grant," so there's no allegation that there were some other property rights held on trust, some contractual entitlements or something of that kind, the allegation is that the remainder was to come, was to be selected in the future, and the Crown was the intended trustee.

Beneficiary – oh, and 74.4 is important. The beneficiaries were the Tenths owners. So this, at least as the case was opened, was an allegation of a vested trust in a 1845 for the persons named in the first schedule, and the plaintiff's theory about the nature of the trust bounced around quite a lot, as His Honour the High Court Judge pointed out at various points in the judgment during the case, and in fact was still shifting even in closing. But the time of closing the argument appeared to be that it was a discretionary trust for the Tenths owners and their descendants, that was why there was still an argument about perpetuities, because such a trust would have raised questions about remoteness of vesting of interests. But in the Court of Appeal and in this Court the argument that's now made is that there was a discretionary trust for the customary owners, I think, although my learned friend Ms Feint seemed to be

suggesting there might be multiple trusts of different lands for different groups at one point, so I'm still not entirely clear what's suggested there

ELIAS CJ:

What do you mean in this context by "discretionary trust", that it's for the benefit of but…

MR GODDARD QC:

I think that's very much a question for my friend, because I still don't know, and that's part of the certainty problem. It's important when we come –

ELIAS CJ:

Well, you're characterising it, aren't you, or did they, you're saying?

MR GODDARD QC:

They did.

ELIAS CJ:

All right.

MR GODDARD QC:

They say it's a discretionary trust for the customary owners. If it was a fixed trust for the customary owners they would need to be able to tell the Court in what proportions, and they haven't, they've preferred to say it was discretionary, it was for the benefit of the customary owners. And the Crown accepts that there can be a trust for a collective customary group which doesn't raise perpetuity concerns, a trust for Ngāti Koata as a collective customary entity. If Koata can hold legal rights, as they can –

ELIAS CJ:

Well, that's a huge question.

MR GODDARD QC:

Well, it's concession –

ELIAS CJ:

Maybe now, but yes.

MR GODDARD QC:
Yes.

ELIAS CJ:
Maybe things have moved on. But that's been a big issue.

MR GODDARD QC:
It has been a big issue, but I think we've ended up –

ELIAS CJ:
Well, there's legislative recognition of –

MR GODDARD QC:
– where –

ELIAS CJ:
– Ngāti Koata, so that's probably enough.

MR GODDARD QC:
Yes. But – and, yes, I think that is enough. But suffice to say that that's not what's pleaded and it's not how it was argued at any stage in the High Court. There were various formulations put forward in relations to the express trust but none of them were for the collective customary groups. Now I think that is what's argued, but it falls both, falls outside the preservations in the Settlement Act for a number of reasons.

And then 75 pleads that the Crown had a duty as trustee to ensure that the 15,000 acres was reserved. So the way again the case has been run was that you had some land that was identified and was in the trust, and then there was a duty as trustee to get in some additional land for the trust, and that doesn't work as a matter of basic trust law unless you have some legal entitlement that you hold on trust, a promise, for example, to create a trust in the future may have contractual effect but it isn't itself a trust. And then –

GLAZEBROOK J:
Although if they owned that land and their obligation was only to identify the bits that they were holding on trust –

MR GODDARD QC:

Then the –

GLAZEBROOK J:

– so they owned the whole amount of the land, that's the argument I think –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– and their duty therefore is not to get in trust property but to identify which bits of the land that they own as trust property.

MR GODDARD QC:

And the orthodox position is that until the specific property held on trust is identified no trust can come into existence, and the Court of Appeal identifies the case to that –

ELIAS CJ:

Are you going to take us to them? Because it doesn't sound right that equity would not be able to intervene.

MR GODDARD QC:

I'll endeavour to do that, although I'm going to have to prioritise to some extent on what I cover. The –

ELIAS CJ:

Well, perhaps you should.

GLAZEBROOK J:

That seems to me a relatively important issue though, if you're saying that in fact if you say, "I own these two pieces of land, one of them I will hold on trust for you as soon as the title – well, I own this," I think probably more realistically, "I own this undivided share of land, I'm going to subdivide it, I'll hold one on trust for you" –

MR GODDARD QC:

Yes, I think –

GLAZEBROOK J:

– and to say that's ineffective and actually, “Once the title is subdivided I can actually with impunity sell both of them because there was uncertainty of subject matter,” it just doesn’t seem right.

MR GODDARD QC:

And yet it is, and there are good reasons for that. Your Honour – I was going to come to this later but I’ll succumb to one last – no, I can’t honestly say it’s going to be the last. I’ll succumb to the temptation of dealing with it now.

Your Honour said, “Well, what about the situation where a vendor conveys a large block of land to a purchaser and the purchaser promises as part of the consideration to carry out a subdivision and transfer back a specified number of sections, what happens?” and I think that that must be the high point of what the plaintiffs could argue for here, that this was effectively a conveyance of that kind in exchange for a promise to subdivide and convey back. If that wouldn't succeed I don’t see how this claim could. And the position is first of all there’s a contractual obligation, obviously, to subdivide and re-convey. Second, there is likely to be an ability to claim specific performance of that obligation. And, third, importantly, as a consequence of the entitlement to claim specific performance, there may well be some sort of constructive trust in relation to the land as a whole which is capable of administration by a Court of equity, but – and this is the critical “but” – what is reasonably clear is that where equity acts in aid of the law, for example by granting specific performance of a contract, the equitable claim becomes time-barred when the underlying contract claim becomes time-barred, and the constructive trust, which is dependent on the availability of specific performance, ceases to be enforceable at that time as well.

GLAZEBROOK J:

Although that's a different proposition you’ve just put from saying there was no obligation and no trust.

MR GODDARD QC:

Well, first of all, so let’s – where does it take us? First of all, there is no express trust of a particular block of land, but there is an argument –

GLAZEBROOK J:

Oh, is that all you were talking –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Oh, well, that's fine.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

If that's all you were talking about.

MR GODDARD QC:

That's all I'm talking about. So there can't be an express trust until you've identified the specific parcels of land. There may be an exception in relation to – I've lost the word – identical items like shares where –

ELIAS CJ:

Fungible.

MR GODDARD QC:

Fungible, I'm great – yes, it go away from me.

ELIAS CJ:

Well, you're not going to cite *Goldcorp* now, are you?

MR GODDARD QC:

I might have, but not now. *Hunter v Moss* [1994] 1 WLR 452 (CA) is the case on fungible items such as shares. But *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 (PC) is relevant to this, as are the other cases which suggest that you can only have an express trust once you've identified the specific trust property. But I'm not suggesting, in answer to Your Honour's question, that equity has nothing to say about that scenario. It may well intervene through remedies of a specific performance and dependent on that constructive trust over the whole in order to give effect to the promise but those drop away with the effluxion of time.

So coming back to the pleadings, we see at 77 an allegation of breach of trust in three respects. Reducing the reserves. This is the various exchanges and other transactions in paragraph 54. Failing to ensure the Tenths Reserves were allocated separately from occupation reserves, and that's the idea that the tenths should have been a separate endowment equal to one-tenth over and above occupied lands, whether those are excluded completely or established as occupation reserves and failing to ensure that the full 15,100 acres was allocated to the Tenths Reserves. The shortfall, which is what this cause of action is about, is identified as some 11,000 acres. Then it's said that the shortfall was vested in the company pursuant to the 1848 Crown grant, and in the sense that all land other than the reserved land was vested in the company that must be right. It is said that the New Zealand Company held the shortfall on trust for the tenths owners as agent for the Crown. That's a little bit difficult to understand but probably doesn't matter, and then it is said after the company's collapse in 1850 the shortfall was transferred to the Crown. Well, again, all the land went back including all the land out of which land might have been selected as rural sections, rural reserves. And it's said at 83, "The Crown either still holds the shortfall on trust for the tenths owners or in breach of trust has converted the shortfall to its own use or sold or gifted that land to others. Further particulars will be provided as research is completed," and those particulars were never forthcoming despite, as the Court of Appeal observed, the fact that all the discovery sought was provided and not all before the trial was first scheduled to begin but certainly by the time it took place in 2011.

And then the relief, I think, is illuminating. The plaintiff's claim for relief in the first cause of action, first, a declaration the Crown was obliged to reserve and hold 15,100 acres in the Nelson settlement on express trust for the tenths owners in addition to occupation reserves and that it failed to do so.

So the complaint is that there should have been an endowment trust of 15,100 acres separate from any occupation reserves or, I think, implicitly from any land that wasn't sold at all, but there was no claim that, in this cause of action or anywhere else, that customary title subsisted in relation to any land and no claim here or anywhere else that customary title had been wrongfully extinguished. Rather what happened was that occupied land was treated as something that needed to sit outside the tenths which were to be pure endowment reserves and those should have been 15,100 acres. So that's the way in which this was framed. It was a pure trust claim after disregarding occupied lands.

And then (b), a declaration that to the extent the Crown owns land in the Nelson settlement that represents the shortfall, including land formerly allocated to the Tenths Reserves, the Crown holds that land on express or constructive or resulting trust for the beneficiaries of the Tenths Reserves, being all the descendants from the Tenths owners, and declarations to the extent the Crown has converted to its own use the shortfall the Crown is obliged to restore the beneficiaries, being the descendants of the Tenths owners listed in schedule 1 to the position they would have been in, and partly in response to the perpetuities argument and issues about ownership the argument that there should be some sort of trusts for descendants has, I think, now morphed into a trust for the customary groups. But this idea that it's, this is a claim about the gap between 15,100 acres and the amount that was reserved in 1848, that that should all have been on trust, is essentially the first cause of action. The second cause of action is concerned with the suggested uplift, this is the allegation in '85 that the completed Nelson settlement was approximately 21,000 acres larger than the 151,000 acres awarded by Spain. This was never established on the facts and it was barely pursued, and the High Court Judge notes that in, perhaps it's just worth noting beside this, paragraph 180, subparagraph (b), of the judgment. But it became quite clear that this 172,000 figure was based in part on scrip quantities and other things that bore no relationship to the actual area of the settlement and there were major factual and logical problems with this claim. It really went nowhere. So I don't think we need to worry too much about the second cause of action.

Third cause of action, breach of trust in further diminution of trust land. Then what we have an allegation in paragraph 91 that after 1850, and I'm not sure why that date was chosen by the plaintiffs, the Crown acted unconscionably or fraudulently in disposing of land from the trust estate in the manner pleaded at paragraph 66, and if we go back to 66 the Court will remember that that includes the grant to the Bishop. That's 66.1, and then two other events after 1856 when the land was being managed by the Commissioners under the statute which are no longer pursued. So that's really just a claim about the Grey grant to the Bishop. And, again, the relief sought a declaration that the Crown acted in breach of trust in disposing of the land to the Bishop and has an obligation to restore the beneficiaries.

Then we have the fourth cause of action, breach of fiduciary duty. Exactly the same factual complaints.

WILLIAM YOUNG J:
So is the claim in relation to the land going to the church is still pursued?

MR GODDARD QC:
Yes, the 1853 one.

WILLIAM YOUNG J:
Okay. Well, there's a particularly difficulty in relation to that under the Limitation Act?

MR GODDARD QC:
Yes, and when I eventually get to my next bit of handout Your Honour will see that I say that is the clearest case of a time-barred claim because that land left the Crown, went to the Bishop, it's since gone all or mostly back to Māori under the ENRAIT Empowering Act, but absolutely clearly that land was not retained by the Crown, so the exceptions to section 21 don't apply and time has run. So that's probably the easiest one to deal with in terms of limitation. That is a hopeless limitation, a hopeless claim in terms of limitation. It just cannot succeed.

So in a way we can put a line through the third cause of action since that's all that's left in the third cause of action and it's plainly time barred.

I suppose – and then the fourth cause of action, breach of fiduciary duty, the way my learned friend, Mr Galbraith, put this yesterday I thought was informative. He said, "If we don't quite get there on the express trust then we've got a fiduciary duty," and that's really very much the way this is pitched. If the plaintiffs can't get across all the certainty requirements for an express trust then they say nonetheless there was an equitable obligation, call it a fiduciary duty or some sort of relational duty of good faith, to manage these assets for the benefit of the customary owners, and the same conduct relied on as breaches of trust is then relied on as breaches of those equitable duties.

And that's why we see fifth cause of action, constructive trust on grounds of equitable fraud which pleads at 110 a constructive trust arising in 1850 by reason of the Crown's unconscionable or fraudulent behaviour in reneging on its obligation to reserve a full one-tenth and denying the tenths owners had a beneficial interest in the shortfall and uplift. So this is basically an attempt to frame in equitable terms

non-performance of a promise that the Crown is said to have taken over from the company.

And then sixth cause of action, breach of good faith. "The Crown had a duty to act reasonably and with good faith towards the tenths owners in relation to the alienation of their land and the creation and administration of the Nelson tenths reserves," and…

So that's the claim made and preserved and that's why I say in section 3 of my main submissions that it is important to remember what this case is not about when considering the wide-ranging submissions made by the plaintiffs. It's not about assertion of some ongoing customary title. That's simply not pleaded anywhere in this pleading. It's not this case, and evidence that would have been relevant to dealing with that question, for example, the extent to which land has been brought under the Torrens system and whether there's any left that isn't, wasn't before the Court as a result.

It's not about the wrongful extinguishment of customary title. There's no allegation of wrongful extinguish of customary title followed by a claim for compensation for that extinguishment, and such claims are now all clearly barred by the Settlement Act.

What it is is a claim that either there was an express trust which was breached or some other equitable duty which was breached in relation to the reserves that were identified and the reserves that weren't identified but the plaintiffs say should have been identified, and that's really what the trial was about with a few by-ways and what this case is about.

That's important, and I won't go through section 3 in my written submissions, the Court has those, where I emphasise briefly what the case is and isn't about. There's also a very good summary in the High Court judgment, as I note as 3.1, about how the case was pleaded and how it involved in terms of the description of the trust claimed to exist.

So what about the standing to bring claims on behalf of the customary owners? I deal with this in section 4 of my submissions. The question of standing is, as Your Honour, the Chief Justice, said, two days ago I think now, really the same in the private law context as who has a right, who has a claim, and the case began with the

three plaintiffs nonsuing explicitly in a representative capacity asserting various rights. Mr Stafford on one of the theories that was argued at some points in time would have been a beneficiary under the trust alleged for descendents of the original named tūpūna, but that was the trust that faced potentially a perpetuity problem which, I think, caused the plaintiffs to move away from contending for that to contending for a trust for the customary groups. At that point, he is a member of, I was about to say "one", but probably more than one of the relevant customary groups' kaumātua, not – and rangatira of some of those groups, but he is not the group, and considerable evidence was called by the plaintiffs, in fact, about the difference between collective ownership and collective title and the interests of individuals which can come or go depending on association with the group, both whakapapa and ongoing ahikā.

Where we are now is that the appellants accept that they are not entitled to any relief in their own right, that they don't have any claims of their own. They say that, and I am quoting, that they come to the Court seeking relief "on behalf of the hapū and whānau" who have customary interests, that's a quote from their submissions, and not on behalf of Wakatū or its shareholders.

Putting to one side the implications under the Settlement Act of that claim, the appellants didn't plead this on the basis that it was a representative claim for the customary owners, didn't seek a representation order, no such order was made, and if it had been sought it seems inevitable that it would have been contested by the interveners who were saying to the Crown, "We have the conduct of this claim in the sense that we can settle all claims of the customary owners." The appellants, plaintiffs below, can't appoint themselves as representatives of customary owners. In the absence of such an appointment by the Court, they can sue only for their own interests.

The easiest plaintiff to deal with is the third plaintiff, the third appellant, plainly no standing, a recently created trust which is a stranger to the, all the alleged trusts pleaded, and there's been no principal basis identified for challenging that finding.

The same applies to Wakatū. Whatever kaitiaki role it may have been recognised as having in the context of negotiations, and Your Honour Justice Arnold explored that with me a little earlier this morning, it is not a beneficiary vested or discretionary under any of the pleaded trusts, that seems quite clear.

ARNOLD J:

If all these shareholders had been – I know that the shareholding has changed apparently because of the flexibility that was allowed at a particular point and also because some of those smaller interest were bought up and – but putting that to one side –

MR GODDARD QC:

So there is that disconnect, yes.

ARNOLD J:

If that disconnect were not there so that the shareholders of Wakatū were all survivors of people on the 1893 list who are referred to in the pleading as "The Tenths owners", would there be a problem?

MR GODDARD QC:

Yes, there would, in the same sense in which if I establish a company to own a farm which owns, over one shareholder company, which owns that farm, it represents me in relation to that farming interest, if I also have had dealings with a neighbouring farmer about the possible acquisition of the neighbouring farm, my company can't sue in relation to those dealings if I've had those dealings personally. I could assign my rights to the company and then it could exercise them, but unless and until I do that it has no rights in relation to that claim.

WILLIAM YOUNG J:

It's also, is the issue that they're not necessarily the owners in relation to the unallocated reserves.

MR GODDARD QC:

Yes. Because the inquiry that was held was in relation to what was allocated.

WILLIAM YOUNG J:

Not, for instance, in relation to land in Golden Bay?

MR GODDARD QC:

Yes. So there's a number of disconnects and one can't leave the process – I'm conscious that we've passed the 3.40…

ELIAS CJ:

Yes, I'd find it useful to stop now so I can prepare what I have to say. But I wonder, to make best use of the time tomorrow, would it be sensible for you to distribute your next four pages so that we can attempt a little prioritisation of our own if we need to?

MR GODDARD QC:

Yes, I think what Your Honour is – yes, I will do that – what Your Honour is politely and quite rightly suggesting is that I may need more prioritising from an external source than I am imposing on myself.

ELIAS CJ:

Well, I think it would be useful to look at it and if there is –

MR GODDARD QC:

And it's helpful to –

ELIAS CJ:

– material that you're referring to perhaps we will have an opportunity to look at it beforehand.

MR GODDARD QC:

Yes. It's helpful to my learned friend as well in terms of preparing a reply, I'm sure.

ELIAS CJ:

Yes.

MR GODDARD QC:

What I will just say about that is that it's not quite as bad as it looks because what the Court will see is what I do is go through the alleged express trust in relation to the town sections, then the alleged express trust in relation to accommodation sections, then the alleged express trust in relation to the rural. There are different points in relation to each but there is also some overlap.

ELIAS CJ:

All right. I was hoping that there might be some case law you wanted, you were going to cite, but we'll just have to look at your written submissions for that will we?

MR GODDARD QC:

Yes…

ELIAS CJ:

Is there anything you want us to look at overnight, Mr Goddard?

GLAZEBROOK J:

And where's the limitation issue?

MR GODDARD QC:

I deal with it in the context of each claim because –

GLAZEBROOK J:

That's fine, that's fine.

MR GODDARD QC:

Yes. I think that's actually the logical way to deal with it.

GLAZEBROOK J:

No, no, that's fine, as long as being dealt with.

MR GODDARD QC:

Yes. So, for example, 7.7 deals with limitation in relation to the town sections.

GLAZEBROOK J:

All right, that's fine.

MR GODDARD QC:

I do want to get into that. Perhaps the Limitation Act, as was originally enacted in 1950, because it's been amended a lot and there are a number of – and in particular sections 7, 10 and 21 are worth a look.

WILLIAM YOUNG J:

What's 10 saying? Oh, it doesn't matter.

GLAZEBROOK J:

And we've got it here though.

MR GODDARD QC:

Yes, 10 says – yes, it is. It's in, as enacted it's in the pink volume, volume 1, under tab 26. Section 10 deals with the application of the limitation provisions in relation to recovery of land to land held on trust, Your Honour. It's actually part of the picture that wasn't addressed explicitly in *Paki* but is quite important because it's what makes the limitation periods for land held in trust subject to the exceptions in 21(1), that's how those get linked through to that.

ELIAS CJ:

Good.

MR GODDARD QC:

Section 18, which extinguishes titles after the limitation period's also worth a look.

ELIAS CJ:

Section…

MR GODDARD QC:

18.

ELIAS CJ:

Good, thank you.

MR GODDARD QC:

Your Honour.

ELIAS CJ:

We'll take the adjournment. Would it be helpful to start at 9.30 again and maybe have the morning adjournment at 11, if this morning was a bit long?

MR GODDARD QC:

Yes, I think that would be helpful, Your Honour.

ELIAS CJ:

Yes, all right. Is that all right, Mr Galbraith?

COURT ADJOURNS:3.45 PM

COURT RESUMES ON THURSDAY 15 OCTOBER 2015 AT 9.36 AM

ELIAS CJ:
Yes, Mr Goddard.

MR GODDARD QC:
Your Honour. So I am planning to conclude by the scheduled time of 12.30. I want to leave Mr Castle half an hour and I think Your Honour said we're going to take the morning adjournment at 11 today, is that right?

ELIAS CJ:
Yes, yes, thank you.

MR GODDARD QC:
I'm going to very briefly finish my submissions on standing and then move to part 2 of my road map and, again, I'm going to try to prioritise much more effectively today key issues from that while placing them within what I think, what I hope, is a helpful analytical framework.

So standing, was in section 4 of my main submissions, the written submissions, and what I just touched on at the end of yesterday was that the appellants now accept they are not entitled to relief in their own right and say they come to the Court seeking relief on behalf of the hapū and whānau who have customary interests, not on behalf of Wakatū and its shareholders. As the Court saw yesterday, the claim is not pleaded as a representative claim for customary owners, and I should perhaps have referred in my written submissions to rule 5.35 of the High Court Rules which, of course, requires that a party to a proceeding who sues in a representative capacity must show in what capacity the party sues in the statement of claim, and that's not an, a frivolous black letter requirement. It has important practical consequences in terms of making sure that the right people are before the Court and in terms of the effect of any judgment as a res judicata as an estoppel as between the defendant and the represented parties, a point I'll come back to. And that's why if, I don't know if the Court has looked at Justice Clifford's preliminary decision in relation to the intervention application, which is in volume 1 of the case on appeal, but at that stage it was quite clear that the plaintiffs weren't suing in a representative capacity, and one of the reasons that I advanced for intervention by the iwi interveners being

desirable was that it would ensure that there was a cause of action estoppel as between the Crown and customary groups in relation to the asserted trust claims. His Honour expressed some hesitation about whether that would be the result, following on from the intervention, but said that could be left to later. But it was always an issue that was in play.

The third appellants, the trustees of the new trust, as I said yesterday, reasonably obviously have no standing to pursue a property rights claim under a trust that came into existence more than 170 years before that trust came into existence, and picking up Your Honour the Chief Justice's observation, a couple of points yesterday when I was talking about public law, this is a property rights claim, and the question is who can sue to vindicate the alleged property rights? The orthodox answer is the right holders. There are some very limited exceptions to that, but that's the normal rule, and this third, the third plaintiff, the third appellants, do not hold any relevant rights. The same is true – and this is where I'd just got to before close of play yesterday – in relation Wakatū Incorporation. It's not alleged that Wakatū Incorporation is a beneficiary under any of the trusts. There is overlap, substantial overlap, between the members of Wakatū Incorporation and the members of the collective customary groups who are now said to be as groups the beneficiaries of the alleged trusts and the relevant right holders. But that of course does not mean that the separate legal person, Wakatū Incorporation, holds any of those rights or can sue in respect of them. The fact that a company has as its members the beneficiaries of a trust for various persons doesn't mean that that company could in any ordinary scenario bring proceedings in respect of the trust, and there is no reason for a different result here.

The position is a little more complicated in relation to Mr Stafford, because as the claim was originally pleaded there was an allegation that there was a vested trust in favour of the 254 tūpuna in 1845 and that Mr Stafford was a descendent, and the argument appeared to be a successor to the interests of some of those right holders. And as I say in my main submissions at 4.4, the Crown's always accepted that Mr Stafford has standing to pursue a claim that he personally is the beneficiary of a trust, whether a vested trust as pleaded or a discretionary trust as the argument evolved in the High Court, for certain persons, and that that there's been a breach of that trust, and that was how the claim was run at first instance. But as it's evolved, and this is critical, it's no longer argued that Mr Stafford has any personal entitlements that he personally is a beneficiary under any relevant trust or that equitable duties were owed to him personally. Rather, the applicants argue that certain equitable

obligations were owed to certain collective customary groups and the obligations to those groups have been breached. And that brings us to the important practical question, as well as legal question, of who can sue to vindicate the rights of a collective customary group and in what form should that proceeding be brought. And that, the short answer put forward by the Crown, is –

ELIAS CJ:

Can you just pause. The idea that these are not individuals, how does that square up with the terms of the deed of sale and the naming of – oh, the individuals weren't named, sorry, until the Land Court…

MR GODDARD QC:

That's right, Your Honour.

ELIAS CJ:

Yes, yes, sorry, I was forgetting.

MR GODDARD QC:

And the plaintiffs' argument, the appellants' argument, is very much that as at 1845 duties of an equitable nature were owed to the collective groups –

ELIAS CJ:

Yes.

MR GODDARD QC:

– which were the customary owners of the lands.

ELIAS CJ:

Yes, I understand.

MR GODDARD QC:

And indeed, a positive complaint is made about the individualisation process conducted by the Native Land Court and which was inconsistent with that collective ownership, and Your Honour knows this better than I do, and was itself a significant vehicle for the expropriation of customary rights and the alienation of Māori from their land over time. Professor David Williams who gave evidence discussed this in great

length in *Te Kooti Tango Whenua*, The Land-Stealing Court, about the Native Land Court.

O'REGAN J:
The Māori Land Court decision of 1892/93, which came up with those names, effectively then crystallised an interest of those named people in the reserves that had been created?

MR GODDARD QC:
Yes.

O'REGAN J:
So you would accept that if there was a claim in relation to them those 285 people could have enforced it. Is there anything in the way that a Māori incorporation works that would indicate that once the decision to incorporate as a group of proprietors has happened that the rights of the proprietors then vest in the incorporation?

MR GODDARD QC:
Well, the legal title to the land was vested in the incorporation by the incorporation order – actually, not by the order, it was transferred by the Māori trustee, the incorporation having been established to receive that, and we see that in the incorporation order which was included in volume 3. The proprietors were incorporated as an incorporation and the objects –

O'REGAN J:
And that was the 285 or the successors of the 285?

MR GODDARD QC:
The successors, and "successors" is the right word because they're, as my learned friend Mr Galbraith explained yesterday, there were periods both before and after 1977 in which interests could be alienated other than in accordance with descent or tikanga, in particular by will, and there were also the, the other reason for disparity in ownership was of course the acquisition of uneconomic interests that my learned friend referred to. But it's reasonably clear, I think, that the incorporation of the those persons, the current right holders under that individualised process, formed a legal entity, and if one looks at the statement of the objects of the incorporation in the order it is to receive legal title of the lands to be vested in it by the Māori trustee, who

by then was the trustee of the Tenths, and to administer those lands for the benefit of the owners. Another Te Tura Whenua Māori Act now, it's also clear that rather than simply having a share in an incorporation there is a beneficial interest in the land, that direct link through to the land has been explicitly recognised.

O'REGAN J:

But does that then justify taking a different view of an incorporation of this kind than the traditional view in relation to a company and its shareholders, which is a slightly different corporate form and has a different context really?

MR GODDARD QC:

The question of whether a beneficial owner under an incorporation could sue to vindicate the rights of the incorporation if it was failing to pursue its rights is a fascinating one which we don't need to get into.

O'REGAN J:

Well, I'm not so interested – I'm really saying, you know, can you say that the incorporation is now in effect standing in the shoes of the 285 that were the original customary owners?

MR GODDARD QC:

Only in respect of the rights that were assigned to it. It's still a legal person which has certain property rights and doesn't have other property rights. Some of the land in which the 285 had various beneficial interests went into the incorporation and it holds that land for them, but other property rights they owned, be they personal, be they interests under other trusts, stayed with them as individuals, there was no assignment, no legal transfer, and no reason to treat property extraneous to what was explicitly transferred as having gone into the incorporation, they are not its rights, and that's not how the case is run, it just couldn't be. A legal person came into existence in 1977 and to find out what it owns, what rights legal or equitable it has, we must look at transfer to it by statute or by conveyance from 1977 onwards.

O'REGAN J:

Well, it also though has the status of being the custodian of the claim, if you like, the kaitiaki of the claim. I mean, that, at least in obviously in the way it interacts with its members, they see it as their representative.

MR GODDARD QC:

At least to a point, although their representatives then negotiated a settlement of that claim, other representatives, and endorsed those settlements and they were incorporated in legislation. And that's why we're really here, is that there was a contest about who had the carriage of the claim for these individuals, so –

O'REGAN J:

But I mean putting to one side the legislation for a minute, just assuming that everything was still up in the air, are you saying that in effect the only way the claim could have been brought would have been through a representative order –

MR GODDARD QC:

Yes.

O'REGAN J:

– or through all the actual individuals who are successors of the 285 coming to Court and each being a plaintiff?

MR GODDARD QC:

Which is impractical and is why you would seek a representation order. And that's the right process for identifying who the parties are to the dispute and for ensuring that anyone who contests the authority of the person who claims to represent them is, has drawn to their attention the fact that that claim to represent them is being made, and either accedes to that following whatever appropriate notification process the Court approves or, if they wish to challenge it, come in at that stage and say, "No, we want to have the carriage of our claim separately, we're not happy for this person to do so," for example, "because we want to settle it and obtain valuable consideration in exchange for that settlement." So it's a very important practical step, and it's not a difficult step, and in most cases – and my friends point quite rightly to many significant claims through history that have been brought by rangatira on behalf of the collective, and where the rangatira has the support of the collective a simple pleading that is brought on behalf of the collective group and an application for a representation order, if necessary, it might be thought even that the pleading coupled with evidence, unchallenged by any person, that it was brought with authority of the group would be enough. But in circumstances where who has the carriage of the claim and who can decide whether to pursue it or to settle it is in play, then certainly

something more is required than a unilateral assertion, at the appellant stage, of a representative capacity.

So coming back then to Mr Stafford, it would have been a simple matter for him to plead that he brought it on behalf of certain customary groups, and he pleads that he's a member of two of the four iwi, he, and the Court will remember seeing in paragraph 4 that he's a kaumātua of Ngāti Rarua and Ngāti Tama descent, to plead that he sued for Rarua and Tama and to seek an appropriate representation order in relation to those iwi, and especially if he sought to represent other iwi, Koata and Te Atiawa to say, "I'm bringing this claim," and there are two reasons why this is not a technicality. The first is dealt with in my 4.6 and it relates to the contemporary Treaty settlement process. It is important to identify who has the carriage of a claim and who can decide whether to settle it or to pursue it. Looking forward, if an individual rangatira who's dissatisfied with the conduct of a claim by the mandated representatives of a claimant group, of a customary group, can commence proceedings in their own name without seeking formal confirmation of that representative status, so that's tested, then the practical effect will be to check the progress of the Treaty settlement process until those proceedings are concluded, there will be no path through that, and – sorry, Your Honour.

ELIAS CJ:
That's not a statutory system, is it, the Crown-mandating process?

MR GODDARD QC:
No, it's not.

ELIAS CJ:
And those who don't want to join in it are not bound by it until the statute extinguishes their claims?

MR GODDARD QC:
That's exactly right. But the Crown, if there is a finding that an individual rangatira can pursue a proceeding of this kind with standing on behalf of the group without obtaining a formal representation order which is then tested, you know, in advance in the Court, it will become practically impossible to proceed with a settlement negotiation and enactment of legislation unless the litigation is overridden. The sort

of exception that has been provided here in order to attest this issue would not be something that could sensibly be repeated. So the –

ELIAS CJ:
Well, if it's not any use what's the value of preserving space for it to be repeated?

MR GODDARD QC:
Sorry, I'm suggesting –

ELIAS CJ:
Sorry, I thought you were saying we should be careful because otherwise this procedure of reserving an existing claim won't be repeated again, was that not what you were saying?

MR GODDARD QC:
Well, I think, and, yes, quite appropriately Parliament is very reluctant to legislate to override pending litigation, it happens in some cases, but the Court saw the advice in the approach that was taken here. The practical result would be to put a settlement process on hold until any proceedings were resolved and –

ELIAS CJ:
But that's a different point really. I thought you were –

MR GODDARD QC:
And that's my main point –

ELIAS CJ:
Yes.

MR GODDARD QC:
– is that the settlement process will be able to be frustrated. In my private international law world one of the issues I'm grappling with is lis pendens rules and in Europe there's this thing called the "Italian torpedo" in which, if you were being about to be sued in one of the European member states you bring declaratory judgment proceedings in Italy, and the strict lis pendens rule means that no other Court in the Union can hear that claim, and that gives you at least five and more likely 10 years while the proceedings wend their way through the Italian Courts, during which you've

torpedoed the effective resolution of the claim. Now I'm not suggesting that our Courts are in a similar position but –

ELIAS CJ:
No, but the same position might be achieved more transparently by legislation providing for the mandating process and stripping rights.

MR GODDARD QC:
That's possible, but in my submission the common law and the civil rules of procedure actually already, in terms of who has the conduct of proceedings before the Courts, provide an answer to who can, by bringing proceedings, at the least complicated potentially frustrate and delay a settlement process that has broad but often not universal support among the people for whom it's being negotiated. And so the Court should be very cautious about extending standing to an individual.

But the other reason why caution is required is the one dealt with in my 4.7. It seems to me that if the Court of Appeal was right to say that Mr Stafford had standing to bring these claims on behalf of the collective customary groups, then it followed when the Court of Appeal went on to find that they were as a matter of substance no capable of success, that the collective customary groups were bound by that decision. So the Court of Appeal's formal orders, finding that Mr Stafford had standing to sue on behalf of all four collective customary groups and finding and dismissing the claims, gives rise to a cause of action estoppel.

ELIAS CJ:
Well, is that not really because the Court of Appeal was proceeding on the mindset that standing was an ability to come to Court issue, but in effect whether a representative order would have been made was still to be determined, in substance.

MR GODDARD QC:
That is not how I read either the reasoning of the Court or the order it made, which was unqualified in saying that he had standing to bring the claim, and the –

ELIAS CJ:
Well, it depends what you mean by "standing", doesn't it?

MR GODDARD QC:

It does, but if, proceeding on the basis Your Honours –

ELIAS CJ:

Well, in public law it's you can come to Court.

MR GODDARD QC:

But this is not public law, as Your Honour reminded me on a number of occasions.

ELIAS CJ:

No, no, but that's why I think – but, you know, you've raised standing, it's a bit of a hare really that's being pursued, and I think the Court of Appeal may well have treated it in those terms.

MR GODDARD QC:

I think that there are two reasons why the issue been in play and has been seen as having some complexity. The first is of course that the Crown was faced simultaneously with groups that were saying, "We want to settle these claims against you," and these plaintiffs saying, "We want to sue you in respect of these claims and pursue that claim through to a resolution," and it was perfectly appropriate and indeed necessary for the Crown to say to the Court, "We do not think that these people are the right holders and have the claim." Now that's been expressed in the language of standing, if that was clumsy then that's my fault and I apologise, but that idea, I think, has been reasonably squarely identified throughout and we see it analysed in these terms by Justice Clifford in the High Court, though he transcends, His Honour transcended any linguistic confusion I may have caused by saying, "Who has the rights under the trust?" Does Wakatū? No, it came into existence in 1977. It's a separate legal person. The rights were never assigned to it. Can this new trust? No. It doesn't have those rights. There's no evidence of it acceding to, succeeding in any way to those rights. Does Mr Stafford? "Mr Stafford," His Honour said, "could have rights under a trust of which he personally was a beneficiary but I've dismissed those claims on the merits." So far as the fiduciary duty claims are concerned, by that stage the plaintiffs were already saying the fiduciary duties would be owed to collective customary groups and His Honour said, "So he is not the obligee so he cannot pursue these claims in ordinary private law terms." That's why we get the ancient equity concept of a stranger to the trust. A stranger to a trust

cannot pursue a claim under the trust, and what His Honour effectively found was that –

ELIAS CJ:
Mr Stafford was not a stranger.

MR GODDARD QC:
Mr Stafford was not a stranger to the trusts as pleaded but those trusts didn't exist and that he was a stranger to the pleaded fiduciary duty because the duty was owed to a collective that he had not obtained representative status to sue for. And that was right, in my submission.

And one cannot treat in private law standing as something, or the ability to sue, as something that's likely to be recognised because it's a double-edged sword, and this is my 4.7. If you can bring a claim and take the fruits of it as successful, if it's successful, so too those for who you claim to sue wear the consequences of the claim fails. It ceases to be a claim that could be pursued by anyone else. It ceases to be a claim that as a private law claim could be settled because it's been dismissed in proceedings brought by someone who had the right to bring it.

The reasoning of the Court of Appeal in paragraph 30 of the judgment, which I touch on at 4.8, is problematic. What the Court said, or what Her Honour, the President, said was Mr Stafford is a rangatira of some of the groups in the collective, but it's hard to see how that of itself could mean that he can sue for all the groups on whose behalf the claims are now advanced. And, again, very importantly, it seems difficult to suggest that any one rangatira can, without seeking formal confirmation of their representative status, sue for the representative group, especially against a backdrop of others claiming to represent the group in negotiations to settle the claim.

I also note at 4.9 that the formal declaration about the standing of Mr Stafford was an unusual remedial outcome in the Court of Appeal below. It doesn't provide any form of formal relief. The analysis of who can bring a claim is normally just one step in the determination of the claim and, ironically, if anything, the making of that formal order leaves the customary groups, leaves Te Ātiawa, for example, worse off than they would have been following the High Court proceeding, again putting the settlement to one side because there's a formal recognition of Mr Stafford's ability to sue for them coupled with a dismissal of the substantive claim.

I think that's probably what I need to say about standing, and that means I can turn to consideration of each of the three categories of land in respect of which a claim is advanced, dealing with express trust and then I think what I'll do in order to make best use of time is deal with other equitable duties in relation to the same category of land as I work through each category. And I spent some time agonising about how best to approach this, and, in particular, whether just do limitation in the abstract next because in many ways it seems to me that the logical way to approach this is the claim barred by the Settlement Act? If so, we can stop there. If it's not barred by the Settlement Act, is it time barred, because after all that's the point of a time bar; you can then stop. But the problem is that the way the claim has been presented is so amorphous that you can't do a limitation analysis without doing a bit more analysis of what the suggested duty and what the suggested breach was, especially when we get to section 21. So I've been driven to doing some analysis of that in order to have a sensible, concrete focus on limitation rather than doing it at a fluffy general level.

So my road map part 2, paragraph 7, the alleged express trust of the town sections. 7.1 should probably have begun, "As at 1845," because that's the key date so far as the claim is concerned as it's presented. "As at 1845 there was no certainty of intention to establish a private law trust on the part of the New Zealand Company or the Crown."

ELIAS CJ:
Can you drop the words "private law" there?

MR GODDARD QC:
Yes.

ELIAS CJ:
What do they add?

MR GODDARD QC:
They add linguistic clarity against a backdrop where –

ELIAS CJ:
Well, they add advocacy perhaps.

MR GODDARD QC:

Both.

ELIAS CJ:

Yes.

MR GODDARD QC:

I'm an advocate; it's my job.

ELIAS CJ:

Yes, but I'm trying to concentrate on the legal point.

MR GODDARD QC:

Yes. The legal point is that the word "trust" not unambiguous, is ambiguous.

ELIAS CJ:

Well, you're – we're talking about a trust recognised in equity.

MR GODDARD QC:

Yes. So if we can use the word "trust" as "trust recognised in equity", that's fine.

ELIAS CJ:

Yes.

MR GODDARD QC:

What we just have to bear in mind is that we see the word in some contemporaneous documents and that may not be what it means. So no certainty of intention to establish a trust on the part of the company or the Crown as at 1845. There was a clear intention to put some sort of statutory trust or statutory regime, as we saw in 1856 virtually in place, for objects yet to be decided once the land was vested and the objects determined, and this submission is closely linked to 7.2 which is the lack of precision at that time about the terms on which assets would be held under a trust. There are many explicit statements about the need for more information, the need for greater clarification, the need to state the objects in a legislative vehicle, and no –

ELIAS CJ:

Well, they'd have to have a statutory trust if it was going to be a discretionary trust. They'd have to have some sort of – the only trust that could arise is a fixed one for the owners who had parted with an interest subject to an interest, a continuing interest in the land.

MR GODDARD QC:

You could also establish without a statute a charitable purpose trust, I think, simply by declaration by the trustee. That would probably be effective. And one might also establish a discretionary trust for persons but there would be a perpetuity problem. We had a fascinating but ultimately inconclusive argument in the High Court about the extent to which the rule against perpetuities was received into New Zealand and how it applied here.

ELIAS CJ:

Much better never to refer to it. But there can't have been no equitable interest.

MR GODDARD QC:

But we need to be precise about what the equitable interest was before we can ask what the duties of the obligor were –

ELIAS CJ:

Yes, I agree with that, yes.

MR GODDARD QC:

– and whether they were breached and so I'm in a slightly pedantic but I think useful way saying, "Was there an express trust the terms of which we can look to to understand what the trustees could or not do?" There are complaints about breach here so we need to know what was the content of the duty.

ELIAS CJ:

Well, the express trust was to, what were the terms, set aside and reserve certain lands out of grant.

MR GODDARD QC:

But that could simply mean that customary title continued. They are reserved, they remain in customary ownership.

ELIAS CJ:

Well, it might have been a trust to hold it. I mean, it –

MR GODDARD:

Yes.

GLAZEBROOK J:

It wasn't the way it was –

MR GODDARD QC:

But Your Honour's right, it might have been.

GLAZEBROOK J:

It might have been but it wasn't the way it was treated because the Crown had since the 1840 agreement been treating it as effectively a trust. So against that background it's difficult to say that as soon as the 1845 grant came about what they were assuming was that all that would go back to Māori. It wasn't at all what they were assuming.

MR GODDARD QC:

No, I think that's right but we need to, at each point in time, ask how much illumination is shed on the objects for which the trust was held, because one thing –

GLAZEBROOK J:

Well, that might be the case but there's no point in doing that by putting forward propositions that clearly weren't on the table.

WILLIAM YOUNG J:

Obviously some of the land was intended to be held by those who were occupying it.

GLAZEBROOK J:

See, I'm not sure that's right, either, necessarily, but …

MR GODDARD QC:

It was intended to be occupied but not necessarily by those who had customarily occupied it initially.

WILLIAM YOUNG J:

Yes. Well, it moved, didn't it? It shifted and by the early 1840s it was pretty apparent that the people who were living there were going to have to be left there. They didn't necessarily want to move into town.

MR GODDARD QC:

Yes, but there, of course, was not a lot of the sections. They weren't on all those sections.

WILLIAM YOUNG J:

No.

MR GODDARD QC:

So what was going to happen to those? How were they going to be used? Could they be used for occupation by people who had moved away from their customary habitations? Could they be rented out? Could they be sold? All of those things needed to be known for there to be an express trust on applying the orthodoxy rules of equity that certainly would have been applied in the 1840s and which on that issue remain essentially the same today.

ELIAS CJ:

You're going to go into those, what certainty of this, that and the other thing means but actually if you look at the old cases the ones that were uncertain were unfathomable. This is not in that category and that's why I asked you, they must have had an interest in the lands that were to be reserved. They must have had an interest at law.

WILLIAM YOUNG J:

They may have owned – it may have been customary ownership until –

GLAZEBROOK J:

It couldn't have been customary ownership in terms of the way they were treated.

MR GODDARD QC:

This is where it's important to distinguish between the land and monies received. Going back to Your Honour Justice Arnold's question to me yesterday, in relation to

land it was customary ownership. The land was still in customary ownership, even on the appellant's theory, through to 1845.

GLAZEBROOK J:
Up to 1845, absolutely. No, I wasn't suggesting anything before that but from 1845 it seems to me there is no doubt.

ELIAS CJ:
Well, even from 1848 reading into that what had been understood at 1845 once the land vested. Forgetting about the terms of the 1848 one, we're talking about whether there's an interest in equity.

MR GODDARD QC:
And if there is an interest in equity it arises not under an express trust which has been declared with the necessary certainty but through equities effectively remedial intervention to protect expectations.

ELIAS CJ:
Well, it could be an implied trust which is actually not a remedial – well, it's actually an express trust.

MR GODDARD QC:
But it has to be an implied trust also which requires the same certainties before a Court of equity says it can enforce it.

ELIAS CJ:
I know and we're going to discuss those, but what I'm putting to you is it cannot be said that when title to this vast tract of territory was obtained there was no interest that the vendors had when everything points to the reservation of land for their purposes.

MR GODDARD QC:
In my submission, there was no equitable interest. The effect of the 1848 grant was first –

ELIAS CJ:
Well, what interest was it? If it's an interest it's got to be either equitable or legal.

MR GODDARD QC:

No, my submission is that there was no interest following the 1848 grant that at that point the land became the domain lands of the Crown and that the Crown had an obligation

GLAZEBROOK J:

At that point or at an earlier point because if it wasn't the demesne lands of the Crown they couldn't have made the grant, could they?

MR GODDARD QC:

There's an element of circularity in working that out. You could say the same, of course, in relation to 1845.

GLAZEBROOK J:

Well, I would, in fact, say that it would have to be the demesne lands of the Crown or at least treated as such and the analysis would be because the purchaser – and I know there were issues in respect of whether this was the correct approach but let's assume for the moment – and in fact that was never challenged and the grant was made on the basis of the Spain report so what the Spain report did was say the purchase was valid and because the purchase was valid it's not just radical title held by the Crown. It's demesne land and they are then able to grant it.

MR GODDARD QC:

I think for the purpose of answering the Court's questions about what the position was following the grant, I don't need to worry too much about when the land became demesne land of the Crown.

GLAZEBROOK J:

No, that's probably true.

MR GODDARD QC:

So I should focus, I think, on the next issue which is so it was demesne land of the Crown excepted from the relevant grant and on what basis was it held by the Crown and my short answer to that is that at that point it was demesne lands of the Crown and that Māori had neither legal nor equitable interests in the land – and this is one of the respects in which there was a breach of the Treaty.

GLAZEBROOK J:

Can I just check, we're talking about the land that was actually reserved from the 1848 grant, the land that effectively later went into the statutory trust, is that what we're talking about?

MR GODDARD QC:

Yes, that's exactly right. The land that became subject to the 1856 Act which was an Act providing for a board of management. As I said, when I went to that Act yesterday the word "trust" actually doesn't turn up in the body of that legislation.

ELIAS CJ:

Well, that's not determinative.

MR GODDARD QC:

No.

GLAZEBROOK J:

So in between that time, the submission is, the Crown could do what it likes or subject to public duties. Is that the submission?

MR GODDARD QC:

That is the submission and that's absolutely consistent.

ELIAS CJ:

One of the things that I find incomprehensible is it's ridiculous to look at a snapshot of what is public law. At some periods in history public law is all about real property. At other times it's all about crime. You're talking about real property, which is something that is foundational. So to just describe it as simply private or simply public is just wrong, it seems to me.

MR GODDARD QC:

The question that we need to address is whether a Court of equity in 1845 would have accepted a submission that there was an equitable interest in the collective customary groups on whose behalf it's now being asserted and in my submission if one had gone to a Court of equity in 1846 claiming that such an equitable interest existed that Court would have said no and it would have said no because first of all it

would have looked for certainty of intention to create a trust to be administered by the Courts of equity and we see that distinction being drawn from booty in the wars in India but although the facts are exotic –

ELIAS CJ:

I'd be much more comforted if you concentrated on real property cases.

MR GODDARD QC:

And if I could find a real property case that shed any light on the issue I would. What I think I can say to Your Honour about the real property cases in relation to the effect of grants and attempts to challenge them is that they were consistently pursued and there was no attempt to assert equitable interests through writs in equity and we get into interesting issues about the exchequer equity rates.

ELIAS CJ:

It's the same thing, though, isn't it? It's the same thing. You're attacking – that's a procedural device and the subsequent changes to the rules or to the Judicature Act say what you could have done –

MR GODDARD QC:

Under judicial review, basically.

ELIAS CJ:

No, no, no, no. Applications for, you know, what's the procedure, not summary judgment, summary proceedings, summary proceedings. It's nothing to do with saying that this is a supervisory jurisdiction.

MR GODDARD QC:

But except that the consequence of scire facias was to set aside the grant as a whole, it wasn't a mechanism for determining that legal title resided here but equitable title resided elsewhere and it's –

ELIAS CJ:

Well, but you did, you had to set up your claim of right.

MR GODDARD QC:

But your claim of right had to be a legal claim of right.

ELIAS CJ:

Or an equitable claim of right. We never had, we never had division between law and equity.

MR GODDARD QC:

Of the Courts administering it, but the distinction between legal and equitable rules –

ELIAS CJ:

Oh, yes.

MR GODDARD QC:

– was a significant feature of the law and we were more than a hundred years from the fusion fallacy as books like Meagher, Gummow and Lehane's sniffily describe it –

ELIAS CJ:

Oh, but for goodness sake.

MR GODDARD QC:

Yes, I know, we're not in New South Wales –

ELIAS CJ:

Yes.

MR GODDARD QC:

– as was established in late 1840. But I've always worried about the fact that date, we celebrate the Treaty on what's the date on which we became part of Australia actually but – and I wonder if it should be December in some ways, when we became a separate – anyway, that's another matter.

ELIAS CJ:

Well, that's only if you look at the legal consequences –

MR GODDARD QC:

Yes.

ELIAS CJ:

– as opposed to the –

MR GODDARD QC:

Significance.

ELIAS CJ:

– way in which it came about.

MR GODDARD QC:

That I agree with.

ELIAS CJ:

And we don't actually celebrate the date of the proclamation –

MR GODDARD QC:

No.

ELIAS CJ:

– although some people do think we should.

MR GODDARD QC:

Your Honour's right.

ELIAS CJ:

I don't.

MR GODDARD QC:

I've got lost, and this time I think it was not entirely my fault.

ELIAS CJ:

No, no, sorry. So I was asking you about the –

MR GODDARD QC:

Yes, so if one went –

ELIAS CJ:

Were you saying that there was no interest –

MR GODDARD QC:

I say –

ELIAS CJ:

– and you say yes, there was no interest.

MR GODDARD QC:

So I say that if one went, and in particular the case I have to meet is that there was no equitable interest, because it's a trust that's being asserted here. And so my submission is that if one had gone to a Court invoking its equitable jurisdiction through whatever writ was appropriate in those days, and remembering the importance of the forms of procedure which really had not properly separated out from questions of substantive relief –

ELIAS CJ:

Oh, you're not making a substantive –

MR GODDARD QC:

No, I'm not.

ELIAS CJ:

– submission on this though, so you don't need to say that really.

MR GODDARD QC:

But if one had gone to a Court administering equity in 1845 and had invited the Court to find an express trust, the Court would have said, "Show me the declaration of trust or conveyance on trust which sets out with the necessary certainty, A, an intention to create a trust administered in the Courts of Equity," and that's a distinction that was drawn for example in *Kinloch v Secretary of State for India* (1882) 7 App Cas 619 (HL), "What was meant by the words?" and Your Honour has said the that the word "trust" is not necessary, that's right, it's also not sufficient. One has to ask what the intention was and is it conveyed with sufficient certainty, and His Honour at first instance after carefully reviewing all the documents over an extended period considered that there was not sufficient certainty of intention to establish a trust administered by the Courts of Equity, that was where His Honour landed and that, in my submission, is right and deserves considerable deference given the time spent on it. And then the Court would have said, "And what are the objects of it?" It was very

well established then that a valid trust administered in the Courts of Equity was either a charitable purpose trust or a trust for persons, and there was the overlay of perpetuities in relation to the vesting of interests within lives and being plus 21 years, but I don't think we need to get too far into that. But again, a Court in 1845 asked that question would have said, "We cannot determine with sufficient clarity from any of the documents relied on as the declaration of trust," and the Court will remember the documents that were identified in the pleading in paragraph 74, I think, as allegedly constituting the declaration of trust, "We cannot tell from that for whom the property is to be held." One needs either identification of the persons who have vested interests and the proportions of their shares so that you know who you hold for or, if it's a discretionary trust, which is not what's pleaded but what was ultimately –

ELIAS CJ:

No, but it could be a trust for all the vendors, and it could have been converted later to a discretionary trust or whatever. But on the basis on which this land was transferred from native customary title to Crown ownership with a Crown grant, on that basis it could only have been – there can't have been no, no interest that the vendors had, given that declaration that those –

MR GODDARD QC:

Let me reach that. So what would the –

ELIAS CJ:

You don't need to look at a piece of paper which says, "I declare this and that," the cases don't require that.

MR GODDARD QC:

They –

ELIAS CJ:

And one would have thought that –

MR GODDARD QC:

In relation to real –

ELIAS CJ:

– the Spain process went a long way down the track. This was not for an – I think the cases say you cannot have a trust for indefinite persons. These were ascertainable, with effort, but they were ascertainable.

MR GODDARD QC:

If the trust is a trust with vested interests, in particular people, then one needs to know who they are and in what shares before there can be an express declaration of trust.

ELIAS CJ:

Not before, you can find them out.

MR GODDARD QC:

And it's in the context of a discretionary trust that the case law has developed in relation to, you know, provided you can tell whether someone's in or out that's sufficient, you don't need to have a list on day one.

ELIAS CJ:

But that doesn't matter. The reason for that is that if you have a trustee and you have a discretionary trust then the trustee can identify who's going to be the objects of it. But the same thing must apply, as long as it's not an indefinite body of people, as long as it can be ascertained, and after all the whole Spain process was to partly look at whether it had been validly sold.

MR GODDARD QC:

But not to determine who the owners were.

ELIAS CJ:

No, no, no, there'd have to have been further enquiries. And indeed, don't the instructions look at setting up mechanisms for identifying ownership, I'm pretty sure they do. It wasn't done of course until the Native Land Court was set up, but that doesn't mean to say that there's a vacuum in terms of interests that the law will recognise.

MR GODDARD QC:

I think Your Honour might be a step ahead of the analysis in saying, "Well, who were the original owners and therefore if there's some sort of implied trust for the original owners would that be enforceable in equity?" I want to deal first with the primary pleading, which is express trust –

ELIAS CJ:

Oh, the express trust. Well, I think it's the same thing, because I would have thought that it was, if you look at all the documents here and if it is the vendor's, that seems to me to be express.

MR GODDARD QC:

Well, the initial documents prepared by the Company and much of the contextual material suggested a trust not for all the owners but just for the chiefs to create a separate category of landed persons. The –

ELIAS CJ:

Well, that might have been the result.

MR GODDARD QC:

The broader idea of a trust which was in significant measure focused on education and social purposes, which we see coming through –

ELIAS CJ:

That's later.

MR GODDARD QC:

Well, it's 1842 we see that already.

ELIAS CJ:

No, no, but what we're talking about here is at the point of transfer they haven't worked out all of that, they'll have to do that by statute in any event, but it cannot be that all interests, all legal and equitable interests are exhausted by this grant.

MR GODDARD QC:

My primary submission is that they are, because the source of the obligation to create an appropriate vehicle for administration of these reserves for the benefit of Māori was the governmental responsibilities of officials, it was –

ELIAS CJ:

Well, that would have changed the basis on which it was held. But at the time that it passed from native title, surely the only trust you can have is for all the vendors.

MR GODDARD QC:

If there was a trust.

ELIAS CJ:

Yes, if there was a trust, yes.

MR GODDARD QC:

There could also be absolute ownership. And that, in my submission, is sufficient, it would be land –

ELIAS CJ:

Although even then the form, until it is separated out and reserved, the Crown must have it on trust for the owners according to native title.

MR GODDARD QC:

Not necessarily, Your Honour, it could well be received subject to a responsibility for which there is accountability through the Colonial Office and the British Crown.

ELIAS CJ:

Property has never been treated like that. Magna Carta says that the Crown has to – doesn't have – can't deseize people of their property without lawful authority.

MR GODDARD QC:

But that's where we get back to the point that a number of the steps taken here are acknowledged to have been wrongful and inconsistent with underlying customary rights, but then the question becomes what are the consequences in equity of those wrongful acts, and what the officials of the day explicitly declared their intention to be was to establish an appropriate legislative vehicle for the ongoing administration of

the lands. Your Honour is quite right that we again get the question of what was their precise status in the intervening window –

ELIAS CJ:
And that was what Justice Clifford was bothered about.

MR GODDARD QC:
Yes.

ELIAS CJ:
He said, "How can – I am bothered that there is this gap between 1840" –

MR GODDARD QC:
'48 or…

ELIAS CJ:
– or no 1842, I think he says.

MR GODDARD QC:
And '56.

ELIAS CJ:
And 56. And really what I'm putting to you, and we probably can't take it any further, is I find it hard to believe that the law as at 1845 or '48 was so bereft of doctrine which could be adapted to these circumstances that there was no interest.

MR GODDARD QC:
I think you're right that except to refer the Court to cases which establish, admittedly in the personality sphere, that the Courts would, the Courts of equity would defer to the, what the Canadians call the honour of the Crown, I guess, in relation to the administration of bounty, of royalties, *Tito v Waddell*.

ELIAS CJ:
But hang on, those are in different circumstances. You have to be very careful about using precedents from other jurisdictions because if the Crown had title, had – if these were demesne lands of the Crown then it might be different.

MR GODDARD QC:

Well, they were at the time of 1845 which is the point at which the appellants say the trust arose.

ELIAS CJ:

Yes, yes, sorry, I'm saying that in New Zealand but, well, I'm just saying you have to be a bit careful about the North American matters and the need to have recourse to the honour of the Crown as opposed to law.

MR GODDARD QC:

And what the, we see the House of Lords saying in *Kinloch*, what we see Sir Robert Megarry, an eminent equity lawyer, saying in *Tito v Waddell (No 2)* [1977] 1 Ch 106 (Ch) is that not every form of accountability for the management of property for the benefit of others is a form of accountability through the Courts of equity.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that's my submission, that it is possible to be accountable in a meaningful way for the administration of property for the benefit of others through what I would term, but Your Honour might not like me to term, public law mechanisms of accountability and the expectation that the Crown will discharge its responsibilities to its citizens or to particular groups of its citizens for whom it is administering particular assets.

ELIAS CJ:

What was the underlying ownership in *Tito v Waddell*?

MR GODDARD QC:

In *Tito v Waddell* it was the islands owned by the islanders.

ELIAS CJ:

No, but was that – I just can't – it's a long time since I've read the case but –

MR GODDARD QC:

I'd have to go back and look at the detail as well. There were leases of lands owned –

ELIAS CJ:

I'm not sure that it's comparable.

MR GODDARD QC:

I think the native owners owned the land. The land was leased to the mining companies and the question was what would happen to the rents.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that's very similar to the question, the vacuum issue, that Justice Clifford was dealing with, which is what happened to the proceeds of these lands, in particular in the early years before there's any allegation of title to the land passing, and, in my submission, the answer is exactly the same here, that there was a responsibility on the part of the Crown to apply the proceeds from the sections set aside as reserves and then when the reserves vested in the Crown, leaving aside whether that's 1845 or 1848, to administer those reserves in a manner that was consistent with the broad purpose for which they had been established, the benefit of Māori, a purpose which makes sense at a political level but is too imprecise to be administered by a Court of equity, and to give that form and shape over time through the enactment of an appropriate legislative mechanism.

ARNOLD J:

So when you say accountable in a meaningful way through public law mechanisms, what public law mechanisms do you have in mind?

MR GODDARD QC:

I have in mind, for example, raising issues with the Colonial Office. We saw the New Zealand Company very successfully holding the local administration to account in that way on a range of issues. I have in mind Parliamentary committees. We saw that play out both in English Parliamentary committees in this period enquiring into the affairs of various colonies, including New Zealand, and petitions to Parliament an extremely important mechanism for Māori to raise grievances and seek resolution of those grievances in New Zealand through the second half of the 19th century and on, in fact, into the 20th century and there was some evidence about concerns in relation

to the tenths being pursued in that way in this proceeding. So those are the primarily mechanism I have in mind, Your Honour.

But I do just want to emphasise that there are many forms of legal obligations. I think of much of public international law, which are in a meaningful sense obligations which are not enforceable before any tribunal but it's wrong, a narrowly positivist approach, to classify those as not legal merely because they are not enforceable before domestic Courts.

ELIAS CJ:
It's not law if it's not enforceable.

MR GODDARD QC:
That would be – I don't accept that proposition.

ELIAS CJ:
It's never been an adjective used of me, by the way, "positivist".

MR GODDARD QC:
No, I know. But the suggestion that most of public international law is not law is a slightly shocking one.

ELIAS CJ:
Public international law, of course it's law. You just have to have a place to stand. But we're talking about domestic rights.

MR GODDARD QC:
We then come to the very complex issue of the status of the Treaty, for example, which I don't think we have time to do justice to and don't need to, but certainly I wouldn't want to be understood to be accepting the proposition that for something to be law it must be enforceable before a domestic tribunal and I think I could, if necessary, cite a substantial amount of authority to the contrary.

We then, I think, looking at certainty of intention, which is one reason why a Court of equity in 1845 would have said, well, no, there's no submission to subject this land and the Court would have gone on to say, nor, moreover, even if that intention had been clear could we accept that this gave rise to a valid trust because there is

insufficient certainty about the objects of the trust. We do not know whether there is one trust or many, is there a separate trust for the Nelson lands, for those customary owners and another trust for the owners of the Motueka lands with the result that proceeds from one cannot be applied for the benefit of the other. That certainly doesn't flow from the express statements, all of which contemplated at least a district-wide application to revenues.

ELIAS CJ:

Well, I would have thought that that's all it could be argued for in the context of 1845 or 1848.

MR GODDARD QC:

A district-wide approach, Your Honour, basically for the whole of this.

ELIAS CJ:

The vendors.

MR GODDARD QC:

And then the question would come how is the trustee to know whether they can apply any of the proceeds from one area to another or whether one has to then drill down into –

ELIAS CJ:

I see this as a holding trust. Obviously it wasn't going to be the last word.

MR GODDARD QC:

But even a holding trust can only be recognised if that certainty exists otherwise what one gets is a resulting trust and certainty of subject matter is the related point. I think a Court would have been quick to say, as His Honour said below, well, there's no problem with the 100 town sections, for example, coloured whatever colour they were on the relevant 1845 grant map. We can identify those with certainty. But the argument made by the appellants that there should have been another 10 town sections, actually slightly more because of the true tenths issue and then because they say that a number of the selected sections were pā or were cultivated and therefore there should have been additional reserves cannot possibly be derived from the documents and other surrounding matters relied on as establishing an express trust.

ELIAS CJ:

Why do you say they needed to – if there was a mechanism, it's a bit like those cases that if you have a trust able to select among discretionary beneficiaries that's not void for uncertainty but here you had a mechanism by which you had an outer limit of where the lands could be attained from.

MR GODDARD QC:

I'm just talking about town sections at the moment, Your Honour.

ELIAS CJ:

I know that, I know that but –

MR GODDARD QC:

And there was no contemplation of a further selection process in relation to the town sections. That had happened and the lands that were to be reserves in Nelson town were all identified on plans attached to both the Spain report and the grant. One cannot sensibly say that those instruments crystallised a trust in the town or in the suburban area in relation to land not so identified and in fact granted away to someone else.

ELIAS CJ:

Because that would require a voluntary exchange by the New Zealand Company.

MR GODDARD QC:

Yes, or the relevant claimants under them.

ELIAS CJ:

Yes, I was talking, of course, about the rural lands.

MR GODDARD QC:

I'm on my 7.3 and what I'm really saying here is that as far as one can go in relation to town sections and any trust of town sections is the 100 town sections shown on the maps, and in the map book you'll see maps from the time and more legible maps prepared both by the Crown and by the plaintiffs showing the exact location of those selected sections. We know exactly where they were. And then we get to the question, so in my submission insufficient certainty to give rise to an express trust

and also no vesting of property in the Crown in 1845. I've traversed this and said about as much as I can about it, I think, in terms of the effectiveness of that grant and the requirement to treat it as absolutely void.

We come then to the question, well, if there was no express trust because there was insufficient certainty of intention to create one and because there was insufficient certainty as to its terms for a trustee to be able safely to administer it and for the Court to be able to supervise its administration, what was there, and there we come back to the answer I gave to the Court a moment ago, which was at the time of vesting, whenever that occurred, what happened was that the land vested in the Crown is demesne lands of the Crown subject to the various forms of Governmental accountability that were real and significant and that applied, as I touched on yesterday, to the instructions, for example. There's no doubt but that a colonial governor was accountable for compliance with his – as they invariably were in those days – instructions to the British Crown but they were a matter between the Governor and the Crown, not a matter giving rise to rights litigable before the ordinary Courts and precisely the same is true of the protection responsibilities in relation to these lands that the Crown took on either in 1848 on the respondent's case or 1845 on the appellant's case.

If there were to be some sort of implied equitable responsibility, equitable duty, then I think Your Honour, the Chief Justice, must be right to say that it would be an equitable obligation to the customary owners of the land concerned. It's a little difficult to know whether it would be to the customary owners of the particular parcels of land or to the customary owners of the whole 151, to be allocated in proportion to the whole 151,000, because, of course, the sections were not taken in a way that mapped net proportions onto customary ownership and that, I think, is another factor that would have discouraged a Court of equity from thinking that it could administer even such an implied trust. It was, it's all too hard, this can only be sorted out by statute and that's why we think it's all referable to matters of public obligation, governmental obligation.

ELIAS CJ:

Well, a Court of equity might have required the lands to be set aside and reserved.

MR GODDARD QC:

Well, there we get into something which looks a lot more like a contractual obligation on the part of someone who acquires lands from a vendor subject to the obligation to subdivide and transfer back that I was discussing with Her Honour, Justice Glazebrook, yesterday, and certainly Courts of equity would act in aid of law in relation to a transaction of that kind, but that has important consequences when we come to limitation because it's quite clear.

GLAZEBROOK J:

But the trouble here is we don't have a contract so, again, it can't have – if somebody had gone to Court and said, "Will you enforce this contract?" the answer would have been, "There isn't a contract because there wasn't a contract."

MR GODDARD QC:

Yes.

GLAZEBROOK J:

The answer would have been there was a process, and I have the same trouble as the Chief Justice myself in saying that the Courts would go, "Oh, well, it's fine, Crown. You do what you like with it."

MR GODDARD QC:

Well, I think that a Court today would be more likely to search for a mechanism by which to hold the Crown to account, and we've seen that in the significant development –

GLAZEBROOK J:

Well, I don't think they'd be searching for –

MR GODDARD QC:

– of public law –

GLAZEBROOK J:

– a mechanism. It would just be the normal principles that – well, I mean, we're talking at purposes but you have specific intentions. You have the history of having set it aside. You have the specific intentions noted both in the 1840 agreement, the 1845 grant, not to mention the 1848 grant, and to say that the Courts would sit back

while the Crown snaffled it for themselves is really doing a disservice even to our colonial Courts.

MR GODDARD QC:
But the Crown was not saying, "We're going to snaffle it for ourselves."

GLAZEBROOK J:
No, no, but if –

MR GODDARD QC:
The Crown was –

GLAZEBROOK J:
No, but your argument says that they could have done with impunity apart from someone trotting along to a select committee.

WILLIAM YOUNG J:
Or possibly challenging the Crown grant by –

GLAZEBROOK J:
Well, that's another –

WILLIAM YOUNG J:
– fieri facias.

GLAZEBROOK J:
– possibility, of course, but –

MR GODDARD QC:
Yes.

ELIAS CJ:
But they'd have to set up their right to do that. That's the whole point. They couldn't go along to the Court unless they had a legal or equitable interest.

WILLIAM YOUNG J:
They could say, could they not –

ELIAS CJ:

No, they couldn't.

WILLIAM YOUNG J:

No, sorry –

ELIAS CJ:

Under fieri facias they could not.

WILLIAM YOUNG J:

Could they not say that it's implicit in the legislation that customary title can only be extinguished on terms that are no less generous to Māori than they have agreed to and that the 1848 grant is invalid because it does not reserve to Māori the reserves that they were promised?

MR GODDARD QC:

The 1848 grant could probably also have been challenged on the basis of – the title that would be suitable would be customary title of large blocks of land which have never properly been extinguished, and that, I think, would have been the short path, and for that matter the challenge, an appropriate form of challenge to the 1845 grant might well have been to look at the defects in the Spain process, his failure to perform his statutory function and to say that was invalid and applying the *Nireaha Tamaki v Baker* line of analysis. So, too, therefore – and the *Clarke*, in *R v Clarke* in the Privy Council is what I'm thinking of, line of analysis, the resulting grant was invalid. But those are very different consequences from a finding of trust in relation to specific sections under the grant.

I think, you know, the submission and the conclusions in the Courts below was that the accountability of the Crown for how it dealt with this land was a matter of governmental responsibility, of – it had the same status, and this is not intended to belittle it, as the Crown's commitments under the Treaty. Those are real commitments, they are meaningful commitments and they are commitments that we have seen play out more than, you know, a hundred years later in settlements that are reached, for example, recognising on the part of the Crown its responsibilities and atoning for its breaches. So these are real obligations. The fact that they are not enforceable before a domestic Court does not mean that they are not a matter of

obligation or that they can be disregarded as a meaningful constraint on freedom of action, and that's really, I think, as much as –

ELIAS CJ:
Well, you didn't need property, though. You didn't need to go to the Treaty for property, it was background to it, because it was accepted that the property interests of Māori were preserved as a matter of New Zealand law.

MR GODDARD QC:
My reference to the Treaty there was as an analogy to point out that there can be –

ELIAS CJ:
But there are political promises in the Treaty –

MR GODDARD QC:
Yes.

ELIAS CJ:
– for which you have to go –

MR GODDARD QC:
Political accountability.

ELIAS CJ:
– to, to – for which you have to make a political claim. That's different.

MR GODDARD QC:
But those are meaningful promises and to some extent in the short term and in other respects in the much longer term they have had real practical consequences for obligor and obligee and in my submission the Crown's responsibilities in respect of these lands are of exactly the same kind, and that is not to diminish them but it is to say that they were not responsibilities that could be enforced in a Court of equity, and I don't think I can add much more to that.

What I want to move onto next is, well, suppose that there was some sort of implied trust or holding trust that came into existence of the kind that Your Honour, the Chief

Justice, has indicated or of the kind that's alleged? We then need to ask, well, in relation to these town sections, what actually happened?

The complaints made in relation to the town sections are twofold. There's the one I've already covered in 7.3, that there should have been more of them, but in my submission it's impossible to spell out of the Spain report and the 1845 grant an obligation to have reserves over and above those specifically identified. That is not so much a bootstraps argument as an attempt to create from an instrument that explicitly recognises a certain number of reserves, some sort of implied obligation to do something different from what the instrument actually provides for. It just makes no sense.

Then the complaint, and it's the most material complaint in relation to the town sections, is the one I deal with in 7.5. This is the 1847 reorganisation of the Nelson township, and this provides a striking example of an important issue in these proceedings about which we have remarkably little information. It's a good illustration again of why there is a practical limitation problem, a practical laches problem to the extent the Act doesn't apply. What we have are various secondary sources, for example, Mackay comments very briefly on this. If the Court has volume 7 of the case on appeal, the key documents volume, and we go to tab 47, we have Mackay writing some time later and the Court will see towards the bottom of page 3158 of the case on appeal, the first page of this extract, there's a long list of the numbers of town sections originally selected as native reserves, about five centimetres up from the bottom, and there should be 100 of those. I haven't counted. And then the next paragraph, "Owing to the impossibility of carrying out the original scheme of the Nelson settlement and the consequent necessity for some equitable compromise the inhabitants applied to the New Zealand Company to modify the arrangements so as to allow the landowners the option of acquiring fresh land and promoting concentration by means of reselection under certain conditions. In furtherance of this object but not in the precise mode suggested by them, the company proposed a new set of regulations in October 1845." So this was running at the time that Spain was doing his thing. These, however, were received with great dissatisfaction, were consequently withdrawn. Settlers continued to press for a remodelling of the original scheme and the directors made another attempt. There were negotiations between a committee of the resident land purchasers and the company's agents. Certain resolutions come to by the Nelson committee on 30 June 1847, subsequently concurred by the company, and an extract from the

resolutions in relation to native reserves is set out. There's a reference to the large reserves in the Wairau and the release of the company from laying out and choosing the 100 rural sections and then it goes on to say, "But in the case of the town and suburban sections, the effect of our proposal would be to allot a much larger proportion than one-tenth of the land actually sold to the natives. How far now that the Crown has taken these reserves into its hands any alteration in them would be sanctioned is a question but we would suggest a memorial being addressed to the Governor with a view to limit the number of town and suburban reserves to one-tenth of the land actually sold so as to throw open the remainder for present choice."

And what then happened was that a proposition to that effect was made by the resident agent of the company on behalf of the land purchases. "The Governor consented to a reduction of the number of the native reserves proportionate to that proposed in respect of the whole settlement. This led to surrender of 47 reserves but the reduction was not extended to the suburban sections. The following is a list of those relinquished," so we know exactly which those 47 were.

Now, we know almost nothing about the process of reasoning that led the Governor to assent to the reduction in relation to the town sections but decline it in respect of the suburban sections. We don't know what considerations about the future viability of the township were in play. We don't know whether there were onerous obligations associated with ownership of the sections such as rating obligations. I suspect those didn't come in until later in New Zealand but I don't know and we have no evidence on any of the factors that were taken into account.

So when we're confronted with this decision which, on its face, involved a significant loss of land to the reserves and we ask was it a breach, we first of all have the question, was this the sort of dealing in respect of which consent could be given at all.

ELIAS CJ:
It's interesting that it doesn't look as though the Governor is thought by McKay to be exercising governmental powers. It's the fact that he's taken these reserves into his hands.

MR GODDARD QC:
Well, I don't think, Your Honour, that McKay is expressing a view about the capacity.

ELIAS CJ:

Well, you'd say he's not competent but it is interesting that he's seeing this exchange as having been made by the Governor effectively qua trustee.

MR GODDARD QC:

I don't think, with respect, that he's taking a view on the status. He's saying it's in the Governor's hands and it was.

WILLIAM YOUNG J:

It was because they were renting it. Some of it, anyway.

MR GODDARD QC:

Yes. By 1845, the last of the three trustees having withdrawn and no other arrangement appearing, I think, to be in place at that time. The timeline for that is set out in detail in one of the appendices to Mr Parker's brief. I'm not even sure anyone was collecting the rents, which would, if there was a trust, obviously be a breach of trust in respect of which time has long run, but the short point is that we know this happened. We know that a measure of judgment was brought to bear consenting in relation to the town sections but not the accommodation sections despite a request for both. The fact that we can't point to an instrument or other document which sheds light on the ability of a trustee to participate in which is effectively a scheme of arrangement in relation to the settlement loops back into my argument about certainty but putting that to one side we just are not in a position to assess today whether this decision, yes, in relation to town sections so it would be more concentrated, no, in relation to suburban was or was not in the best interests of Māori.

ARNOLD J:

But the New Zealand Company still got the title to the entire amount of land, just no longer subject to the reservations in relation to these additional town centres.

MR GODDARD QC:

In 1848.

ARNOLD J:

Yes, so it's a little difficult to – you say there may be a benign explanation of all of this but it's, it – maybe it was done for good purposes but the fact remains the company still got the original amount of land and Māori didn't get the reservations that had been agreed.

MR GODDARD QC:

And what we would need to understand in order to form an informed view on that is what factors were taken into account in 1847 and whether at that time it was envisaged that the whole of the rest of this land would simply go to the company, as happened a year and a bit later in 1848, or whether there was some other possibility in play at that time with the result that it's the 1848 decision that effectively is the disadvantageous one.

ARNOLD J:

Well, it seems to me there's some pretty clear factual material. We know what happened. I'm not myself convinced that there's much in speculating about what might have happened between the middle of 1847 and when the grant was made in 1848.

MR GODDARD QC:

If, for example, there were obligations associated with ownership of town sections, and if the level of settlement was such that the outlying ones were of no –

ARNOLD J:

Reorganisation may have been –

MR GODDARD QC:

– practical value –

ARNOLD J:

– very sensible but it doesn't mean that the consequence, I mean, if you wanted to reorganise you might have said, "Right, we're going to reorganise. We're going to focus the sections. We've only sold 500 out of the 900. We're going to focus them. The remaining land goes back to Māori. Now what you really have to – what you're really saying is there may have been some good reason for not returning that land to Māori.

WILLIAM YOUNG J:

I think what he's saying is there's good reason for getting rid of it and that then takes it outside of any limitation consideration.

MR GODDARD QC:

And I'll come to that, because it clearly went. And so at this point I was really addressing the argument can we say with the necessary confidence that a breach of trust –

ARNOLD J:

Well, that's what I'm saying really.

MR GODDARD QC:

– has been made out.

ARNOLD J:

The obvious thing to do, if you were going to reorganise, was simply to say, "All right, the additional land that we haven't been able to sell and we can't use would go back to Māori," but that's not what happened.

MR GODDARD QC:

No. The argument for the plaintiffs at first instance was very much, well, all of this land was supposed to be inalienable so the mere fact of disposal of it was a breach however good your reasons, and the fact that – but there was no declaration of trust in those terms at that stage and every statutory regime that we see before and after contemplates at least exchanges. It's whether this sort of arrangement would have been sanctioned or not is hard to tell without clear terms of trust.

ELIAS CJ:

Well, Māori didn't have any say in which they got allocated so this was really just a reconsideration of that process.

MR GODDARD QC:

Yes, and that's another way of looking at it is this was just a re-run of what was originally intended at base, which was a proportion at allocation, in light of the fact that the town turned out to be smaller. I don't want to spend much time on the question of whether this was a breach because it seems to me that the arguments

sitting on either side of this are stronger, first, that it was not a trust administered in the Courts of equity and, second, that if there was a breach then the claim in respect of it is time barred and –

ELIAS CJ:
I just notice in the last paragraph it says that it was of great benefit to the trust's estate.

MR GODDARD QC:
The overall reorganisation?

ELIAS CJ:
Mmm.

MR GODDARD QC:
Yes, that's right, and so that's – I was going to get to that. That's I think more in relation to, just to be fair, to –

WILLIAM YOUNG J:
Suburban swaps?

MR GODDARD QC:
– to the suburban –

ELIAS CJ:
Yes, yes, I understand that but he's characterising them as the estate of the trust.

MR GODDARD QC:
But also identifying, yes, that the action is for the benefit of that estate, those ones which I haven't yet come to. And it's not as if we can be confident, or can assume, that all decisions were made were, and I guess this is the point actually I should have made, it's quite clear that the Governor was not uncritically preferring the interests of the company to the interests of Māori in all respects or acceding to all the company's requests. Requests were being made, some were being accepted, some were being rejected, and I don't think on the state of the evidence that we are well placed to assess whether the particular decisions that were made in relation to this or other

matters were inconsistent with the equitable duties which themselves are hard to pin down in this matter. I'm conscious that it's a few minutes past 11.

ELIAS CJ:
Yes, we'll take the adjournment.

MR GODDARD QC:
I'll deal with limitation after.

COURT ADJOURNS: 11.05 AM

COURT RESUMES: 11.22 AM

MR GODDARD QC:
So the point in the argument that we've reached, Your Honour, is the point of saying so if there was a trust of some kind and if the participation in the reorganisation by the surrender of 47 sections without their replacement – and I'm picking up Justice Arnold's point – was inconsistent with that obligation, can the claim be pursued some 160 years later before the Courts, and that turns on both limitation and potentially, if it's not an express trust or an implied trust but some sort of other equitable duty, questions of a laches or at least application by analogy. It's worth I think going to the Limitation Act 1950, as discussed by this Court in *Paki (No 2)* so far as what was being asserted was an equitable interest in land, the Real Property Limitation Act of 1833 was in force in New Zealand and could conceivably have barred the claim earlier, but it's sufficient I think to look at the 1950 Act because that included more extensive provisions in relation to trusts and it is, in my submission, sufficient to show that these claims are barred.

Key provisions, very quickly – sorry, we're in volume 1 of the authorities and the Limitation Act as enacted is under tab 26 – the first point to note is in section 2, the definitions, land, which includes any legal or equitable –

ELIAS CJ:
I'm sorry, I missed that, what was that?

MR GODDARD QC:

I'm sorry, Your Honour, I did that rather fast. Tab 26, volume 1, pink volume of authorities, the legislation volume, tab 26 is the Limitation Act 1950.

ELIAS CJ:

Is it the Limitation Act 1950 you're relying on or –

MR GODDARD QC:

Yes.

ELIAS CJ:

– the earlier one?

WILLIAM YOUNG J:

Yes, it's really, it's, I think it's common ground that it's easiest to go direct to that Act.

ELIAS CJ:

Yes, yes, I think that's what we've concluded.

MR GODDARD QC:

I was persuaded by this Court's analysis in *Paki (No 2)* that all one achieves by looking at the Real Property Limitation Act 1833 is a measure of –

WILLIAM YOUNG J:

Is confusion.

MR GODDARD QC:

Yes, pain, suffering and confusion, and that it's better short-circuited by going straight to the 1950 Act. There's also the short point that we pleaded the 1950 Act and not the 1833 one, which going straight to the 1950 Act forestalls any argument about.

So section 2, definitions, land, as this Court noted in, again, *Paki (No 2)*, includes any legal or equitable estate or interest therein, and that's important because when we turn over to – well, it's probably just worth noticing in passing the very familiar section 4 in relation to actions in contracts and tort and certain other actions and of course the limit on the application of that section to equitable claims in subsection (9), come back to that – but then section 7, limitation of actions to recover land, subsection (2),

"No action shall be brought by any other person," that's anyone other than the Crown, "to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or to some person through whom he claims," and we don't need to worry about the proviso, so a 12-year limitation period for claims to recover an interest in land, including an equitable interest in land, and the application of those provisions to land held on trust is explicitly recognised in section 10, if we turn over the page, and this also helps because it provides an explicit linkage through to section 21. So subject to the provisions of subsection (1) of section 21, which we'll come to in a moment, "The provisions of this Act shall apply to equitable interest in land, including interests in proceeds of sale, in like manner as they apply to legal estates and accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person in title and possession to an equitable interest in the like manner and circumstances and on the same date as it would accrue if its interest were a legal estate in the land," so what is probably implicit in section 7, and the definition in any event is spelled out in section 10, but that's subject to the provisions of section 21 subsection (1). Just on the way to that it's perhaps worth noticing section 18, extinction of title after expiration of period, 18, "Subject to the provisions of section 10 of this Act, at the expiration of the period prescribed by this Act for any person to bring an action to recover land," which the Court will remember includes equitable interests, "the title of that person to the land shall be extinguished." This was a very important provision under a deeds system because it meant that if you'd been in possession for more than the limitation period you had a secure root of title by virtue of that possession. It's much less important of course under a Torrens system, but under a deeds system this was critical, this meant that the title was permanently extinguished and that the sort occurrence that can revive a limitation period in a, you know, like an acknowledgement or something like, did not work in relation to interest in land, and that's why one had a provision of this kind, it was security of title, which was an important value of the law, and a critical balance between on the one hand vindication of rights where there'd been wrongs, and on the other hand security of title and the ability to deal in land going forward, and this provision was part of that. So explicit provision for the extinguishment of title to interest in land, including equitable interests, after a limitation period has run.

And then we come over to 21 under the cross-heading, "Actions in respect of trust property or the personal estate of deceased persons," and it's 21, so it's not in a very logical order, it's, as the Court I think actually has observed a few times. Subsection

(2) provides, subject to subsection (1), "An action by a beneficiary to recover trust property or in respect of any breach of trust not being an action for which a period of limitations prescribed by any other provision of this Act shall not be brought after the expiration of six years from the date on which the right of action accrued." So if you're seeking to recover on equitable interest in land you've got a 12-year period by virtue of sections 7 and 10, but for any other breach of trust claim it's six years, subject in both cases to the exceptions in subsection (1).

What is the exception? Well, the exception is, in 21, "No period of limitation prescribed by this Act," so it's the whole Act, including the land provisions and including subsection (2), "shall apply to an action by a beneficiary under a trust, being an action." Now we no longer need to dwell on (a). That's no longer relied on, as I understand my friend's submissions. Or (b), "To recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use." So there is an exception here. It's an exception which, as the Courts have explained in a number of other contexts, is driven by the fact that possession by a trustee is not on its face adverse to the beneficiary. So there's no event which triggers the running of time. That, of course, is why equally the exception doesn't apply where the trust is imposed as a remedial response to a wrong, where the so-called trustee takes initially as the result of a wrongful act or some act adverse to the claimant. But you can't, as a trustee, say on the one hand, "I hold this pen for you," if I held this pen on trust for my learned friend, Mr Galbraith, then he's entitled to rest secure on the assurance that I'm holding it for him and for so long as I have it no time will run even though secretly I'm using it to highlight my submissions and using it up. A very prosaic illustration of a very important principle, and that's the principle discussion in *Paragon Finance* and more recently by the UK Supreme Court in a very helpful and illuminating survey of the law in this field, *Williams v Central Bank Nigeria* [2014] AC 1189 (SC). If I had more time I would have gone to it, both because it's incredibly illuminating on the history of these matters and the principles that underpin them and because the facts are great, but it's in volume 8 under tab 139, and it was footnoted, I think, by Your Honour, Justice Young, in *Paki (No 2)* as a recent consideration of the *Paragon Finance* principle, but it's taken, I think, that analysis really to the next level while consistent with *Paragon*.

So what we have here is a claim which is rather short on particulars. There are allegations in relation to the claimed land, either that some land is still held by the

Crown subject to these trusts or, alternatively, that it's been converted to its use. But what seems reasonably clear, and we can do this again focusing on the town sections to begin with, is that the breach complained of relates to the 47 sections that were surrendered. We know where they are. Both parties have prepared maps marking them exactly, so we know what land we're talking about. That's the only land in the town that is the subject of a specific claim of misapplication as opposed to the more generic, "Oh, there should have been more claims."

And in relation to that land, there is no allegation that any, that all or any of it, with, you know, precision, is in the hands of the Crown. My friend, my learned friend, Ms Feint, said the day before yesterday it will have been granted to settlers and she was not suggesting it was in the possession of the Crown today, and the only land specifically referred to in the town by these plaintiffs in the course of these proceedings to date are the Auckland Point sections which, of course, were not among the 47 surrendered which have nothing to do with the alleged breaches. So the –

ELIAS CJ:
And the Auckland Point has gone now anyway, has it, or is that…

MR GODDARD QC:
No – the Auckland point, so that was the one taken under the Public Works Act –

ELIAS CJ:
Yes.

MR GODDARD QC:
– of 1924. It was included in the commercial redress properties –

ELIAS CJ:
Yes.

MR GODDARD QC:
– under the settlement. It was ultimately selected not by –

ELIAS CJ:
Yes.

MR GODDARD QC:

– the four iwi who had the interests in these lands but by one of the Kurahaupō iwi as a commercial redress property, and the transfer of that land to the relevant trust has been effectively delayed, frozen, by the caveat that Wakatū lodged which was not removed the High Court pending the final resolution of these proceedings. So the position remains that it's held by the Crown subject to a commitment to transfer – I'm reminded by my learned junior that the Tenths actually still hold, that Wakatū hold some of Auckland Point, but that to the extent that it went to the school it's held by the Crown subject to the caveat and pending transfer to the iwi that selected it as part of its redress. I hope I've got that right. My learned friend Ms Feint said something about other Tenths' sections with the District Court, under the District Court, the surrendered 47? Okay. I'm grateful to my friend. So, not that there's any evidence of that I think here, although I stand to be corrected on that as well.

But the position then is that it's alleged that there was a breach of trust in not selecting the or not retaining the 47 sections. They were then granted in 1848 to the Company absolutely. So –

WILLIAM YOUNG J:

Just so I understand, the other sections that were the subject of reserves, were they granted directly to the Crown?

MR GODDARD QC:

There was no express grant, they were simply reserved from the grant and then dealt with by the Crown pursuant to eventually the legislation in 1856.

WILLIAM YOUNG J:

Right.

MR GODDARD QC:

But there was no explicit land dealing in relation to those sections in 1848.

So the land in, went to the Crown – the 47 sections went to the Company in 1848 as part of the large grant, and at that stage on the appellant's case there was a breach of trust, and at that stage those sections were not retained by the Crown. So at that point, unless, and subject to it coming back, if nothing more had happened we'd have been looking at a breach of trust which would no longer be an action to recover the

land because the land would not be held by the trustee nor is there any proceeds of it, there was no payment for the land to the Crown in the 1848 grant, so time would be running. The complicating factor is that all of the land came back into the hands of the Crown in 1850, came back pursuant to the legislation, the Imperial Act of 1847, and subject to the obligations to deal with the land set out in that Act, which provides that it returned to the Crown subject to the obligations of the Company, which would include equitable interests on the part of purchasers who had signed a contract then paid for a section, and which were then spelt out and machinery provided for giving effect to them in the 1851 ordinance.

And again to the extent that – so the first question is, so what's the status of the land at that point in time? And in my submission it's re-vested pursuant to a statutory mechanism which didn't contemplate any trust, and either it re-vested absolutely subject only to the obligations provided for in that Act or, if there was any equitable consequence of the previous breach when the land came back, that was in the nature of a remedial constructive trust imposed as a result of the prior breach and the *Paragon* and *Williams* line of authorities applies.

ELIAS CJ:
But isn't it possible to look at it in terms of the, instead of in terms of breach in terms of the status of the land, and if that were subject to a trust and went to the Company but was recovered by the Crown why isn't it within the terms of section 21(1)(b)? Because if it is trust property then it became – I'm just talking about as at 1852 or whenever we're talking.

MR GODDARD QC:
The holding of the land pursuant to the alleged trust had clearly been broken by the disposal and in terms of –

ELIAS CJ:
Yes but it must happen that trustees must sometimes wrongly disposed of property have an obligation to get it back. The fact that it's interrupted wouldn't affect the application of section 21(1)(b), would it?

MR GODDARD QC:
If they recover it to hold it on the trust and that is where it seems to me that –

ELIAS CJ:

But if they recover it and it is subject to trust, that's the discussion we were having before.

MR GODDARD QC:

It is and that's where it seems to me that the application of the exception or the non-application of the exception to someone who holds adversely to the beneficiary becomes important because there was no suggestion that when the Crown re-acquired these lands pursuant to the 1847 Imperial Act it was proceeding on the basis that these 47 sections, for example, were held on trust. It was treating the land as its land to deal with.

ELIAS CJ:

Why does that matter?

MR GODDARD QC:

Well, time had started running when the Crown lost possession, effectively, pursuant to this and the question is whether it stopped running when it was recovered.

ELIAS CJ:

No, because it could still have been subject to trust in the hands of the New Zealand Company.

MR GODDARD QC:

Well, that would have been a constructive trust imposed on a knowing recipient of trust property and the whole point –

ELIAS CJ:

No, only if you're looking at it in terms of breach but if you're looking at it in terms of the status of the land being trust, the trust property.

MR GODDARD QC:

But in the hands of the New Zealand Company there was no intention that the New Zealand Company be a trustee. At this stage this had been abandoned. Ever since 1840 that had gone so you could only say that it was held subject to equitable obligations by the New Zealand Company. If you treated the New Zealand Company as a knowing receiver there would be an argument.

ELIAS CJ:

I'm not sure that they might not themselves be trustees myself but …

MR GODDARD QC:

Well, they were claiming it in their own right. They were never – they did not receive it in 1848 as a trustee for anyone, on behalf of anyone. They were asserting their own title.

ELIAS CJ:

No, they were away laughing, really, weren't they?

GLAZEBROOK J:

Well, the Crown had already taken – they had an agreement that the Crown would take over so one can imagine that they were perfectly entitled to say, well, the Crown's dealing with that and whatever it does has nothing to do with us now.

MR GODDARD QC:

Now, the plaintiffs suggest or have suggested at times, and one can understand the argument, that they were, that the New Zealand Company was aware of the intention to hold the 100 sections on trust. To put it mildly, it was their idea in the first place. They knew that the sections had been surrendered and that was a breach of trust, which is the hypothesis we're operating under now. They knew all the circumstances relevant to that breach so you have a respectable knowing receipt argument against them if there was a breach by the Crown, but what is critical then is whether this question of whether time runs under 21(2) which is not confined to claims against the trustee. It applies to all claims by a beneficiary to recover trust property or in respect of a breach of trust. Then does the exception apply – the exception which is limited to an action by a beneficiary under a trust and the Courts have said against their trustee is what that applies to and for reasons of both principle and legislative history the Supreme Court says that the exception does not apply to someone who takes adversely to the beneficiary even though they may be liable in knowing receipt.

GLAZEBROOK J:

Assuming the trustee and taking the principle that people are entitled to think that the trustee will look after everything, the fact that there's a gap, does that matter? Because one assumes because having got – just assume an absolutely normal sale

to somebody and then a sort of, “Whoopsie, I shouldn’t have done that, I’ll just quietly buy it back and put it back into the trust estate and pretend nothing had happened,” if later the trustees sell it again then presumably the beneficiary could come along and say, “I want that trust property back.”

WILLIAM YOUNG J:
But that’s because it’s held on express trust. The trustee is acknowledging after the re-acquisition that it’s subject to the trust.

GLAZEBROOK J:
Well, maybe the trustee isn’t acknowledging that, they’re just getting it back and doing some trading and get it back in their personal name.

MR GODDARD QC:
Yes and in my submission that’s the critical difference. If it has been re-acquired in circumstances where –

GLAZEBROOK J:
So if you’re dishonestly dealing with it back and forth you’re better to have sold it out first before you take it back to use it for yourself and then say, “I’m relieved of trust obligation or at least if you come back after I’ll just sit it out for 12 years and if you come back after 12 years I’m sorry, it’s gone out and come back in and it’s no longer subject to the trust, so I get out of the whole thing of being dishonest by selling it out, buying it back, and then saying it’s mine and time ran against you. Too bad.”

MR GODDARD QC:
If it was –

WILLIAM YOUNG J:
Well, there’s a fraud exception, of course, too.

MR GODDARD QC:
Yes, there’s the fraud exception, of course, and then there’s the concealed fraud exception and we’d need to work our way through those but what the Supreme Court emphasises rightly, in my submission, the exception under 21(1) isn’t directed at fraud.

GLAZEBROOK J:

Well, fraudulently, I suppose, because fraudulent doesn't acquire, relate to a breach of trust. The trustee might have mistakenly thought that it was perfectly entitled to do that.

MR GODDARD QC:

I was referring to fraud about whether it was better to be spectacularly fraudulent, and that's not the submission but I was also wanting to make the point that 21(1) is not about an exception driven by fraud, that you can be wholly fraudulent and nonetheless take the benefit of section 4, the time period in relation to common law fraud, the section 21(2) limitation period in respect of fraud that sounds otherwise in equitable remedies, and what 21(2) is concerned about is the difference between a trustee holding for their beneficiary with the result that it's not an adverse claim and someone who asserts an adverse claim and in my submission what we have here is a situation in which it was quite clear that no trust was recognised and that a claim adverse to Māori was being asserted first by the company from 1848 and second by the Crown when the company property came back to it, subject to various obligations under the 1847 and 1851 legislation.

GLAZEBROOK J:

So the only time this would operate is if the trustee expressly acknowledged when they got it back they were holding it on trust, otherwise you break the chain.

ELIAS CJ:

As a matter of statutory construction I find that hard to follow.

MR GODDARD QC:

The other – so that's the argument that it doesn't matter what happened after 1850 but then we come to the practical point that even if I were to be wrong on this and once the property came back 21(1)(b) applied while that property was held by the Crown to the extent that it went out again. Of course, on any view time starts running again.

GLAZEBROOK J:

Not on the proceeds, though.

MR GODDARD QC:

Only if there are proceeds in the hands of –

GLAZEBROOK J:

No, I understand that and in many instances it would have been granted without proceeds presumably.

MR GODDARD QC:

And the clearest example of that is the one that His Honour, Justice Young, put to me yesterday.

GLAZEBROOK J:

Well, the New Zealand Company's just – but whether…

MR GODDARD QC:

Of the Grey.

GLAZEBROOK J:

The rest of it would have been granted with proceeds, though, wouldn't it?

MR GODDARD QC:

That…

GLAZEBROOK J:

What they got back and didn't have to give to the New Zealand Company, I wouldn't have thought they'd be just granting without consideration having been paid with the Crown?

MR GODDARD QC:

It would depend on whether it was being granted, for example, to a local authority for public purposes in which case –

GLAZEBROOK J:

No, I understand that but –

MR GODDARD QC:

No, but that's important because the –

GLAZEBROOK J:

Well, we don't know though, do we, what – or do we know?

MR GODDARD QC:

No, we don't know and the burden is on the party asserting the exception to the limitation period to make it out. I deal with that in paragraphs 12.6 of my principal submissions and I refer to a couple of cases on the burden in this situation. The most helpful one is a High Court of Australia decision called *Banque Commerciale SA En Liquidation v Akhil Holdings Inc* (1990) 169 CLR 279 (HCA) and that –

ELIAS CJ:

Where's that? It's referred to in a footnote, is it?

MR GODDARD QC:

It's in a footnote to my 12.6 and it's at tab 118 of the authorities, and the relevant passage is, perhaps just provide Your Honour with the page references, I really don't I think have time to go to it, in the judgment of the Chief Justice and another one of the Judges, Chief Justice Mason and Justice Gaudron at 285, and also Justice Brennan at 289 to 2 – 290, really, 290.

GLAZEBROOK J:

You were, I think, the Chief Justice asked you a while ago, I think, or the issue came up as to whether there'd be at least an evidential burden that shifted to the party that's likely to know this, and you said you were going to deal with that. Is this an appropriate time to do that?

MR GODDARD QC:

It is an appropriate time and, in my submission, this is a matter on which discovery can be sought and was sought and provided and that the burden rests squarely on the party alleging application of the exception to particularise the property or the proceeds that they say are still held by the trustee and to make good that allegation.

GLAZEBROOK J:

And you say the proceeds have to be still held because, of course, money being fungible that won't be the case, will it, in any case?

MR GODDARD QC:

No, it may have been applied to judicial salaries or something like that –

GLAZEBROOK J:

Well, it could have been applied to –

MR GODDARD QC:

– and lost forever.

GLAZEBROOK J:

I'm just asking though, it was a question in terms of what "proceeds" means.

MR GODDARD QC:

Yes. If we go back to the language of the provision, I think that's reasonably clear from it. "To recover from the trustee trust property or the proceeds thereof in the possession of the trustee." So it's clearly referring to both those –

GLAZEBROOK J:

Or previously received by the trustee and converted to its use.

MR GODDARD QC:

And converted to his use.

GLAZEBROOK J:

So presumably if it's spent it's still – if there are proceeds –

MR GODDARD QC:

That have been converted to the trustee's use.

GLAZEBROOK J:

Then they are still able to be recovered.

MR GODDARD QC:

Yes, so that's how I read this as well, Your Honour, but what is still necessary is to identify the proceeds and allege that they've –

GLAZEBROOK J:
Absolutely, absolutely, I understand that's the position.

MR GODDARD QC:
So one can't just say, "Oh, there might have been some gain from this property which might have been converted to your use." The whole machinery of pleading and discovery and evidence exists to enable a plaintiff to pursue this, and, of course, what happened is the claim was pleaded, including in terms that echo this provision. The Limitation Act was pleaded and then discovery was sought on this as on other issues, and although there was a concern expressed by Mr Ingram, I think it must have been when the evidence was first filed back before the first stage of the hearing about not having time, there was abundant time before he in fact gave evidence and certainly before the proceeding concluded a year later, given the scattered hearing time to deal with this, and Her Honour, the President in the Court of Appeal, expressly remarked on the fact that there had been time to deal with questions of breach and I would say a fortiori these limitation issues which were squarely raised.

So the bar is made out in relation to the breach except to the extent that the plaintiffs have identified sections from these 47 that are in the possession of the Crown today, and I was not under the impression that any were being pointed to – and I understood my learned friend Ms Feint to acknowledge that, this in the context of the town sections that will be granted to settlers so they're not arguing that that's held, and there's been no identification of any proceeds held or converted to the Crown's use. So on the state of the evidence before the Court as I understand it –

ELIAS CJ:
That is something on which there could be inquiry.

MR GODDARD QC:
But why would there be an inquiry, Your Honour, when there's been a trial? There was –

ELIAS CJ:
Well, there haven't been findings of fact. In fact one of the questions I have is why the Court of Appeal, having taken a different view of standing, didn't remit the matter to the High Court?

MR GODDARD QC:

Well, on this issue the Court of Appeal was satisfied, first, that on its face the time period had run and, second, that there was nothing put before them to establish that the exception applied. And this was a trial everything, so even in the absence of findings one would expect the evidence on this to be in the record and able to be pointed to, and it hasn't been. So – because there's a world of difference between remitting something to a Judge to make findings on the basis of evidence –

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

– that's already been taken and holding a whole new inquiry –

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

– and in my submission there's absolutely no warrant for a fresh limitation hearing here, the evidence is in and the evidence does not establish, as I understand it, certainly none's identified in my friend's submissions, that there are sections of these 47 in the Crown hands today, or that particular proceeds were received and converted to the Crown's use.

WILLIAM YOUNG J:

But I think –

MR GODDARD QC:

And if I'm wrong on that then I'm sure it will be pointed out in reply.

WILLIAM YOUNG J:

But the appellants' case presumably wasn't really presented in a way that was carefully tailored to section 21.

MR GODDARD QC:

No, it was all at a much more broad-brush level.

WILLIAM YOUNG J:
Okay.

MR GODDARD QC:
And indeed, one of the striking things about this case is that though the plaintiffs have approached it at a rather more conceptual level focussing on the broad grievance, and the Crown has been saying it's a property case, it needs to be pleaded with appropriate particularity, we need to know who the parties are and we need to deal with these as effectively black-letter law issues, and it would be fair to say that to some extent that the way the case was run by each party, you know, passed a bit in the night as a result, and my submission is that given the nature of the claim it did have to be run as an orthodox equitable property rights assertion and not as a Waitangi Tribunal inquiry, that also happened, and there was a separate mechanism for responding to that, at the level of generality appropriate to that forum.

As I say over the page on my note, page 4 of my road map, and I touched on this yesterday, the Auckland Point land that was acquired under the Public Works Act is a complete red herring because that is not land which is alleged to have been disposed of in breach of trust, so the fact that it was acquired under the Public Works Act some decades later is neither here nor there, it's completely irrelevant to this proceeding, it certainly sheds no light on the application of the section 21 exception because it is not trust property that was, you know, dealt with by the Crown other than consistently with the obligations imposed on it.

There are no other breaches alleged with respect to dealings with the town sections, and the same responses would apply, and then of course there's also the standing and Settlement Act issues which have been discussed at a generic level.

That brings me – and I'm going to deal with this very fast – to the accommodation sections. The first three points, four points, about certainty and when title vested in the Crown I've already dealt with. At 8.5 in my –

WILLIAM YOUNG J:
Does this really matter? Because the suburban sections were allocated.

MR GODDARD QC:
Yes, they were allocated, and we need then to move on to whether there were breaches.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
So, that's right, that's another reason why I can skate over, is that it doesn't matter too much.

WILLIAM YOUNG J:
So 8.2, 8.3, 8.4 are all really by-the-by aren't they?

MR GODDARD QC:
They're important issues of principle.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
But even if the appellants succeed on all of those there are several complete answers to the claim, yes, Your Honour's right.

And here I think I am on much safer ground than in relation to the 47 town sections in saying that it is difficult to discern any breach of any trust or equitable obligation in relation to the hundred accommodation sections or the hundred suburban sections. The complaints that are made and twofold exchanges of some sections for others and the grant to the Bishop. There is no basis in the evidence for suggesting that the exchanges were not in the interest of Māori, indeed the Court noted earlier McKay's observation to the contrary, and when the statutory regimes comes on the scene later there are powers to exchange sections, as one would expect. And the grant to the Bishop was a grant of land for purposes wholly consistent with the broad objective of benefit for Māori as conceived by the framers of these trusts. We may think today that there would have been better ways of pursuing their interests, but that's not the test, the test is whether it's consistent with the benefit in broad terms of

Māori. And even if there had been a breach, this is very clearly land in respect of which the section 21 exception does not apply.

If we turn over the page to the two categories of land, the exchanges and the land granted to the Bishop, the land granted to the Bishop's the easiest one, so let me deal with that, even though it's my B first. As Your Honour Justice Young observed yesterday, this is very clearly time barred. What happened is the Crown granted, gratuitously, to the Bishop 900-and-something acres of land for a school. If that was a breach of trust then clearly time has run in respect of it. That land is not in the hands of the Crown, to the extent that it was still held by the Church, it's been transferred to the trust established by the NRAIT Empowering Act 1993, there's no possibility of an exception to the time bar applying in respect of the Bishop's land.

So far as the exchanges are concerned, again, what are we talking about? We're talking about sections that went out from the reserves to settlers in exchange for land that came in. So again, by definition, the land that it is said wrongfully went out has gone to a settler, and there's no evidence at all to suggest that any of that remained in the hands of the Crown. It will of course comes back in 1850, but it was all settler land which the Crown had an obligation to re-grant to the settlers under the '47 and '51 Acts. So – and there are no other breaches alleged with respect to dealing with – oh, I've said "town sections" in 8.8, that should be "accommodation", and the same responses would apply, there was the standing and Settlement Act barriers.

We come then to the rural reserves. If one had gone to a Court of Equity in 1845 asserting a trust of 100 150-acre sections in the land identified in the 1845 grant as the areas from which rural sections were to be selected by the Company or whether – the Court would have said, "What is the subject matter of this trust? Unless you can point to it, there is no trust." So as well as the issues about certainty of intention, as well as the issue of certainty of objects that I've discussed already, there is the added problem here that there was no identifiable property in a trust in 1845 in the rural area. There was a process in contemplation for a two-faced selection, and we discussed this yesterday. First of all, selection by the Company of its lands and then a selection process which did eventually happen for the settlers in which in accordance with your ballot parity you would choose particular rural sections. But this, I think, is a nice illustration of the way in which these reserves were matters of public power. What was the source of – if the Governor had insisted on a selection

of rural reserves, by virtue of what right or power would the Governor had been insisting on that selection. There was –

GLAZEBROOK J:
Is this after the 1848 grant, sorry, I'm just catching up here.

MR GODDARD QC:
I'm operating here on the – after 1845. The selection of the rural sections happened between 1845 and 1848 in fact and that's when it's said that it should have happened. In 1848 it was too late because this land went to the Company. So the complaint is that these lands should have been selected after 1845 but before 1848 and as a result excluded from the 1848 grant.

GLAZEBROOK J:
I just don't see what the, why the Governor would have had any difficulty insisting on the rural reserves being selected at that point.

MR GODDARD QC:
I agree, but what I want to do is identify why the Governor could have insisted on that, and that's important when we ask if there was a trust because there was no property right, or even a contractual right, held by the Governor enabling the Governor to insist on the selection of these rural reserves. The reason the Governor could have insisted on it Your Honour, and I think this is probably what Your Honour is thinking of, is that the Governor was the source of the –

ELIAS CJ:
Grant.

MR GODDARD QC:
Power to grant land and so the Governor could say, well I'm not going to give you a grant until the selection has been made and the reserves withheld. Now that is a public power, the power to issue grants in the name of the town –

ELIAS CJ:
I thought in other litigation you've argued that that's a third source power if the Crown owns the land. Because that's what it's doing, it's granting its own land. It's a prerogative power.

MR GODDARD QC:

A prerogative power which is not exactly the same as third source –

ELIAS CJ:

No, no, well that's what I –

MR GODDARD QC:

I think there's no daylight between me and Your Honour –

ELIAS CJ:

No.

MR GODDARD QC:

– in relation to the fact that prerogative is different from the so-called third source, or as I prefer to term it, natural person powers, of the Crown. The difference that has emerged in argument in previous matters is whether there is such a category at all.

ELIAS CJ:

Yes, yes, but there's a prerogative power.

MR GODDARD QC:

But there's a prerogative power and we're not going to handle the prerogative here, and that –

ELIAS CJ:

But it's the Crown under its prerogative disposing of property it owns.

MR GODDARD QC:

Yes, but one cannot hold a prerogative power on trust in the equity sense.

ELIAS CJ:

Well I don't think it is – well I think you –

MR GODDARD QC:

It's not property.

ELIAS CJ:

Well, but the property of the Crown is subject to the Trust. That's the argument.

MR GODDARD QC:

Well it's quite clear that there was no express trust of the whole of the lands.

ELIAS CJ:

No it buys, it turns on the argument of what degree of certainty is required. As you've said the Crown have the whip hand in this. It could have identified –

MR GODDARD QC:

And I accept that absolutely but it's whip hand was a public whip.

ELIAS CJ:

Well I don't know that that matters at all.

MR GODDARD QC:

Well it matters in this sense that to the extent that there were any sort of equitable claims, to compel a selection process, and then that what was selected be held on trust.

ELIAS CJ:

But it could have excepted the land that it decided was subject to, or well that it acknowledged was subject to a trust.

MR GODDARD QC:

But if I declare a trust of 20 books in my library for the benefit of my learned friend Mr Galbraith, I have it wholly in my power to select those but until I do, no trust comes into existence.

ELIAS CJ:

Well it's the same argument we've been having, really, the same argument you've been putting.

MR GODDARD QC:

I think it's a different one because in relation to my book example I'm not relying on any public law/private law issue.

ELIAS CJ:

Well the question is whether there is sufficient indication of trust, that it was subject to trust. If it was subject to trust the "it" was capable of being ascertained by the Crown which was under the obligation to give effect to the trusts, that's the argument.

MR GODDARD QC:

So at this point it's about the "it". It's two-fold. First of all –

GLAZEBROOK J:

What's your best authority on that particular point so that you could, say you had 40 books and you promised that you would hold 20 on trust for Mr Galbraith, what's the best authority that until you actually select those 20 books you are entitled to sell the whole of the 40 and retain the proceeds?

MR GODDARD QC:

There are, let me just –

ELIAS CJ:

This isn't an at whim self-created trust either, which matters. It's not something that you're constituting?

MR GODDARD QC:

It doesn't matter –

GLAZEBROOK J:

Well especially in this particular case because it was actually the consideration for the sale of the land.

MR GODDARD QC:

It doesn't matter in terms of the certainty test. The fact that it's not a unilateral declaration of trust means that there might be other mechanisms for compelling performance. So if I entered into a contract with my learned friend, under which my learned friend agreed to pay me $200 in exchange for my promise –

ELIAS CJ:

Contract is not the paradigm here. It's trust and real property precede contract law. This is sort of, as I said here, foundational stuff really.

MR GODDARD QC:

Yes, no I'm just trying to find the best point for the – here we go. So on certainty of subject matter my argument is well captured in the Court of Appeal decision under paragraphs –

GLAZEBROOK J:

Do they refer to –

MR GODDARD QC:

Goldcorp.

GLAZEBROOK J:

I want your best authority, which doesn't mean the Court of Appeal decision in this case. And this is with all due respect to the Court of Appeal.

MR GODDARD QC:

It would be Justice Oliver in *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 as followed in *Goldcorp* by the Privy Council. So it's *London Wine Company* and *Goldcorp* and I say that for the reasons given by the Court of Appeal, *Hunter v Moss*, which was the fungible shares case, is different. Land is not fungible.

ELIAS CJ:

You know Macklin says, that in his writing on equity, says that it's almost meaningless, really, not to look at trusts separately in relation to real property and other forms of property. It's part of that corpus of law.

MR GODDARD QC:

And in this area the need for certainty on real property was a matter of particular emphasis in the Chancery Courts because – for the same reasons –

ELIAS CJ:

What's your authority – I'm just looking at Gamble Williams.

MR GODDARD QC:

And I am thinking of – I would need to go back and look at the real property cases, but those were the source of the original rules on certainty of subject matter and the critical importance of knowing exactly what parcel of land was held on trust, and it

links into the special equitable rules about specific performance of contracts for the sale and purchase of land because every parcel is unique and distinct which is why equity always said damages is not a sufficient remedy. And so for the same reason it was particularly important in order to validly constitute a trust of land that one know exactly what the meets and bounds of that land were. And there are old cases Your Honour about the extent to which uncertainty about boundaries can be resolved. But what we're talking about there is literally boundaries around the edge of a parcel that may not have been identified with the precision that one would expect a surveyor to bring to the task, not a selection process. So there is no case I am aware of in which a trust for a smaller parcel of land to be selected from a larger parcel has ever been upheld by a Court of equity

ELIAS CJ:
But has it ever been considered?

MR GODDARD QC:
In the context well –

ELIAS CJ:
From an identified larger parcel?

MR GODDARD QC:
I think there have been family settlement cases but I haven't specifically focused on the real property cases as opposed to the more recent statements of the principle in *London Wine Company* and *Goldcorp* –

ELIAS CJ:
Well, they're really is –

MR GODDARD QC:
– and Your Honour is –

ELIAS CJ:
– I'm just saying it will, I think it would be helpful because those, they're such, they're a mile away the context of those recent cases and you can skew the law if you don't keep those sort of distinctions in mind.

MR GODDARD QC:

I think they are in some respects different but they're different in the sense that there is less reason to be concerned about precision in relation to bars of gold than particular parcels of land so I would say that if the principles have been applied and upheld in those cases in the context of personalty, had for sure one would expect them to apply in relation to –

ELIAS CJ:

In this case you say the rural sections were selected?

MR GODDARD QC:

No, not the rural reserves.

ELIAS CJ:

No, no not the rural reserves –

MR GODDARD QC:

– no the settlers' one were yes.

ELIAS CJ:

– the settlers' were. So why does it matter to anyone other than the trustee and the interests of the Trust, who are – where the sections are selected from after that? It's not a – you're no longer into that, there's a process of selection with different interests. The settlers have got what they want?

MR GODDARD QC:

But at the stage –

ELIAS CJ:

So you've got the, you've got the area, you've got the settlers' interests taken out, why shouldn't, why isn't there certainty in the sense that the trustee can simply identify –

MR GODDARD QC:

Because as we explored yesterday, my understanding is that the boundaries were more than the 151,000 acres in the partly surveyed area so it's not simply a case of identifying a residue and saying the whole of that is held on some other basis. It also

becomes very important when we move onto limitation and let me do that in the time remaining to me in relation to this category of land. The – there are some assumptions which underpin section 21 of the Limitation Act which are in my submission absolutely consistent with the law of equity and which confirm important aspects of the Crown's case in this matter.

The first, it's just worth noticing, takes us back to the standing point. The limitation rule in relation to trusts is expressed in 21(2) as applying to an action by a beneficiary to recover trust property and that's because the assumption is that the people who can recover trust property are the beneficiaries or in certain circumstances successor trustees, obviously acting for the beneficiaries but it's still the beneficiaries' right of action, equitable interest that's being asserted by the successor trustee. And we see that play out in an important way in 21(3) which makes the point that, "If one beneficiary is not time-barred," but another has, then another is, then the beneficiary who is time-barred can't derive a benefit from a judgment or order by the non-barred beneficiary. So there's a working assumption that the world of people who can bring claims in respect of trusts and benefit from them is beneficiaries not some stranger to the trust. That's one base assumption but the other base assumption that underpins it is that, "The property that's the subject of the trust will be known with sufficient certainty to be able to identify whether that property is or is not in the hands of the trustee," and what I say in relation to the non-selection of rural reserves is that if the failure to select those reserves was a breach of trust, then time has run under 21(2) and there not being any identifiable property which was the subject of that trust, it is impossible for 21(1)(b) to apply. And in particular if what was lost was some sort of right of selection then that right has gone, it's long expired, it's not exercisable anymore. That right of selection is not in the Crown's hand anymore and there is no other property.

ELIAS CJ:

Sorry why do you say that? Because of the rule against perpetuity?

MR GODDARD QC:

Well just here today the Crown has no right to cause a selection of rural reserves to be made. Any such right disappeared as a result of the events of the mid 19th century which caused the land to leave the authority of the Crown. And even if that weren't right we would be brought back to the same position as in relation to the town sections, which is that it was for the plaintiffs in this case, if they wanted to rely on the

21(1)(b) exception, to identify the specific property inside these boundaries that they say is held by the Crown as a consequence of this breach flowing on from the consequence from this breach and that has not happened.

So that takes me down to my 9.5 and I also say in 9.6 and I know Your Honour has said a number of times and Your Honour Justice Glazebrook as well said, well this isn't a contract case but –

ELIAS CJ:
Well no I said, "Contract's not the paradigm," that's all. Well it is, and it is to contract case.

MR GODDARD QC:
It seems difficult to suggest that in what one would have thought was the strongest case for a claim to, for some sort of equitable remedy in respect of non-allocation of sections which in my submission is a contractual framework where if I own a farm, I sell it to someone who's going to subdivide it and the consideration is a certain amount of money but also very importantly, a promise that a certain number of sections will be conveyed back to me. So I had property rights in the farm. I sell it to someone, sell it to Your Honour and Your Honour promises, Your Honour pays me $1 million up front and promises to re-convey sections of average quality from the subdivision. And in that scenario after the, if the obligation is not performed on the due date and if the land is conveyed away to someone else then it seems very clear both that after six years any ability to sue on the promise is gone and that because the farm has gone, any ability to assert some sort of constructive trust in relation to the whole of the property to carry out the selection and re-transfer back will be lost under 21(2) six years down the track or possibly I suppose 12 years if I'm asserting an interest in real property and the limitation provision of section 7. But either way if in that scenario time would have run it seems hard to suggest that a, time would not have run in respect of some other obligation to carry out a selection process and transfer back some land or hold it for the benefit of a person. So either the statute applies directly or it applies by analogy, if we're in the space of some or other fiduciary or equitable duty to carry out the selection process and re-convey. How there could be some less well defined obligation and a contractual obligation which could produce a claim that was less subject to limitation is very hard to understand.

I think I've dealt with the practical issues in relation to fiduciary duty and other equitable duties mostly along the way. I should perhaps say just two things. The first is that as the case has evolved I don't really understand there to be any argument for an equitable duty outside the orthodox *Chirnside v Fay* framework. In fact as arguments evolved, and in response to questioning from the Court, the argument has veered back rather to there being some sort of expressed or implied trust, full blown trust rather than some less full blown trust, less full blown to equitable duty, and so I'm not going to spend time, my remaining four and a half minutes on the Canadian cases. I think I agree with, accept my learned friend's submission that *Guerin* can really be seen as a pretty orthodox application of fiduciary principles of the kind considered in *Chirnside* to the extent, and this is an issue on which one could spend many, many hours, that the Canadian cases do go beyond orthodox fiduciary duty scenarios in cases where a fiduciary duty has been found, as opposed to cases like *Manitoba Métis* where the conclusion was there wasn't one. And I think one can read the cases where a duty has been found as for the most part consistent with the orthodox fiduciary duty framework and consistent with the hallmark of an obligation of loyalty as Your Honour the Chief Justice said, for example, in *Chirnside*.

So I don't think – but if the Canadian cases go beyond that then there are, for the reasons explored in my written submissions, strong reasons for New Zealand not to go there. It would confuse the law of equity and would be an unprincipled development that isn't required to fill any gap in our legal and institutional framework and perhaps the key submission to make on this is that it would be, it's wrong to suggest that less protection is afforded to Māori by the mix of established legal rules and institutions in New Zealand, than is afforded by the mechanisms available in Canada and this case is, in fact, a good illustration of the effective and well functioning institutions that we have in terms of the Tribunal to enquire into historical wrongs and make recommendations which provide a platform for negotiation and resolution of grievances. We just don't need to import from the very different Canadian environment a mechanism developed there at least in part to fill a gap that we don't have.

I should also say about the claims for breach of fiduciary duty and other equitable duties that so far as limitation is concerned in my submission section 21(2) must apply by analogy insofar as there is a claim for breach and to the extent that what is contended for is a constructive trust imposed on property coming into the Crown's hands, as a consequence of breach, then we are squarely in the *Paragon* and

Williams v Central Bank of Nigeria space. If the Court has not found it possible to find a trust, a true trust, then before – arising in 1845 and if any trust arises as a result of the alleged wrongful conduct of the Crown, which is one of the ways in which the appellants present their case, then that would be a remedial constructive trust, to use that label. Certainly a constructive trust arising from an adverse claim to land inconsistent with a prior non-trust equitable duty and time would run in the ordinary way.

If that were not accepted then we would be in the space of laches, that pronunciation challenging doctrine, and for the reasons given by the majority in the Court of Appeal, and having regard to the factors referred to by His Honour Justice Young in *Paki (No 2)* it is, in my submission, impossible to do justice to the standard to which the New Zealand Courts aspire this far down the track in respect of these events. I accept that the documentary record is good, though not perfect, in relation to the events that are to have brought these obligations into existence, but where the record really falls short is in relation to the matters that are said to be breaches and it is not fair, it is not just, it is inequitable to expect the Crown to, or any defendant, but there the Crown, to respond to allegations of breach by officers who have been dead for 100 years or more, who cannot give evidence about the reasons for their actions, and in respect of actions that are sketchily documented. So that is one problem.

The next problem is all the steps that have been taken for 100 years or more on the assumption that the lands that were demesne lands of the Crown were the Crown's to deal with free of these equitable obligations and the real prospect that other measures would have been taken cannot, if the claim had been brought earlier, cannot simply be passed over and then finally –

ELIAS CJ:
So that's a submission that Justice France was wrong in that part of her reasoning?

MR GODDARD QC:
And that the majority was right on the laches point.

ELIAS CJ:
Yes.

MR GODDARD QC:

Yes, and the other respect in which positions have changed, but it's a little bit more complex here I acknowledge, is the undertaking of Treaty settlement negotiations, and I say it's complex because of course those negotiations were concluded knowing that the proceedings were on foot, but in reliance on the measures that were taken to settle with the customary owners leaving only the personal claims of these plaintiffs on foot.

Finally, then, the question of what relief would be appropriate. What is, in my submission, very clear is that any relief that would be granted for the benefit of the customary collective groups is precluded by the Settlement Act. The, in my submission, a claim for a declaration by those groups is also precluded by section 25(4) because it would necessarily be preceded by findings that were then declared in relation to matters such as a breach of trust, and if the collective customary group cannot bring the claim for a declaration, which it clearly cannot, then it would be most peculiar if an identical declaration could be obtained by these plaintiffs and the best way of thinking about that is probably to say that that's because they are strangers to the trusts, in respect of which the declarations would be sought, and they cannot bring proceedings to vindicate those rights even though a declaration. After all, if they could, and they failed, then that would have adverse consequences in terms of issue estoppel for the groups, that's why that doesn't work.

I say at 11.2 and this is a dramatic oversimplification, "That the declaration is an equitable remedy." So equitable principles in relation to limitation and laches apply. If one reads the texts on declarations one can find almost every view about the nature of the remedy that one can imagine. *Wolf v Wolf*, for example, say well that it's mainly statutory these days but to the extent that it's not statutory, although it has a long equitable history, perhaps it's best thought of a sui generis right but where equitable principles apply because it's discretionary. I don't think it matters much and this why I allowed myself the simplification. Whether it's sui generis but equitable principles apply because it's discretionary or whether it is thought of as an equitable remedy the position remains that it's discretionary and that what that means is that certainly questions of delay will be relevant to the appropriateness of granting a declaration. If a claim for substantive relief would be precluded by laches because the Court cannot with confidence make findings about the events, logically one would not declare those matters either. If circumstances have changed in a way which would make substantive relief unfair, that's not obviously a separate reason for

declining to declare what the position was, so the reason for the laches might matter and might apply a little differently in relation to declarations. But again I come back to the fact that what is really sought here is a remedy in relation to rights under a trust and one would not normally expect a stranger to the trust, someone who could not seek substantive relief to be able to obtain a declaration in relation to those rights. We would tie ourselves in all sorts of, not only procedural knots, but also knots in relation to substantive entitlements if we permitted someone who was not a beneficiary to sue in respect of a trust.

ELIAS CJ:

Well not a beneficiary because there's no, because there's no trust?

MR GODDARD QC:

No not a beneficiary because the plaintiffs here are not the beneficiaries under the trust they assert and they accept that.

ELIAS CJ:

Well they're not all the beneficiaries under the trust, but they have interests.

MR GODDARD QC:

No not these plaintiffs Your Honour.

ELIAS CJ:

Well Mr Stafford has an interest.

MR GODDARD QC:

Not under the trust as now contended for which is a trust as now contended for which is a trust for the collective customary group not for individuals.

ELIAS CJ:

He's part of it.

GLAZEBROOK J:

So an individual member of a collective customary group isn't a beneficiary – that's an odd way of looking at it isn't it? It's not necessarily that he could only sue in the, in the individual capacity as the, a proportionate fraction or part of that customary

group but it's difficult to see why you say he has no interest at all because the group has to be made up of individuals. But it also has to be made up of the collective.

MR GODDARD QC:
And that's the challenge and we end up here –

GLAZEBROOK J:
Well it's a challenge in dealing with collective rights in a system that looks at individual rights yes.

MR GODDARD QC:
Yes –

GLAZEBROOK J:
But we surely have to adapt our proceedings to deal with that in a proper manner in terms of the Treaty and in terms of just of justice generally?

MR GODDARD QC:
I agree that our procedure needs to adapt to reflect the – in a system that has been designed primarily to focus on individual rights needs to adapt in a meaningful way to deal with claims by a collective in the way I've suggested, but that ought best to be done is through explicitly representative claims because otherwise of the problem that a number of different individuals could seek to assert in different ways, more or less effectively and with more or less support from the collective, the rights of the collective, in a way which might not well be in its best interests. So there needs to be a process for representation and a collective choice about how the collective –

GLAZEBROOK J:
Well it may, it may be as the Chief Justice suggested that that should be done by legislation and in the meantime that the difficulty would be denying access to the Court – leave aside the settlement process et cetera, would be denying access to the course of the collective unless you can get an absolutely representative of all of the members of it rather than merely – and then what say you have 99 percent of the members and one percent say no, normally what one would do with an ordinary representative action would be to exclude the one percent and have the 99 percent but you're saying that can't be done because you've got a collective here and the individuals don't have right. So I'm not sure that your solution actually – and then I

certainly don't think that anybody who isn't party to the action would actually be precluded by issue of estoppel or res judicata from bringing it up later. It's obviously complicated by the settlement and the Act but...

MR GODDARD QC:

Well more generally the complexity arises out of the fact that if you recognise a collective as a right holder as I think we must in this context, then the question becomes how the collective vindicates its rights and I understood Her Honour The Chief Justice to be saying that perhaps a mechanism was desirable for, essentially a mechanism for mandate in the Treaty settlement context was a different proposition I think. What I was saying in relation to claims before the Courts, wouldn't deprive anyone of access to the Court, rather what I said was that if said claim is explicitly pleaded as brought on behalf of the collective, as in my submission is required by the High Court Rules, then that may in some circumstances where that representative status is uncontroversial and supported by a simple statement, I am authorised by the collective, unchallenged by anyone, to be sufficient. If there is any doubt about the authority of a person explicitly asserting that they are suing as a representative, if there's any doubt about their authority to do so, then that is appropriately dealt with by an application for a representation order and the Courts would need to adapt their normal rules in relation to representation orders for a class action to deal with the fact – in a class action context the individual, the rights are held by each of the individuals and so it's open to an individual to say no I want to sit outside this and pursue my individual rights in some other way – settle for example, or bring a separate proceeding. That doesn't work where the right is held by the collective and the answer is a collective yes or no to the existence of the right or the assertion of its invasion. So the Courts will need to make representative orders or decline to make them after hearing from those concerned and will not normally be able to carve out the one percent. But all of that is well manageable within our High Court Rules and –

GLAZEBROOK J:

I'm not sure it is in fact.

MR GODDARD QC:

Well that's where I think –

GLAZEBROOK J:

Because how would the, well in any event I'm not sure that it really is even worth getting into this in the sense that –

MR GODDARD QC:

I would be concerned by a submission that – let's – that's customary title which is held collectively and is a common law right cannot be vindicated before the Courts but nor should we, in my submission, swing to the alternative of saying that any one member of the customary group can bring a proceeding seeking to vindicate customary title with the risk that in their proceeding they make concessions which don't have the support of the whole of the collective or part way –

GLAZEBROOK J:

But you're assuming the whole of the collective is bound by those concessions which are, I would suggest, just can't be right?

ELIAS CJ:

Absent the settlement.

GLAZEBROOK J:

Absent the – no I'm sorry in terms of the settlement deed but absent, in fact some actual authority given by all of the members of the collective to the individual.

MR GODDARD QC:

Well that may need to be a matter of evidence then about the fact that through, as the matter of tikanga and contemporary support the whole of the collective has endorsed this particular course of action. But we need to find a mechanism for dealing with that so that, for example, rights can be compromised where there's an invasion of customary title which causes loss and a claim is made for damages. How, it can't be the case that it can be determined by the Courts but it can't be settled, we must be able to shape our rules of civil procedure to respond to that. But Your Honour's right, I don't think we need to sort all that out today.

ELIAS CJ:

Can I just raise with you section 2 of the Declaratory Judgments Act which is a general provision applying to all proceedings in the High Court, not to applications on originating summons which provided for subsequently in the Act. But it simply says

that, “There’s no objection to a merely declaratory judgment and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.” Is that anything you want to make a comment on?

MR GODDARD QC:
That removes any objection to the form of a proceeding on the grounds that –

ELIAS CJ:
Yes.

MR GODDARD QC:
– a declaration is sought, or that only a declaration is sought, but it shouldn’t, and can’t, be read as expanding –

ELIAS CJ:
It doesn’t make it an irrelevant – sorry, as expanding?

MR GODDARD QC:
It can’t be read as expanding the class of persons who can sue to vindicate a private right and it doesn’t –

ELIAS CJ:
Well it isn’t a vindication, necessarily, of a private right. It can simply be a declaration as to, as I’ve put to you earlier, the lawfulness of a historical and spent action.

MR GODDARD QC:
A lot turns on the precise terms of the declaration I think.

ELIAS CJ:
Yes.

MR GODDARD QC:
And that’s another shifting target in this case.

ELIAS CJ:

Well I'm just pointing out that this is a provision of general application and I'm just really interested in your comment, is whether any consequential relief is or could be claimed.

MR GODDARD QC:

Well I think what Your Honour is –

ELIAS CJ:

So if an individual who has an interest affected doesn't purport to seek relief on behalf of the wider group –

MR GODDARD QC:

But simply seeks a declaration that some right has been invaded at some time in the past.

ELIAS CJ:

Yes.

MR GODDARD QC:

It seems to me that – well first of all, it needs to be that person's right and not the right of a stranger –

ELIAS CJ:

Well –

MR GODDARD QC:

Then we get to the, I think Your Honour's asking me in the context of a collective group –

ELIAS CJ:

Yes.

MR GODDARD QC:

– customary group, and in particular focused on Mr Stafford's position here as a member of the group?

ELIAS CJ:

Yes.

MR GODDARD QC:

In that situation I would still say that it, if the right is held at a collective level, then a claim that it has been infringed is of necessity a claim by the collective which requires the authority of the collective to bring it, and that's because if there isn't that authority, and the action is unsuccessful, we are left with one of two unsatisfactory outcomes. One, if there's no cause of action estoppel is that the next week another member of the group can bring the same claim and the defendant will be – and then the next week another member of the group can bring the same claim, there is no certainty for the defendant, which is something that in, certainly the private law space, we consistently set our face against. Conversely, if the unsuccessful claim does bar future claims by the collective, then there'd be a real concern if the proceedings could be conducted without some explicit identification of the representative –

ELIAS CJ:

Well you'd have to be very careful that there was no mischief, they would be wrecked.

MR GODDARD QC:

And the way to do that is to insist that the claim be brought explicitly on a representative basis. There's a very fundamental question in relation to proceedings is who are the parties before the Court and we expect always to know that at the inception of proceedings, that's why we have rules about pleading a representative character in proceeding. It's why we have special rules about denial of representative character all in our High Court Rules. These are not mere matters of form. These go to the substance of whose rights are being adjudicated and who is affected by the determination that's reached, and in my submission we – not only is the existence of collective rights not a reason to refrain from applying those rules, it reinforces the importance of clarity if a claim is representative and of insisting that only a claim explicitly brought on behalf of the collective can seek to vindicate or declare the rights of the collective. That's my submission.

ELIAS CJ:

The Declaratory Judgments Act 1908 of course also is a mechanism for getting opinions on validity of statutes, that was enacted of course while we still had a controlled legislature, deeds –

MR GODDARD QC:

Yes.

ELIAS CJ:

– everything else, and it binds only those who are served with a summons if that procedure is adopted, or they are parties to the litigation. It's pretty wide.

MR GODDARD QC:

Flexible.

ELIAS CJ:

Yes.

MR GODDARD QC:

But again what that underscores is that we need to know who is served so we know who is bound and if what you have is a situation where someone who is affected brings proceedings, yes the defendant, and other people are affected as well, then we have a well developed body of rules designed to ensure that those people are served and have the opportunity to participate and again the submission that I make about the way in which claims should be pursued of this kind will ensure coherence and outcomes that are both sound in principle and practically workable, whereas a stealth representative action in which you don't say I'm swinging for anyone else but then you pop up and, you know –

ELIAS CJ:

No but it's hard to see that a declaration, if we were brought to that viewpoint, that the 1848 grant, for example, was in breach of trust or fiduciary duties, would adversely affect anyone.

MR GODDARD QC:

What if Your Honour were minded to reach the opposite finding and find that it wasn't made in breach of trust.

ELIAS CJ:

Yes, well exactly –

MR GODDARD QC:

It has to cut both ways.

ELIAS CJ:

That also, it has to cut both ways, yes.

MR GODDARD QC:

And if that's the finding then it shouldn't be possible for the –

ELIAS CJ:

But effectively you would get that finding if you succeed. You would get the finding that there was, or if you succeed in the argument that there was no breach of trust.

MR GODDARD QC:

The Crown's approach to the claim by these plaintiffs is that it wouldn't have the benefit of a cause of action estoppel vis-à-vis the collective right holders because –

ELIAS CJ:

Oh no, no –

MR GODDARD QC:

– these plaintiffs don't sue for them –

ELIAS CJ:

– I understand that. Yes I understand that.

MR GODDARD QC:

– and rather the Crown considers that it's settled the claims of the collective right holders through the Settlement Act.

ELIAS CJ:

I know.

MR GODDARD QC:

And so conversely – and that's why when it came to joinder of parties the Crown supported the joinder of the interveners because it seemed more likely to result in a finding that was binding on the collective group, recognising some complexities about the relationship between modern representative entities and the actual collective which again I haven't got time to get into.

GLAZEBROOK J:

I can't understand that submission, if you intervene to say that people have no standing, and they're found to have had some standing, then you're going to be bound by absolutely everything that's been done having said that you are not supporting the Act and I just find that extraordinary as a submission.

MR GODDARD QC:

Well it depends on the scope of the intervention right that's granted –

GLAZEBROOK J:

Yes.

MR GODDARD QC:

– and on –

ELIAS CJ:

And what's sought by that intervention.

MR GODDARD QC:

Yes, that's right, and it did go beyond just standing but not – I think Your Honour is right that on an intervention component purely to standing you would never get that result, but an intervention that says we want to be heard on standing because we think they're our rights, and we also want to be heard on the rights, would produce a different outcome, so it depends. I haven't managed to finish at 12.30 but I think it's –

ELIAS CJ:

No but you've done very well, thank you. Thank you Mr Goddard. Mr Castle do you expect to take half an hour?

MR CASTLE:
No.

ELIAS CJ:
Can we get underway and sit a little late if need be after the adjournment? All right thank you. Yes Mr Castle we'll hear you now and then Mr Galbraith can reply after lunch.

MR CASTLE:
Thank you Ma'am.

(Māori greeting 12:54:03)

ELIAS CJ:
Tēnā koe Mr Castle.

MR CASTLE:
Now Your Honours I wish to make but a few short points in relation to the matters on which leave was granted. I don't propose to repeat what's in the written submissions although I did notice that there are footnoted references to Angela Ballara's work were omitted or deleted unintentionally from the written script. The chapters are nine and 10 of her book and the pages for those chapters are pages 111 and 124 but I can give the Court the correct references.

ELIAS CJ:
That's fine. We've taken that down and it's in the transcript, thank you.

MR CASTLE:
Thank you, Ma'am.

The position taken by the iwi intervener or interveners, obviously, intervener singular now, throughout this case reflects an underlying tension, Your Honours. I use that language without criticism. It's actually language also used by Justice Clifford. An underlying tension between the people of Ngāti Rārua, including those with interests in the tenths, in their capacity or having the character as beneficiaries of what is the settlement trust on the one hand and on the other the people of Ngāti Rārua in their

capacity or having the character as shareholders of Wakatū. That is a tension seen elsewhere in this jurisprudence, including with reference to incorporations in Gisborne. Your Honour the Chief Justice referred to it previously in this hearing. It's also recorded in relation to the Bay of Plenty Māori Incorporation and it's seen in some measure in relation to the Māori Incorporation in Taranaki.

ELIAS CJ:
It's an earlier generation of settlement processes, really, which has been overtaken by the current one.

MR CASTLE:
Yes, and the mechanisms became particularly popular in the 1950s but the problems that relate to them and this continuing tension prevails.

Now, that is demonstrated in this case because all Ngāti Rārua shareholders in Wakatū Incorporation are beneficiaries of the iwi trust. But not all Ngāti Rārua beneficiaries are shareholders in Wakatū. All Ngāti Rārua people in the northern South Island, including those historically in the Nelson and Motueka areas but also including those historically in the Wairau, whakapapa back to the Nelson and Motueka tenths.

The iwi does not consider remedy or benefits of what is an historical claim in relation to the tenths should go back to the shareholders of Wakatū and some care is required, in my submission on behalf of the iwi, in relation to the language which has been used throughout which is that Wakatū was the steward or the guardian of the tenths claim. Wai 56 is settled. This claim – and I'm –

ELIAS CJ:
I think that was, of course, an expression used before the settlement.

MR CASTLE:
Yes, indeed.

GLAZEBROOK J:
And in the deeds which is where – I'm fairly sure was in the deeds.

ARNOLD J:
It's in the mandate, yes.

MR CASTLE:
It's in both the mandate and the terms of negotiation. Now –

GLAZEBROOK J:
So what's the care that we should use in using the term, saying it is used in those documents?

MR CASTLE:
Well, I would not, with respect, want the Court to leap from recognition or at least the use of that language in the pre-settlement Act documentation that therefore Wakatū has standing.

In relation to the second appellant, may I just draw Your Honours' attention again to the submissions of paragraph 26 of the written script and Mr Stafford's status as a kaumātua is there and acknowledged and I reiterated today but the claim is not brought by him, as I understand it, on behalf of iwi or with its consent and in my understanding of the claim it's the second appellant's position that he doesn't consider he needs the iwi consent or support.

Now, in that regard the iwi position is that the claim is an iwi claim and I'm bound to point out, as instructed, that for the iwi it's a claim which has been settled and in the context of this jurisprudence often, as it's said and correctly, may I say that there must be honour on the part of the Crown as a treaty partner. The iwi's position is that it must also act honourably, having settled what it considers to be an iwi claim.

Now, not included in the matters on which the iwi intervener was granted leave but necessarily following consideration of those matters and particularly the issue of whether any relief may be available to the second appellant, the issue of what that relief that is and to whom it is to be made, so who might be entitled to it, is a matter that goes directly to the declaration which is being sought here, the people of the iwi of Ngāti Rārua may be affected by any declaration that is granted. The iwi remains an interested and potentially affected collective, a party which may be impacted upon in the outcome of this proceeding and if the issue of relief arises, as has consistently been the iwi position in the High Court and in the Court of Appeal, if the issue of relief

then is to follow any findings of this Court then the iwi will be engaged in considering that issue.

The proposition that beyond the declaration any relief can be the subject of determination in this Court is resisted for the same reasons it was resisted in the Court of Appeal, with respect, but I say again that's an issue in which the iwi may need to be engaged.

Now, that will be particularly so when the issue arises as to what is the proper meaning to be given to the reservation in section 25 of the Settlement Act because if that arises for proper interpretation then again I say the iwi wishes to be engaged in that debate.

Those are the matters on which I wanted to address the Court pursuant to the leave granted.

ELIAS CJ:
Yes, thank you, Mr Castle. Thank you for attending to assist. We appreciate the attendance of your clients.

We'll take the lunch adjournment until 2.15, thank you.

COURT ADJOURNS: 1.04 PM
COURT RESUMES: 2.20 PM

ELIAS CJ:
Yes, Mr Galbraith.

MR GALBRAITH QC:
If the Court pleases, could I just start by making clear what I made clear the other day that despite what my learned friend somewhat accurately says about the precise pleading in the, I think it was the third amended statement of claim, the reality is that both the plaintiffs, Mr Stafford and Wakatū, bring this claim before the Court solely on the basis that, in the case of Wakatū, that it's for the benefit of the customary owners, and in Mr Stafford's situation exactly the same except he happens to be one of the customary owners individually, and I took the Court the other day to paragraph 62 of Justice Clifford's caveat judgment which is behind tab 11 in the first volume, and

His Honour makes that abundantly clear that that's what this proceeding may not have looked like when it started out, if I used the term "looked like", but that's certainly what he says. He says, "But it was clear from the outset that the beneficiaries of those trusts, and hence of the claims, were the members of customary groups, even if the way the plaintiffs characterised the nature and make up of the customary groups is in question." And so that's the position of both Mr Stafford and Wakatū and that is, of course, in my submission, significant when I get to some of the later issues, but I just wanted to make that clear at the start.

Perhaps just secondly to say that we do seem to be, after some by-ways, back pretty much where Justice Clifford left us with his postulate in his judgment that in that period 1842 through 1856 there must have been some accountability, legal accountability, which the Crown had and, as the Court's aware, and as I said the other day, we went from a situation where Māori had customary title, it had effectively ownership of all their lands, and by 1856 less than 4000 went across into the statutory administration of the Native Trusts Act, and what has been made clear in the course of the hearing over the last four days is that on the Crown's contention that 4000 acres encompassed all the pā sites, all the burial grounds, all the cultivations that Māori were ever to get out of these transactions or proceedings that took place from 1838 on.

ELIAS CJ:
And all the rural sections it was to get.

MR GALBRAITH QC:
Yes, everything. That's lock, stock and barrel. At the end of the day, Māori gets less than 4000 acres and they've got to do everything. They've got to live on it. They've got to – their wāhi tapu sites obviously and they've also got to cultivate and make their living from it and that's the lock, stock and barrel, and as I said on Monday, that would be a surprising consequence without Crown, who were effectively the architect or the controller through that period, not having undertaken or assumed some legal obligation to Māori while this was all happening.

I just – I don't want to go through and I won't go through in length all the factual matters. I fully accept the Court's got a clear grasp on those now. But I've just put in front of Your Honours just a short paper on a few of the factual issues which the

Crown have debated, and I'm not going through them line by line but they'll be, I hope, useful in pulling together some of what we want to say in respect of these.

Can I just say something before I turn specifically to that and that's about the 1842 situation. Of course, as the Court knows, in 1842 a selection was made of the town and the other sections and the – and I'll put it in inverted commas because it's in dispute – a trust was then activated and managed by some individuals, including the Bishop who was identified by the Crown.

I just want to take the Court, if you wouldn't mind, just to one document. You've seen it before but I just want to make a point about it, and you'll find it in the second volume of the three volume further bundle, supplementary bundle, that came in last week, and it's the document at tab 92, that's a letter from the Bishop and, as I say, you've seen it before, in which he is giving instructions to Mr Thompson as to administration of, of course, what was then land owned by Māori. It was their land. There'd been no 1941 Ordinance determination at that stage, but the Crown had, and it's said both by the New Zealand Company and by Māori and in these proceedings, the Crown had stepped in and taken control of that land at this stage, and so you see in that letter that there's a direction about native reserves being let upon terms which were a minimum of seven years and 14 years. Later on the seven year restriction got removed, but seven years, and we know because there are the other documents that there were rentals received, that from around about this period those lands were leased out to various lessees and I think one can safely assume that as the direction was seven years they were for at least seven years, so they were still leased, the ones that were leased, at the time we got to the 1845 grant. And my respectful submission, and I made this submission the other day, is that at least in respect of the rentals that were being received on land which was undoubtedly at that stage owned by Māori, that those rentals and the application of those rentals must have been subject to some legal control and, in my respectful submission, the most natural one to identify is that of a trust, and, of course, the terms of "trust" and "trustees" is used throughout the correspondence which went on in relation to the administration of those funds, and I accept that it was in a context where it was anticipated that in due course there would be a statutory regime set up, but there wasn't one at this stage, and so the idea that the Bishop could simply do what he will, or the Crown could direct the Bishop to do what he will with those funds, it could be used to fund anything which the Crown, of no benefit to native whatever –

ARNOLD J:

I think Mr Goddard accepted that the money might be impressed with the trust –

MR GALBRAITH QC:

Yes, yes.

ARNOLD J:

– but the land he distinguished, as I understood it.

MR GALBRAITH QC:

And that may or may not be right at that stage in the sense the land was still owned by Māori but then again, of course, taking control of somebody else's property may itself –

ARNOLD J:

Yes.

MR GALBRAITH QC:

– be impressed with a trust, so that, that – but what it seems to me relatively clear that if the money which was received was impressed by a trust and Mr Goddard may, perhaps not conclusively but to some extent, have indicated that was a possibility, it would be extraordinarily odd if when in 1845 the land itself then, and I'm only talking about these sections, I'm not talking about the 10,000 acres for a moment, that that land then passed out of Māori ownership on a basis that was intended to be a reserve, still leased to the same people presumably that leased it in 1842, or 1842, 1843, that the title, the estate which passed into Crown hands as demesne land at that time, was not itself impressed with a trust. In other words, what I'm really saying is I can see that you might argue about it in 1842 because it was still owned by Māori that perhaps the land itself wasn't impressed with a trust but it seems, with great respect, much more difficult to argue that once the land passed into Crown control, so Crown not only had control of the money but Crown also had control of the land, that there wasn't then a trust in relation to that land.

ELIAS CJ:

Well, the dealings with the land must have been authorised by something –

MR GALBRAITH QC:
Something.

ELIAS CJ:
– again. Yes.

MR GALBRAITH QC:
Yes, and we've got a nemo dat problem all the way through what happened in this period also.

So then just perhaps going to that few pages that we've handed up, there was a debate, and as I say I don't want to go into this at great detail about tenths and elevenths and pā, cultivation grounds, et cetera. In respect to the pā, burial place and cultivations, I suppose that the starting point really is to stand back for a moment and think, well, did Māori really intend to sell where they were living, as that's what it comes down to, and that's a pretty odd thought, and I don't want to get in the causes of action and that, but one would give yourself a fighting chance in a non est factum plea, I think, on that, if somebody turned up with a contract saying, "Well, actually, Māori intended to sell where they lived and where they buried their ancestors," that's a pretty extraordinary starting point for the Crown to come from. And of course the Crown's argument on this evolves out of the fact that when Commission Spain did make his report there appears to have been some land in the big wood area that were put into Crown reserve title, or, sorry, the titles which had been chosen in 1842, and of course our argument is that pās, cultivations, et cetera, should have been totally excluded and they were a separate category. But in my respectful submission the fact that there was some degree of muddlement in Spain's report can't found an argument that indeed Māori intended to sell and did sell their pā sites, their burial places and their cultivations. And of course despite the Crown going back and talking about some of the romantic and rather fanciful notions that the New Zealand Company had back in the 1830s when they were appearing before select committees and that, the world had moved on.

O'REGAN J:
But I don't think the Crown, the Crown isn't saying that Māori sold them are they? They just saying the exclusion of them –

MR GALBRAITH QC:

Is…

O'REGAN J:

– was part of the reserve area.

MR GALBRAITH QC:

Yes.

O'REGAN J:

But there's no suggestion that they were land that should have passed to settlers, to the New Zealand Company for allotment to settlers.

MR GALBRAITH QC:

Well, I think it's implicit possibly – Your Honour's quite right, I don't think my learned friend said that explicitly and of course it would be inconsistent with the deeds of release, the order which excluded those, but of course the problem is if they weren't sold then how does the Crown come to deal with them and you have that nemo dat principle immediately, and so they couldn't, on our argument, fall into the reserve lands.

O'REGAN J:

Well, the sale was subject to reservations of some kind, unclear exactly as what that meant, but that could have either been by excluding them so customary title remained or it could have meant by passing them across but subject to an interest that Māori were entitled to maintain possession of.

MR GALBRAITH QC:

But that does get back to that question, Sir, that I really posed a moment ago, in standing back does one really expect that Māori intended to transfer the or to sell to the New Zealand Company on the basis it was then for the New Zealand Company to give back some right to them to possess the very house they were living, if I can put it as simply as that, and our submission and the oral history evidence and, I would say, the documentation which we refer to here, makes it clear that, as I said, those fanciful notions which the New Zealand Company have had back in the 1830s had long gone by the time you got to the early 1840s. And so here we refer in 1.3, for example, to the letter from the Colonial Secretary in 1842, which is a direction to

the Governor that powers et cetera are out of consideration. There was an earlier 1843 report from Commissioner Spain which say the same thing, and one of the points which Commissioner Spain made, and again it's a stand-back-and-think-about-it sort of common sense basis, that if anybody tried to possess the power then we'd have a, well, they hadn't had a Wairau incident at that stage, but it just would have been preceded by some 12 months or so. And then there's the January 1844 meeting which Ms Feint took you to and I think I referred to also, where there was a very direct front-on discussion between Wakefield and the Governor and Commissioner Spain in which it was made abundantly clear that pās et cetera were out of limits. We've referred here too – and I won't take you to the evidence but the reference is there – that a speech that Spain made at New Plymouth making it abundantly clear that pās et cetera were out, and we've referred also to James Macky's summation.

If one just going to the grants themselves, in my respectful submission it's very clear there are three categories of land there which are excepted, the semicolons – and they were probably more grammatical in those days than people are these days – but semicolons separate the three categories, and so it's not a question of reading, running one into the other. They are quite distinct reservations.

It's unsurprising and it certainly was – and if one compares and again I won't take you to it but if you compare the Wellington grant with the Nelson grant the format is a little different but the format is not different when it comes to exceptions. I don't think there's a shadow of ability to read the Wellington grant is encompassing the pā sites within the reserves and certainly that wasn't the way they were subsequently treated because there was, in fact, separate surveying done subsequently and then there was the trading that was done to try and sort out the problems between settlers and Māori over some of these sites, and we note in 1.5, and this is subsequent history, of course, that indeed under the management of initially the Commissioners under the 1856 Act and then subsequently the Public Trustee et cetera there were separate distributions made in relation to tenths reserves and – we've used the term occupation reserves but they're the pā sites and cultivation sites.

Tenths, elevenths, in my respectful submission it really doesn't matter at this stage of this proceeding, the grant is quite specific as to the area which is to be reserved, 15,100 acres, and we know the town sections and we know the rural sections which were to be obtained in terms of acreage and numbers. How this came about is quite,

in my respectful submission, reasonably clear through the correspondence and the memoranda that when the New Zealand Company first went to market it did so on the basis of eleventh and so that's why when it surveyed off the town sections it surveyed off a number that it could then deduct 100 from and that would be an eleventh, but I think in the second prospectus they weren't as particular but in any event as we've got here Lord Stanley's reply saying he's ever heard of an eleventh as a tenth and that's the instruction he gives to Spain, it's a tenth, and of course Spain's report is one-tenth also and …

WILLIAM YOUNG J:
Do the maps indicate tenths or elevenths?

MR GALBRAITH QC:
It depends what Your Honour is talking about. If you're talking about town sections – I haven't done the calculation either but I think one of my learned friends has.

O'REGAN J:
What about after the town was reduced in size? Wasn't it reduced?

MR GALBRAITH QC:
No, the number of sections weren't reduced.

O'REGAN J:
No but the 47 were surrendered, wasn't that on the basis that that left Māori with 53 out of 530, which is a tenth, not an eleventh? Is that not right?

MR GALBRAITH QC:
Yes but there were more than 530.

O'REGAN J:
I realise that. I'm just talking about this tenth versus an eleventh. Wasn't that based on a tenth at that point whereas the earlier one had been an eleventh?

MR GALBRAITH QC:
I believe Your Honour is correct because that's what happened. It went down from – yes, from 100 to 47.

O'REGAN J:
I know it's not something you would want to rely on given the circumstances.

MR GALBRAITH QC:
No, but really what I'm saying in respect of this, it's a little bit of a red herring because at the end of the day there's 15,100 acres and we've got a shortfall of 10,000-odd acres so – and 47 sections that disappeared in the way that Your Honour just discussed but we've just given the references here and the Colonial Office, in any event, they were quite determined it was one-tenth and that was the instruction to Spain and that's actually what is reported.

We've got a little bit more detail in the next section about pā sites in particular because of course our argument is that they were separately – they should have been separately excepted. They weren't. Some got muddled into the tenths sections and our claim is that there was a breach or failure by the Crown to except those pā sites and this is just an attempt to identify some of those in respect of which there is material before the Court in identifying and as I said as the Court is aware the deeds of release say that they except from those deeds of release the pās, burial grounds, and the cultivations.

So in 3.2 we're just talking about the big wood which Spain acknowledged that Māori were adamant about they hadn't sold. There was a pā, as you'll see in 3.2, at one end of the big wood and that was section 157 which is one of the tenths sections. The potato cultivations with the reference to the map there but some at least of the big wood fell onto a tenths section that was subsequently exchanged, of course, that you're aware of.

McKay's compendium records that some 800 acres of the best land in Motueka have been appropriate to occupation land and that created a loss for the tenths and as I think my learned friend said this morning he noted that Justice Clifford had also noted some tension in Spain's award and as I said before it seems to me that Spain's award for a number of reasons isn't perfect but the intention is clear from the term of the grant and it's the grant that of course is the effective document and the grant does differentiate between reserves and pā sites et cetera. It excepts them separately and so in my respectful submission we are justified in making the – or seeking the declaration that they were to be treated separately and that there has been a breach in respect of that.

We refer in 3.5 on to other – some of Your Honours have asked questions about identifying other pā outside the areas which were identified as reserves. There are and the evidence before the Court wasn't complete and one would expect there were other pās because even with my limited understanding you would expect to find pā sites dotted around the area, particularly coastal areas, and quite how the 1.7 million-odd in 1848 ever snuck through without hardly even a doddering of pā sites is very strange.

The Crown-owned tenths land, this will come up again, obviously, in relation to limitation et cetera. There was limited evidence before the High Court but this is the reference to Mr Ingram's evidence and it's probably just useful for me to take you to that. You'll find that in volume 3 of 7. It's part of the original case on appeal, behind tab 19. It's paragraphs 16 and 17 and you'll see there that Mr Ingram draws the Court's attention to some of the places like the former Nelson tenths reserve lands which are now in Crown ownership and you've got the Auckland Points School, the District Court building, the Nelson Hospital, the reserve land, Victory Primary School. Now, I'm not saying – and I'm not the best person to speak about the history of these lands – but I suspect that none of these lands at least is identified at present have been in continuous Crown ownership. Am I – is that right? Yes, that's right. So these aren't lands that have been in continuous Crown ownership but they are lands that were in Crown ownership. They were per tenths, lost and have come back into Crown title.

The next two in 17, the Parklands Primary School and –

O'REGAN J:
Does this need to be updated post the deed of settlement, this evidence?

MR GALBRAITH QC:
Yes. Well, no, because I think these have been all…

O'REGAN J:
These have been caveated, have they?

MR GALBRAITH QC:
Yes, or some of them at least have.

O'REGAN J:

Right.

MR GALBRAITH QC:

Some have, haven't they? Some, yes.

O'REGAN J:

Some have, all right.

MR GALBRAITH QC:

Well, I think I'm right in saying, and I will be very quickly corrected, Sir, I think only – I'd better not say. Right, caveats are on Auckland Point School and the Victory Primary School and Matai School. The –

GLAZEBROOK J:

Some of those could well have come back in through the – well, certainly –

MR GALBRAITH QC:

Yes, yes, some of them –

GLAZEBROOK J:

– the Auckland Point did.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

I don't know about the others.

MR GALBRAITH QC:

Some of them could well have done. They may all have done.

GLAZEBROOK J:

And you – is there a difference between coming back in for public purposes of that nature and the coming back in just in the way that I was discussing with Mr Goddard earlier?

MR GALBRAITH QC:

We would say, "No," but it's obviously an issue to be considered. The two in –

GLAZEBROOK J:

Why would you say, "No"? Because –

MR GALBRAITH QC:

Because –

GLAZEBROOK J:

Because, as you know, I was pointing to Mr Goddard –

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

– the view that…

MR GALBRAITH QC:

The terribly fraudulent owner and the not quite so fraudulent –

GLAZEBROOK J:

Yes, and the not so fraudulent –

MR GALBRAITH QC:

– one? Yes.

GLAZEBROOK J:

– but that there may well still be the trust invested, whereas this is coming in for a totally different public purpose which seems to me to put it in a, potentially put it in a different category.

MR GALBRAITH QC:

Well, it's certainly more –

GLAZEBROOK J:

Even if I don't accept Mr Goddard's submission in respect of the other.

MR GALBRAITH QC:

Well, it's certainly a more beneficial situation than the fraudulent owner, Your Honour, I accept that entirely, but in our respectful submission doesn't change the position that if these were trust lands and they went elsewhere for whatever reason or however and are reacquired, albeit under the Public Works Act or because there was an agreement to – because, of course, it doesn't have to be compulsory taking, it could just be an agreement, that it's like any other agreement or resumption of ownership and the trust should be restored because that's the equitable obligation, of course, primary, is to restore the trust and the first remedy one has in the restoration of trust is restoration of the property.

The next two, Parkland Primary School and Pangatotara…

O'REGAN J:

But the relief you're asking for doesn't require us to determine this, does it?

MR GODDARD QC:

No, no, but that's, as my learned friend fairly put it, these two cases have passed a little bit in the, perhaps say the night, Sir, in respect of that because it's been the plaintiffs' position throughout that these are difficult questions, require more research and a deal more argument, and the Crown's position has been, "It's all to be done here and if you haven't come up with the evidence, well, too bad," putting it simply.

I think the other two sites in 17, I think these may be sites which have stayed in Crown ownership throughout and I have, and it's not in the evidence before the Court so I say this with some hesitation, I believe that there may be some areas in relation to these two sites, and you'll see the second one is now part Crown forest land which has an unallocated status where, while it may well be under the Land Transfer Act, there hasn't been an issue of a title and so there may be a situation where some land still in customary title exists there.

So going back to, more to the issues. There's the issue of the 1845 grant and its status, and I won't repeat what I started to say the other day about delivery not being necessary provided it's under the Great Seal and we've got the cases in the supplementary casebook, and as Her Honour the Chief Justice said, *R v Symonds* says the seal of the colony is the equivalent of the Great Seal and *Scott v Grace* says the same thing, but I don't, hopefully we don't have to go down that path.

What was more suggested, though not particularly directly by the Crown, was that in some rather more abstract way the Crown grant was "inoperable" I think is the terms that were used. It can't be by renunciation because it's very clear that NZC was never going to put its neck on the block by renouncing the grant, it just wanted to not positively accept it in meantime while it lobbied –

WILLIAM YOUNG J:
Might it not, if it couldn't get a grant on terms which enabled it to live up to its contractual obligations, might it not simply have defaulted?

MR GALBRAITH QC:
To the settlers, but it –

WILLIAM YOUNG J:
To everyone.

MR GALBRAITH QC:
Oh, but, well, yes…

WILLIAM YOUNG J:
Said, "Okay, well, if the best we can do is Commissioner Spain's grant, well, then we're out of here and we're going to default and go into liquidation."

MR GALBRAITH QC:
Well, they could have, but they never showed the slightest inclination to do that and they went into –

WILLIAM YOUNG J:
Well, because they were hoping that they would get a better grant.

MR GALBRAITH QC:
– grant lobbying. Sorry?

WILLIAM YOUNG J:
Because they were hoping they'd get a better grant if they did.

MR GALBRAITH QC:

Well, no doubt about that, that's the point. They took that as the base line and were working very hard to see if they could improve their position, which they managed to do in Wellington, with McEldowney negotiations there, but there's never, at least in the documents I've seen, and the Crown hasn't pointed to anything, that there's never been anything which says, "If we don't get this we walk away," you know.

WILLIAM YOUNG J:

But do they have to say that? I mean if it –

MR GALBRAITH QC:

Well, if you're going to renounce something I think you do, Sir.

WILLIAM YOUNG J:

But is it – well, I suppose –

GLAZEBROOK J:

But realistically they weren't going to walk away because they couldn't do so, they wanted to continue –

O'REGAN J:

It was just a option they hadn't exercised yet, wasn't it?

MR GALBRAITH QC:

Yes, well, that's what they were trying to hold it as, an option they hadn't exercised, yes, it's got a certain…

O'REGAN J:

And they obviously, unless the Crown turned the heat up and said, "If you don't take it by this date we're going to rescind it" –

MR GALBRAITH QC:

Yes, but what happened was –

O'REGAN J:

– they basically had an open-ended option and –

MR GALBRAITH QC:

Yes.

O'REGAN J:

– that's what they relied on.

MR GALBRAITH QC:

Yes. Then what happened Governor Fitzroy went off the scene and Governor Grey came on and he was young and on the way up and he was going to do his best to resolve all these difficulties and…

ARNOLD J:

But also, I mean, walking away from the deal hardly seems realistic, given that people had begun to build houses, as you've referred to, these reserve sections, some of them were leased –

MR GALBRAITH QC:

Yes.

ARNOLD J:

– they had buildings on them, periodic, you know, different terms, I mean, all of this would have had to have been undone in some way.

MR GALBRAITH QC:

And the people involved in the New Zealand Company saw themselves in a particular light, they did see them as themselves, and Wakefield, for example, really did see themselves as, you know, the founders of something great. So, as I say, there's no evidence that either they positively renounced and there's no evidence that they would have renounced had Governor Grey not done right by them. So –

O'REGAN J:

Where does that take us to thought?

MR GALBRAITH QC:

Well, it just means this, Sir, that the Crown grant was, was granted in 1845, once it's under the seal that's it, it means that –

WILLIAM YOUNG J:

You don't pay any – I mean, I took, I think, Mr Goddard to one of the, section 14 of the 1847 Act, that does seem to presuppose that it's a grant when excepted that is effective.

MR GALBRAITH QC:

That's – let's have a look at the 1847 Act. Well, that's not law, we'll put it that way –

WILLIAM YOUNG J:

But that's –

MR GALBRAITH QC:

– unless the 1847 Act changed it, because a Crown grant, you don't, you can renounce it – well, it's very doubtful if you can even renounce a Crown grant, but just let's assume you can, you can renounce a deed, no doubt about that. But very different situation with a Crown grant, which is a grant by the sovereign power of course. But assuming you can, the 1847 Act doesn't change the law on Crown grants, in my respectful submission, whatever it might have said about accepting or not accepting, and the 1847 Act, if it had any effect at that stage, then had to operate on the 1845 grant because otherwise it wasn't doing anything in July 1847 when it was passed because –

WILLIAM YOUNG J:

But there were other New Zealand Company grants, weren't there?

MR GALBRAITH QC:

Yes, there were, and the – yes, there were, there was the Wellington and the New Plymouth grants.

ELIAS CJ:

What dates were they, do you know? Because one of them at least was after – was 1852, I think.

MR GALBRAITH QC:

Yes, well, the Wellington one was contemporaneous effectively with the Nelson one –

ELIAS CJ:

With this one? Yes, that's right.

MR GALBRAITH QC:

– because they were put on the ship and sent down from Auckland together and while it might have taken a couple more days to get to Nelson – but, in any case, it's the date when it's signed and that's the date it's operative, so –

O'REGAN J:

So it's clear that the 1845 grant didn't give anything to the New Zealand Company until they accepted it. They – or at least it didn't give them a title to lands until they'd accepted it, but are you saying it nevertheless crystallised the Crown's assertion of its demesne and title?

MR GALBRAITH QC:

Well, it certainly does that. It certainly does that, but, I mean, in – you're quite right, Sir, in the sense that in a conveyancing sense, which was the term that my learned friend used, neither of the grants, '45 or the '48 one, ever produced a title which NZ, the New Zealand Company was able to pass onto anybody else so they spectacularly underachieved in that way, but the grant itself does create the interest under it, and that's the point, it's granting away, and that's the whole point about delivery of deeds, et cetera, that it's the intention of the grantor which matters. It doesn't actually matter.

O'REGAN J:

Well, except that when the grantee has obligations in return there's an issue about what evidence is there of their having accepting those, isn't there?

MR GALBRAITH QC:

Well, that's your –

O'REGAN J:

I mean, normally that would be the payment obligation but there wasn't –

MR GALBRAITH QC:

Sure.

O'REGAN J:

– wasn't one here.

MR GALBRAITH QC:

No, that's right.

O'REGAN J:

But there was the reservation obligation.

GLAZEBROOK J:

No, that was already reserved.

MR GALBRAITH QC:

No.

GLAZEBROOK J:

I don't think it was an obligation of the New Zealand Company because it was reserved under the grant itself.

MR GALBRAITH QC:

Grant, yes. So that's created –

GLAZEBROOK J:

The only – and I suppose there were reservations in terms of prior grant holders but that wasn't either an obligation. It was a reservation out, so in fact I'm not sure there was any obligation of the New Zealand Company.

MR GALBRAITH QC:

No.

GLAZEBROOK J:

They mightn't have liked the terms and the reservations but they weren't obligations.

MR GALBRAITH QC:

And they didn't want to pay the money that you had to pay to pick up your grant, and unless you picked up the grant then you couldn't go off to the conveyancing office, whatever it was called then, and register something, but that's only a debt and that's

very clear on the cases that they – that's not a condition of the grant, the payment of the money for the grant. And the case law, as least as I've –

O'REGAN J:
Sorry, just coming back to it. So are you saying that as a result of the 1845 grant the New Zealand Company did have –

MR GALBRAITH QC:
Yes.

O'REGAN J:
– even though it didn't accept the grant, it effectively –

MR GALBRAITH QC:
Yes.

O'REGAN J:
– notwithstanding that was given an interest in the land?

MR GALBRAITH QC:
Yes, and I – I was going to say, "I bet my bottom dollar," but that's not a legal way of putting things, but I would be very surprised if the New Zealand Company didn't go and tell the settlers, "Hey, you're okay. We've got a grant for 135,000 acres and that and we're just trying to improve it." I'm sure they didn't go out and say, "Look, this is all up in the air. We don't know if we've got a grant or not and we might renounce it," and –

O'REGAN J:
We're guessing though, aren't we, 170 years later?

MR GALBRAITH QC:
Oh, we're – that's right, Sir, I should have said that, Sir, I'm sorry, but…

When one looks at the case law also it's, well, at least to the extent that I've been able to, it's pretty clear that you can't set aside a grant, you can't set aside a grant simply by saying, "Don't like it." The basis for setting aside a grant is only where the grantee has misled the grantor and the Crown, and even if the grantor, the Crown,

has got it wrong but it hasn't been misled then the grant is still valid. You can't set it aside.

And it's interesting that *Xenos* case, which I haven't taken you to, about deeds, it's exactly what's said in that case and that was about a deed of insurance, and they said, "Well, once the deed of insurance has been signed by the directors of the company, because you don't like the terms of it, too bad. If you want the insurance you're stuck with it and you've got to go and find a legal remedy to alter that." And so once the grant is made, the grant is made, unless there is a legal process to set it aside. It operates from the time it's made.

ELIAS CJ:
It was set aside by revocation within the terms of the 1848 grant, was it?

MR GALBRAITH QC:
Well, it was set aside by the 1867 Act?

ELIAS CJ:
Or was it the 1867 Act?

MR GALBRAITH QC:
Yes.

ELIAS CJ:
But did the terms of, I can't remember – did the terms of the 1848 grant refer to it? No. So it required the 1867 Act because there were two inconsistent grants.

MR GALBRAITH QC:
Yes, yes. And that's what you would have expected, of course, if – because part of the Crown's case, I didn't hear it so explicitly but my understanding of it is that the, first, the 1845 grant was inoperable. In my respectful submission, that's not correct. And then secondly that in some way the 1848 grant was a continuation of the process which was started with the 1841 ordinance in Spain's hearings. Now, if that had been so you would have expected the 1845 grant when you read it says exactly that, this is a result of and Commissioner Spain's report. Read the 1848 grant, it doesn't say anything like that at all and there's not a skerrick of evidence that it was a

continuation of anything at all. There was no further inquiry. This was a, if I can use the term, an executive Act of the Government.

GLAZEBROOK J:
Wasn't there some process of identification in the period?

MR GALBRAITH QC:
There was surveying going on but there was nothing like –

O'REGAN J:
Some pā sites were identified.

MR GALBRAITH QC:
There was a map of the Motueka-occupied sites, Sir, but that was being done by surveyors doing that sort of thing and of course the 1845 grant contemplates that surveying being done because two of the areas were only part-surveyed at the time so it's a continuation of the process under the 1845 grant. But what in my respectful submission an appropriate interpretation of what happened is that Governor Grey thought he could and decided to do something executively. In my respectful submission, he didn't have the power to do that for a number of reasons but one of the reasons was, of course, the 1845 grant had created these interests and so whatever interest the Crown had coming up 1848 was only interest that it had left after the 1845 grant and it couldn't grant something it didn't have, and if the interest in 1845 as we argued for was subject to a trust, for example, then it couldn't grant away other than the bare legal title it held as trustee. It couldn't grant the beneficial interest in those lands that were identified under the 1845 grant, and we say on trust, to the New Zealand Company so the 1848 grant is ineffective in that respect. The Crown argues the opposite, of course. It says the 1848 grant was ineffective and therefore the 1848 grant is the one that grants the land to the New Zealand Company.

O'REGAN J:
But where does that leave us in terms of the trust argument? Isn't that just a breach of trust in 1848?

MR GALBRAITH QC:
Well, it is certainly a breach of trust in 1848. There's no argument about that, sir.

WILLIAM YOUNG J:

So is the issue of the Crown granting breach of trust?

MR GALBRAITH QC:

Well, it must be in dealing with the – purporting to deal with the 1845 land which we would say is held on trust. It couldn't.

WILLIAM YOUNG J:

So it's quite an interesting argument, isn't it, because it is an act of the executive Government.

ELIAS CJ:

No, but it's not inviolable.

WILLIAM YOUNG J:

No, I'm not saying it's inviolable. I am interested in an action of executive Government in a public capacity being held to be a breach of a private trust.

MR GALBRAITH QC:

Yes, well, if the Government owns –

ELIAS CJ:

No different from it being in breach of private ownership.

MR GALBRAITH QC:

No. Well, it's really what Her Honour the Chief Justice said. The Crown can't – and this goes back to the Magna Carta and we, in fact, refer to Magna Carta –

ELIAS CJ:

I'm so glad to be able to refer to the Magna Carta. I will have to weave it in somehow this year.

MR GALBRAITH QC:

The Crown can't just go and take somebody's land and – excuse me saying this. It really is as straightforward as that. It can't. It has got no power to do it unless it does it under some statutory power. An executive power doesn't allow it to just march in and take somebody's land.

GLAZEBROOK J:

That was probably stronger even in the 19th century than it is today, if anything.

MR GALBRAITH QC:

Yes, if anything. So depending on this Court's view as to the validity of the 1845 grant, but in my respectful submission it is a valid grant and was never set aside until 1867, then it created, we would say, legal estate in the Crown but equitable interest in Māori for the 15,100 acres and of course we say because the pā sites et cetera were never sold then the Crown could never acquire – until there was free session of those – title, legal or otherwise, to those sites and so they remained in 1845 in customary ownership and the Crown couldn't deal with them in 1848 because they were owned by Māori and the Crown couldn't create, by grant or any other way, any interest in property which it doesn't own. And this is why throughout we've said that there is onus on the Crown to show how it claims or how it got the claim of title which it makes under the 1848 Act and the only way it appears to be claiming that is by saying, well, the 1845 grant was inoperable and I'm not quite sure what the answer is to the fact that the pā sites et cetera weren't sold although certainly the greatest weight of evidence is they weren't sold and so they would have remained in customary title.

GLAZEBROOK J:

So is the argument about the 1867 Act that because the 1848 grant was inoperative the null and void et cetera and the 1867 Act doesn't apply or is there another argument in relation to that?

MR GALBRAITH QC:

Well, it's – the 1867 Act is obviously a problem and one can't shy away from that. What it says is that the prior grants, whether it's two grants for the same bit of land or the first grant is inoperative and –

WILLIAM YOUNG J:

It was premised on the assumption that the second grant was inoperative, wasn't it? Otherwise there wouldn't have been a need for the legislation.

MR GALBRAITH QC:

Well, it's certainly premised on the presumption that there were some difficulties about it, yes.

WILLIAM YOUNG J:

It is actually addressed in *Hansard*. There is a very obvious statement in *Hansard* that issues had arisen and it was for this purpose, it was to avoid litigation at the Supreme Court.

MR GALBRAITH QC:

I can well understand that. I mean, there obviously were issues about prior grants. It's clause 10 of the 1867 Act. And it does, as His Honour Justice Young has put to me, and my learned friend said, too, it starts off by dealing with the situation of grants which purport to cancel and then it goes into a more generic situation. Every grant, whether formally cancelled or not, of the land comprised in which a new grant has been duly issued – bit of an argument about whether, if you've issued a grant which you've actually got no power to issue because you don't own the land and that's been duly issued so that's a first level argument in respect of this, the first grant is then to be deemed absolutely void. That must be in a sense read down or read only to give effect to it so far as it has to give effect to it to carry out the purpose of deciding which grant for that bit of land does confer the title, if I can use that expression. It shouldn't be read to retrospectively wipe out collateral or consequential dealings which may have occurred in the previous period because that would be extraordinary.

ELIAS CJ:

It may well be, too, that this validation, it may not be confined to it but it may well have been prompted principally by two grant holders with different grants. The idea that you've got a grant saying that the grantee doesn't necessarily require such override.

MR GALBRAITH QC:

Well, certainly not an override in the sense that I'm just talking about because, I mean, just to postulate a situation, if somebody got prosecuted for something which they did inconsistently with their grant they get convicted. The 1867 Act comes along and they can then go to Court and say, "Hey, I shouldn't have been convicted." That would be an extraordinary proposition in my respectful submission. So it should be

confined to – which would have it biting here, I accept that – it should be confined to if you have got that contest of two titles, two title holders, then it's a declaration that the title holder under the second grant, provided it's duly issued by the Governor, prevails in that contest, but not in any other contest, so my learned friend's submission that a private trust, if it existed, then gets collapsed retrospectively, in my submission doesn't follow from interpreting the Act, and there is a principle of equity that statutes shouldn't be used, and it tends to be, they use the term "fraudulently", but it's a bit like the statute of frauds-type provision that it shouldn't be used to deny unconscionably an inequitable entitlement, and so the Courts will go out of their way to, while they obviously want to respect the statute, they have to do that, they'll go out of their way to find a way of ensuring the equity is still performed or imposed on the person who had that equitable obligation. So, 1845, 1848, in that period and as a consequence of the 1848 grant, as the Court knows, 47 town sections went, were lost, and 10,000 acres of rural land were not, also weren't brought under 1848 grant.

Can I just take – I don't want to take the Court's time unduly, but it was suggested, well, the Court should be very reluctant to think ill of the Crown and what happened, and with great respect I, if I can say, I agree with what His Honour Justice Arnold said, when one looks at the material which is before the Court in relation to the 47 sections going, the one absolutely certainty, at least on the documents, is that there was no consideration of Māori interests at all, it was simply a pact between settlers, New Zealand Company and the Governor. And it's, might just be interesting just to look at one example of what happened in relation to the possibility of identifying the rural lands, and you'll recall that there was enough land there to satisfy the 10,000 acres, right from the time of the 1845 grant, it needed a bit more land if it was going to have the full amount so that everybody, settlers and the 10,000 acres, could be identified, but there were proposals to go ahead and undertake that identification, and because you'll also recall in the Spain report and in the grant itself, it identifies acreages in the different areas, and so if we look at volume 1 of that supplementary bundle of documents, at the three supplementary volumes of documents, this is just an example of what happened. Behind tab 72 there's a handwritten letter and there's a transcript on the back of it from July 1847, and it's from the resident magistrate to the agent for the New Zealand Company and he says, "I've received from the Lieutenant-Governor to proceed to the Massacre Bay District, independently of pās and," and this is interesting, "independently of pās and cultivations, to select as much land as I may consider sufficient with the present and future wants of the natives and not the whole quantity of land specified in Mr Commissioner Spain's report, namely

4500 acres as native reserves." Now that area was 45,000 altogether, so this is a tenth, that was what he's identifying that Spain's identification, there should be four and a half thousand acres. "I'm also instructed that neither the portion with the coal mine exists nor any other part that is particularly valuable to Europeans be included, which I after communicating with you may determine upon to be excepted in the Crown grant for the use of natives." So in other words you picked the poorest land and you ignore the fact that Spain has said, and that's still the operative report and grant at that stage, you ignore the 4500 and you choose that land.

And then if one goes across to tab 73, that's July 1847, you'll see there, again it's a number of handwritten things which have been typed on the back of at 5393, you'll see under, see Heaphy Esquire, Nelson, 28 August '47, "Sir, in pursuance of the arrangement which I made with you yesterday I have to request you will consider yourself engaged on behalf of the New Zealand Company to occupy the resident magistrate to Massacre Bay for the purpose of watching over the interests of the company in reference to selection of native reserves to be made on the part of the Government." "Native reserves to be made on the part of the Government." Again, see that, it's on behalf of the Government and it's accepted by the New Zealand Company that that's how you identify these native reserves. "Your duty will be to see that no excessive quantity of land is reserved. It appears to me that if in addition to the actual cultivations already reserved about 500 acres more are appropriated for the natives abundant provision would exist for the present and future wants of all who reside in that district. You will also be careful to see that no coal district or other land which may offer peculiar advantages either from situation or otherwise to the exercise of European industry and capital is reserved further." So I think it's fair to say that one shouldn't hesitate, that the purpose of the loss of the 10,000 acres was not to certainly benefit Māori and it wasn't a continuation of the just and equitable process that the 1841 Ordinance spoke of and it wasn't a continuation of Spain's inquiry. It was indeed an executive but unauthorised, at least the Crown hasn't pointed to any authorisation, act of the Governor in association with the New Zealand Company. And so one would hope that the law wasn't bereft of some way of responding to that situation.

So that all, of course, just led up to the 1848 grant, and I've already spoken about the 1848 grant –

ELIAS CJ:

But that correspondence continues at 5396?

MR GALBRAITH QC:

Yes. No, it goes on, Your Honour, I just…

Perhaps the other thing just to, I should have said before, about the 1867 Act, the –

ELIAS CJ:

The Governor authorised the expenditure for the surveyor, boat –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– provisions and sundry expenses.

MR GALBRAITH QC:

They were very careful with –

ELIAS CJ:

But they actually kept quite meticulous records for the most part.

MR GALBRAITH QC:

I was just going to say that they were very careful with their money, I mean, yes, they really were.

ELIAS CJ:

Well, after Fitzroy's sticky end or –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

No, first sticky end, however, there was another one.

MR GALBRAITH QC:
No, there was no – they didn't need an Auditor-General in those days. It was very, very cautious.

So we then have, as you know, we have the, and we talked about it already, 1847 Act, in the Loans Act which, in which the Crown tried to assist New Zealand –

ELIAS CJ:
Well, sorry, just at – just curious, 5400, what – sorry, this is 1847, "Hold a Court at Massacre Bay to adjust certain disputes among the natives." I just was trying to think what that was under. It doesn't matter.

MR GALBRAITH QC:
I don't know. Yes, I'm sorry.

ELIAS CJ:
It's pre the Native Land Courts. It must be –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– have been in the general jurisdiction. Or was there an Arbitration Court or something –

MR GALBRAITH QC:
I'll see if I can find out because –

ELIAS CJ:
– that adjusted these?

MR GALBRAITH QC:
I'll see if I can find out because –

ELIAS CJ:
Because there certainly was reference in some of the instructions we were taken to, to setting up a mechanism.

MR GALBRAITH QC:
Yes, there was and –

ELIAS CJ:
And I'm just – I…

MR GALBRAITH QC:
No, I know it was set up, Your Honour.

ELIAS CJ:
Because I never get out of 1840, I don't really know this period.

MR GALBRAITH QC:
I'll try and see if we can find something.

So what we had was 1847 Loans Act, land back, New Zealand Company goes into liquidation, if that's what they did in those days, in 1850 the land comes back to the Crown. In my respectful submission, it doesn't change its status anywhere along the way of that happening. If it went into the New Zealand Company, if it, as part of it subject to a trust, it was subject to a trust, and if it came out the other end it was still subject to a trust.

And then in the 1851 Act, as the Crown rightly says, there was then a provision to provide for settlers to obtain at last title to the lands that they were, they had purchased from the New Zealand Company a long time ago.

It is worth – if you wouldn't mind just going to the 1851 Act briefly, it's, or it's a certain Act, it's actually an ordinance – it's exhibit 10 in the legislation bundle, the pink bundle…

ELIAS CJ:
Sorry, again, just if you are checking it, 5400 again I see, that reference that you read out to the parties being not necessarily kept out of their money after the services performed. What money was being paid then?

MR GALBRAITH QC:
I'll check that, Your Honour, let me have a look.

GLAZEBROOK J:

Which…

ELIAS CJ:

One of three of the supplementary ones.

GLAZEBROOK J:

One of the three, okay.

MR GALBRAITH QC:

So just in the legislation bundle, exhibit – not exhibit, sorry – tab 10, is the 1851 Ordinance, and this is, you'll see in the preamble to it on the second page, about halfway down that preamble on the second page, it says that directors of the New Zealand Company gave notice they were going to surrend the charters, "All claim and title to the lands granted and awarded to the said company, by virtue of the said recited Act, cease and determine, and all the lands of the Company in the colony reverted to and became vested in Her Majesty as part of the demesne lands of the Crown, subject nevertheless to any contracts which should be then subsisting in relation to any of the lands," and so this was how the settlers got a scrip as it – or a title from the Crown, a grant from the Crown, in place of what they'd had from the company before. What's interesting about it is that it provides for settlers who didn't want to take up the land which they had contracted with the company to acquire to get in place of that scrip for every acre that they decided to surrender from their contract with the Company, and they could go off and use that scrip, that was, I was going to say like Monopoly money, but it was, but they could go and use that to go and purchase other land somewhere else in New Zealand if they wished to. So you not only had the situation where, as my learned friend fairly accepted yesterday, that the New Zealand Company had only sold down about somewhere round about half of the, or perhaps a bit more than half of the, of the contracts which it had wished to sell down in the Nelson area, but you had the opportunity or the settlers had the opportunity of giving back those contracts and taking a scrip in exchange, and so unlike what I think the Crown said the previous day, as my friend accepted yesterday, this 1851 Act didn't mean that all the land which the Crown had assumed back from the New Zealand Company then went off to settlers, and there was obviously a very considerable residue of land which remained with the Crown, and the Crown over time either retained that land or dealt with it and, as I think my learned friend accepted, unlikely it gave it away for nothing, and so it would have, there would have

been proceeds of sales of that land subsequent to 1851 to the extent that that land was disposed of and not given to public bodies as my learned friend rightly said was one possibility. And then there's the 1856 Act and of course the residual land, 3900 and some-odd acres, comes under the administration of the Commissioners under that Act.

So just turning quickly to the legal obligations which we say apply – I mean, the Court understands what we say – we say in respect of the land identified in 1845 reserved and that that was on an express trust implied from the circumstances at the time, and in effect the 1845 grant was indeed a declaration of, not that one is needed, in respect of the pā sites they should have been excepted from the 1845 grant and therefore they remained in customary title –

ELIAS CJ:
Well, so what are the terms of the express trust again? Are they set out in…

MR GALBRAITH QC:
No, the express trust, I agree with Your Honour, in effect it's a holding trust at that time for the – it has to be for the vendors of those lands and it can't be differentiated between districts or hapū. At that stage, that's certainly wasn't how it was treated, could practically be treated. And the Crown, of course, as the Court's aware, put up a number of arguments of difficulty in relation to that. A little bit surprised to hear *Tito v Waddell* that I thought the Crown had given up on rearing its head again, but *Tito v Waddell* is a very different circumstance, not just for the cases it relies upon, like *Kinloch* and that, but it was a statutory regime that was in issue in *Tito v Waddell* and the argument was whether that statutory regime of the Government of the Gilbert and Ellice Islands gave rise to a trust, and certainly it discusses whether there's a higher level situation of trust and above the political trusts.

ELIAS CJ:
Was it Gilbert and Ellice?

MR GALBRAITH QC:
I'm sorry?

ELIAS CJ:
Was it Gilbert and Ellice?

MR GALBRAITH QC:
Well, it was the – no, it was Nauru that was the actual island –

ELIAS CJ:
At Nauru, yes.

MR GALBRAITH QC:
– but the Government of Gilbert and Ellice, I think, were –

ELIAS CJ:
Offered an island, yes.

MR GALBRAITH QC:
Yes, yes. And the, perhaps just to put this to rest because it did arise, there were royalties there but again under a statutory regime it's not like the royalties that we're talking about in 1842 here, and, of course, as you know, the Banabans, they got shunted from island to island and a rather sad history.

So that's what we say arises in 1845 and continues through to at least 1856.

The driving reason, "reason's" not a good word, the driving justification for that circumstance is that we are dealing here with pre-existing property rights which did get removed into the control and disposition of the Crown, and on a particular basis which is identified in the 1845 grant, and so it would be surprising if the Court can't overcome some of the technical difficulties which the Crown now asserts prevented there being an express trust until a statutory regime was set up because the alternative, or the counterfactual, as people say these days, is that otherwise the Crown had no obligations that could be effectively enforced by Māori during that time and could do what it will with the land and there might have been nothing left in 1856 or, for that matter, 1848.

To the extent that there are technical arguments that can be run, as the Crown has run here, that, of course, was one of the reasons that in Canada and *Guerin* that the Supreme Court there decided that fiduciary duty was a, I won't use the term I used on Monday, "easier", a way of avoiding those sort of arguments, I suppose one might say, which are – don't – lack of a degree of merit, albeit they may have some historical justification, and so *Guerin* actually started out as an express trust claim

and ultimately, of course, was a fiduciary duty finding and, as I think I also said on either Monday or Tuesday, I agree with what His Honour, Justice Young, said in *Paki* that if it does have, the *Guerin* situation has elements which are very redolent of an express trust, and it's certainly what we've got here, so that there is that alternative which is available if the Court saw that as a path forward but, again, as we discussed the other day, the Courts, the New Zealand Courts so far have managed to not have to go down that particular route which has its own interesting factors.

O'REGAN J:
What was the effect of the 1856 Act on the holding trust?

ELIAS CJ:
1867?

O'REGAN J:
No, the 1856 Act.

MR GALBRAITH QC:
In 1856, the –

O'REGAN J:
The Native Reserves Act.

MR GALBRAITH QC:
The Native Reserves Act, yes.

ELIAS CJ:
Sorry, yes.

MR GALBRAITH QC:
We've accepted, Sir, and I can't now change that acceptable, that we can't make a claim for breach of trust after that in any of the dealings which took place because they were dealings, then, under a statutory regime. Whether the lands themselves were held on trust is another question but the actual dealings were authorised by statute and that can always happen, of course.

We have the issue of limitation and I addressed it previously in relation to express trusts and perhaps just one thing to note about the Limitation Act. Section 6 accepts land held in customary title from the operation of the Limitation Act is only land which is held in customary title isn't subject to limitation.

WILLIAM YOUNG J:
But that's not relevant, is it?

MR GALBRAITH QC:
No. Well, it may be relevant if there is any land now left in customary title.

ELIAS CJ:
Which is not covered by the Settlement Act?

MR GALBRAITH QC:
Which is not covered, yes.

WILLIAM YOUNG J:
But more importantly, it's not covered by the claim, is it?

MR GALBRAITH QC:
Well, we haven't identified customary title land but I do believe there is some out there but as Her Honour the Chief Justice said to me and I think absolutely correctly that it's probably fragmentary but there is, I am instructed, some land that potentially is still held in customary title out there, but if it's in customary title then of course it's land to which a claim, a title claim can be made.

O'REGAN J:
If it's in customary title it's in customary title and you don't need more than that.

MR GALBRAITH QC:
I agree, yes. That's what I was just trying to say. If it's in customary title it's in customary title and that's it and it's not subject to limitation.

Section 21(1)(b) is the determinant provision under the Limitation Act in respect of the express trust or we would say fiduciary duty by analogy, so one is –

WILLIAM YOUNG J:

Can I just ask you, can you really make a claim in relation to the land given to the church?

MR GALBRAITH QC:

Oh, sorry, I meant to deal with that. Forget limitation for a moment.

WILLIAM YOUNG J:

No, no, I am interested in limitation.

MR GALBRAITH QC:

Well, can I just say what the claim would be in relation to the land that was given to the church, because of course it came back to the historic owners. The mistake that was made there, or at least the breach that was committed there, was to transfer the land to the church for a purpose but without making the purpose, the condition of the transfer, in other words, transfer to the church for use for establishing a Māori educational establishment but then not saying, "If you don't continue that you've got to get it back," that's the first thing a trustee should do. If you're going to transfer trust land for some purpose then you would never do it on an open-ended basis like that and that's what happened, of course. It was a church school that operated for a short period, a number of years but only a number of years, and after that the school ceased and the land stayed in the church.

WILLIAM YOUNG J:

It seemed to be a very large area for a school.

MR GALBRAITH QC:

900-odd acres, I think it was, Sir, altogether. The only explanation I can give for that, and I've come across it in relation to some land in the Waikato areas –

ELIAS CJ:

A lot of the cases are about it.

MR GALBRAITH QC:

Some of the ideas were that if you had a big chunk of land like that then you could educate people at the school to learn to farm and it would also provide income to support the school as part of the idea.

ELIAS CJ:

Yes, an endowment.

O'REGAN J:

Where was the church?

MR GALBRAITH QC:

Motueka.

ARNOLD J:

So are you saying, then, the Crown, by transferring the land to the Bishop to the church converted trust property to its own use?

MR GALBRAITH QC:

Well, I can't say the Crown transferred property to its own use, Sir, because of course it went to the church.

ARNOLD J:

Yes but it went to a third party for Governmental purposes.

MR GALBRAITH QC:

I think it's more that – I think what we would say is that it should have come back. I don't think we can complain about it going but I think we can complain about it going on terms that didn't bring it back when it was no longer being used for purposes that were beneficial to Māori in the area. That would be more what we would say, Sir.

ELIAS CJ:

It was probably more the decisions of the Courts that were the impediment because one would have thought that otherwise there would have been a claim for a resulting trust if it's charitable.

WILLIAM YOUNG J:

I don't have any difficulty with seeing the transactions of a breach of trust but what I am more troubled by is how you can make a claim in relation to it, given section 21.

MR GALBRAITH QC:

I understand, Sir. I mean, section – that's a difficult one, Sir, because the property is no longer in Crown ownership so we will run immediately into a section 21 problem. I accept that. Can I just come back to that in a moment having gone through the possibilities that some land is still, as we discussed before and Mr Ingram's evidence indicates there is – there are definitely are tenths section which are now back in Crown ownership one way or another. There's the possibility, and we just don't have the evidence before this Court, that there is land that never left Crown ownership and is still in Crown ownership and I apologise that the evidence isn't here for the reason that the two cases passed in the night, but that possibility exists and –

GLAZEBROOK J:

Well, whose responsibility was it? Because Mr Goddard's submission is that this was not supposed to be a split hearing, that discovery had been given and the onus is on the appellants to have shown that.

MR GALBRAITH QC:

Yes. What I have to submit, Your Honour, is – and these are my instructions – that the discovery was late in the day, the plaintiffs have only the resources that they have and unfortunately not the resources of the Crown, that it was knowledge or information within the Crown, I mean, the Crown is the party that knows what happened to these lands and knows what it's got, and the best was done and it's not – and I'm limited, therefore, in the evidence which I can point to and the Court of Appeal weren't unduly sympathetic but that is the evidence that there certainly is some land which is still in Crown ownership and there is some that may not have left Crown ownership and a further inquiry would be required to identify the extent of the land that falls within that category and therefore, subject to the other issue which His Honour Justice Young is about to raise with me, would satisfy section 21(1)(b). The other –

O'REGAN J:

Well, how was this dealt with in the High Court?

MR GALBRAITH QC:

I wasn't there, Sir.

O'REGAN J:

No, I know but the case was made in the High Court. Everyone was expecting a judgment on the whole case then, weren't they?

MR GALBRAITH QC:

Yes.

O'REGAN J:

They weren't expecting an answer saying, "Here's part 1 and now here's part 2."

MR GALBRAITH QC:

Well, one problem was that the High Court Judge, of course, decided there was no standing so the question he postulated, for example, he came to that so there isn't, as I understand, any finding on that. I'm not saying he didn't say some things about it in his judgment but there's no determination, as I understand.

So if there is property in that category then it would satisfy 21(1)(b) and, as I say, there's certainly evidence of some property which has been in the Crown, gone from the Crown, came back again and that's the issue that Her Honour Justice Glazebrook raised with me and the issue which Justice Young would probably raise with me, that the entitlement to claim against that land is remedial rather than institutional and so that leads me into the submission I made before that in these circumstances where you have Māori land dispossessed by the Crown the nature of the interest involved in that should either mean paragon isn't applied or read down.

WILLIAM YOUNG J:

Sorry, but the *Paragon*, the Crown doesn't need to rely on *Paragon* in relation to some of these claims, does it?

MR GALBRAITH QC:

No. Well, to take the one that you put to me –

WILLIAM YOUNG J:

The church land.

MR GALBRAITH QC:

Yes.

WILLIAM YOUNG J:

I mean, that seems to me to be a pretty difficult claim irrespective of *Paragon*.

MR GALBRAITH QC:

I agree with Your Honour, it's a –

ELIAS CJ:

Except perhaps for declaratory relief.

MR GALBRAITH QC:

Yes. It is a difficult claim and the other matter which I averted to previously making submissions is that I'm sure this Court will be sensitive to things like the United Nations Declaration and that and so the interests of indigenous people that have been harmed over, unfortunately over history.

ELIAS CJ:

Well, if the *Guerin* duty is –

MR GALBRAITH QC:

Not a problem.

ELIAS CJ:

– indeed sui generis then there's an issue as to whether the terms of the Limitation Act apply anyway, I suppose.

MR GALBRAITH QC:

Yes. If *Guerin* sui generis applies then, in my respectful submission, we escape from the strictures of –

ELIAS CJ:

Well, you may but…

MR GALBRAITH QC:

Well, that's my submission.

ELIAS CJ:

It's still discretionary upon the –

MR GALBRAITH QC:

It's still discretionary. It's actually quite interesting in *Tito v Waddell* that His Honour there, certainly in the declaratory area, regarded that as – he found against him for everything, of course, but he didn't actually contemplate the possibility –

O'REGAN J:

He stumbled on something correct.

MR GALBRAITH QC:

Well, he did contemplate the possibility of a declaration but then decided he wouldn't make one, so…

ELIAS CJ:

Well, also they haven't had the tradition of –

MR GALBRAITH QC:

No.

ELIAS CJ:

– the Declaratory Judgments Act which I think is unique.

MR GALBRAITH QC:

Yes. In my respectful submission, it's a very beneficial jurisdiction. It's been used – I mean, there was a time when it was interpreted overly narrowly and it's been interpreted more generously in the last perhaps 20-odd years.

So – but His Honour, Justice Young, is correct. The claim against the Bishop is, in relation to that land, is – you would need to say that that – it would need to be a generous interpretation, perhaps just put it that way.

I'll just speak briefly about standing, and I've really, I've started on that in this reply. I understand all that my learned friend has said about standing and problems that can arise, but that isn't the situation we've got here, and that's really why I started on that in reply, that we do have here two plaintiffs who say, and have said, as Justice Clifford records, from the very early days of this proceeding, not necessarily in the pleading specifically, but we've stood up and this case has been brought on

behalf of the customary owners as a representative proceeding to try and get redress for what wrongs were done to the customary owners an awful long time ago.

Now what happened, and my learned friend also fairly indicated this, was that there were applications for intervention and these were granted, and you'll find Justice Clifford's minutes in there. As I understand it, all the iwi trusts who had an interest did become interveners, or were given the opportunity of being interveners, so it's not a situation where this has all happened without the other persons who potentially might represent some customary owners who are no longer, or descendants of customary owners who are no longer members of Wakatū despite the fact Wakatū, as I say, well, any redress would be on behalf of all of them, it's not a situation where they haven't been involved in the proceedings and they, apart from my learned friend, Mr Castle, are not here today. So Mr Castle's clients, the point he makes is that if we get to a situation of redress other than a declaration then his clients wish to be heard, and Wakatū has no quarrel with that at all because that issue will have to be resolved and Wakatū genuinely is attempting to bring these proceedings on behalf of all customary owners, and so that's why I said the other day that there might have to be a section 63 reference to identify the customary owners. Wakatū is proceeding on the basis that the customary owners are those who are identified by the 1892, 1893, Native Land Court decision but if, if there is any issue of identification arising out of that then that is a step that would have to be taken down the track.

So in my respectful submission, while I understand and appreciate the difficulties which my learned friend has postulated, this isn't a case where those difficulties arise, certainly not at this stage of the process or the proceeding. The proceeding is brought at the moment to obtain a declaration in relation to, one, there being legal obligations, either of express trust or fiduciary duty that were breached, and then if the Court were persuaded as to that, a declaration as to that, and I think the first part of the declaration we put before the Court is probably suitable for that, and then of course Mr Stafford and Wakatū would say, "Well, there then should be a reference back to the High Court for considering these issues about identifying property, identifying more specifically if there a breach and, if necessary, reference to the Māori Appellate Court under section 63 to identify the customary owners."

GLAZEBROOK J:

And the Settlement Act?

MR GALBRAITH QC:

I've got to deal with that. So we face the Settlement Act and to some extent the, what I've just said applies there in respect of that also because it's really, and I think is the way both Justice Clifford in the caveat judgment and also the Court of Appeal in the judgment we appealed from, have really seen the Settlement Act provisions that either you interpret them so this proceeding becomes an empty proceeding and the only, if it has an existence, it is only the existence of Mr Stafford as a individual claimant, which is not the base upon which he presents himself to this Court, or the – and so the proceedings, despite the appearance in the saving provision, is in fact, as I say, empty, it doesn't have any effect, or you give effect to is by recognising that this claim was brought from the early days as a claim on behalf of the customary owners and that Parliament must have known that. It's why I read from section 60 – sorry, paragraph 62 of Justice Clifford's judgment, it's why, if one looks at the notice of appeal in the Court of Appeal which is the first document in volume 1 of the supplementary bundle of documents, you'll immediately see there that the declarations that were sought there, it's behind tab 1, is a declaration that the Crown was obligation to reserve and hold on trust for the hapū and whānau of the area and a declaration that there were fiduciary obligations to the hapū and whānau of the area, and so, and it's the CA number which of course is specifically referred to in the preservation section, and so the originating document, if I can use that term, for an appeal is the notice of appeal, and that's what the notice of appeal was about, and that was what was said to be preserved, so unless the Court, with respect, was going to take the position that the appellants can only argue this case on the basis of their statement of claim and that what in fact has happened through two other series of Court levels and what judgments have been given on is to be ignored in this Court, then the preservation section must, with great respect, encompass the ability of the appellants to argue on the basis that they're bringing this claim for the customary owners and the hapū and whānau, the descendants of the hapū and whānau at the time of the alleged trust and breaches. So it's a question of whether some substance is given to the preservation section or it's devoid of any substance.

GLAZEBROOK J:

Well, it might be whether some substance is given, but in fact if you look at, say, Mr Castle's clients, they have settled Wai 56, they have settled this particular claim and received compensation in respect to it, and they've agreed that that's in full and final settlement, and they are precluded from suing themselves.

MR GALBRAITH QC:

I don't like to speak for Mr Castle client –

GLAZEBROOK J:

Under the Act.

MR GALBRAITH QC:

– but, yes, you – and that seems right, Your Honour, yes.

GLAZEBROOK J:

So how can they –

ELIAS CJ:

So nothing can touch, nothing can affect them, under the Settlement Act?

MR GALBRAITH QC:

I would have thought that was correct.

GLAZEBROOK J:

Well, then how do you get an inquiry into what goes to the customary owners if those customary owners can't sue?

MR GALBRAITH QC:

Well, you were asking –

GLAZEBROOK J:

Well, how can they receive double or more compensation in respect of it?

MR GALBRAITH QC:

Well, that, you were asking about Mr Castle's client. Mr Castle's –

GLAZEBROOK J:

Well, I'm just, I'm saying as a –

MR GALBRAITH QC:

Yes, yes. No, I think –

GLAZEBROOK J:

– as an example –

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

– so, because he, there are obviously customary owners that Mr – well, they are –

MR GALBRAITH QC:

There are customary owners in Mr Castle's entity.

GLAZEBROOK J:

Yes. That are not contained within Wakatū.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

But even the ones who are contained within Wakatū, the same argument applies, doesn't it?

MR GALBRAITH QC:

Well, the settlement, you've got – I mean, as I've said, either the preservation section means something or it doesn't mean something, and if it doesn't mean something then it hasn't actually preserved anything which, in respect of the Court of Appeal, the CA notice of appeal or the…

O'REGAN J:

Well, yes, it has. It's arguably still protected that, the ability of Mr Stafford to get a declaration, hasn't it?

MR GALBRAITH QC:

It's arguably done that. It's arguably done that, but that wasn't the substance of – I'm sorry, that's not right to say.

O'REGAN J:

Well, that's –

MR GALBRAITH QC:

That's only part of –

O'REGAN J:

That's the primary remedy requested –

MR GALBRAITH QC:

Yes.

O'REGAN J:

– in both the Court of Appeal and in this Court.

ELIAS CJ:

Although it's a declaration with substantive consequences –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– as sought.

MR GALBRAITH QC:

Yes, and so we're in that situation where the Crown law advice, as I understand it, was given as on a matter of principle and that is the principle that legislation shouldn't take away active rights under proceedings and the preservation section purports not to but if one interprets the other way it, in effect, does, certainly, the rights which were being pursued, and had been pursued, in that proceeding, so…

ELIAS CJ:

There are no right – there is no wrong, I suppose, there is no wrong in respect of which your claim is brought that isn't the subject of the Settlement Act, is there?

MR GALBRAITH QC:

Well, it's hard to – the reason I'm hesitating, Your Honour, is that the Settlement Act, or at least the recitations that my learned friend took us through, are pretty general in – so I'm just not quite sure – and I think he was having a bit of that trouble also. Or perhaps he wasn't, sorry.

ELIAS CJ:

Well, I don't think it was a trouble for him.

MR GALBRAITH QC:

Yes, well, perhaps it wasn't trouble for him, but –

GLAZEBROOK J:

Well, I think he said they were necessarily general –

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

– and they were set out in more detail, both in the deeds and in the claims.

MR GALBRAITH QC:

Yes, but they –

ELIAS CJ:

Yes.

MR GALBRAITH QC:

– certainly weren't specific in the way that this claim is brought.

ELIAS CJ:

Yes, but you're not, you haven't tried to persuade us that there is anything additional that you're seeking that wasn't the subject of claim.

MR GALBRAITH QC:

Well, the Wai –

ELIAS CJ:

Or wasn't the subject of settlement, sorry.

MR GALBRAITH QC:

Can I just –

ELIAS CJ:

Yes.

MR GALBRAITH QC:

– ask about that? Well, I think that – I mean, apart from the fact that one was a private law claim and one's a Treaty claim and, of course, the considerations which are then given are significantly different because, as I think Your Honour said, it's more of a political process under the Waitangi –

ELIAS CJ:

Well, it is a political process but it settles –

MR GALBRAITH QC:

Yes, I –

ELIAS CJ:

– law, legal claims.

MR GALBRAITH QC:

Yes, and it purports to settle Wai 56 and so, I mean, I accept that. I don't think I can argue anything to the contrary except they're different and they have different potential consequences and –

O'REGAN J:

Well, what do you say would be the result if at the end of this process and the referral back and all the other steps you're talking about a decision was made that the Auckland Point School should be vested in the customary, of the people who have entitlements under the reserves? What would happen to the person who claimed it under the Treaty settlement?

MR GALBRAITH QC:

Well, nobody claimed it under the Treaty settlement but it became, it became a, as I said, it became part of –

ELIAS CJ:

Whereas commercial redress –

GLAZEBROOK J:

They may buy it, able to buy it.

O'REGAN J:

Well, it was selected as redress, wasn't it?

MR GALBRAITH QC:

Yes, yes. So Māori who identified that had to pay for it so it wouldn't be a – and there's a caveat on it at the moment, so in a sense nobody loses. They keep their –

O'REGAN J:

But what would happen to it? That's – you're saying they'd have to deselect it.

MR GALBRAITH QC:

They haven't selected it yet, as I understand it. Just it's an opportunity they have under the Treaty settlements so it's an opportunity that wouldn't be available, but –

GLAZEBROOK J:

But that means that part of the settlement wouldn't be available, so not only a double-up, you'd be taking away some of the settlement as well.

MR GALBRAITH QC:

No, because the iwi gets the money. They just don't have the opportunity of spending it.

ELIAS CJ:

The settlement is really the money, isn't it, and the opportunity, I suppose.

GLAZEBROOK J:
Well, I think those opportunities were quite important because of the importance of land to Māori, even if …

MR GALBRAITH QC:
Well, you see, the odd thing about that, though, is it's not an iwi because they'd had no claim, they'd had no whakapapa with that property at all so it's not a question of –

GLAZEBROOK J:
Well, in this particular case but in other cases it can be a way of getting back land that they're not entitled to in terms of the Treaty settlement itself which is important to them.

MR GALBRAITH QC:
That's absolutely correct, Your Honour.

Just in relation to declaration, as I said the other day, so I am repeating myself, declaration itself has a value to the plaintiffs. The most important value is the recognition, of course, of their situation. But it has some practical – possibly some practical significance, as well, depending upon the way the Crown then is prepared to recognise a declaration in the plaintiffs' favour and it may, of course, lead to some consequences in terms of costs.

O'REGAN J:
Your submissions on standing are really just about Wakatū and Mr Stafford. Have you abandoned the standing of the third appellant?

MR GALBRAITH QC:
I don't have instructions to abandon it, Sir, but I haven't made any submissions on it, as my friend pointed out.

That is what I was proposing to say but if there are any other questions.

The question Your Honour asked about the hearings, I have to read this. The Resident Magistrates Courts ordinance of 1846 permitted the resident magistrates summary jurisdiction and disputes between Māori and European and

provided for a Court of arbitration which consisted of a resident magistrate and two native assessors to hear disputes involving only Māori, so that was from 1846.

ELIAS CJ:

So they obviously use that process in adjusting the – or were prepared to use that process in adjusting the interests. Because that was when they went back in 1847 with surveyors. Anyway, it must be in the material and the narrative of the history of what happened. So I just couldn't remember what legislative …

MR GALBRAITH QC:

The page reference is volume 4 of 7, page 1401.

GLAZEBROOK J:

At one stage, Mr Galbraith, you said you had another point on the 1867 Act and I think you got diverted away.

MR GALBRAITH QC:

The only thing I was going to say, Your Honour, was that if the 1867 Act had the effect of wiping out the 1845 grant then you have got a significant problem coming up to 1848 because nothing has happened at that stage. The Crown hasn't got anything and it hasn't gone through the 1841 ordinance process. That's absolutely blindingly clear. So probably the whole thing falls over in 1848 and then goodness knows where we get to after that. It might have been my lack of courage which meant I didn't get there.

ELIAS CJ:

Well, it's quite a significant point. The 1841 ordinance with amendments, was it still in effect in 1847?

MR GALBRAITH QC:

Yes and it's preserved actually specifically, I think I'm right, in the Loans Act. It's actually recognised in the Loans Act but it's preserved so it's still there.

O'REGAN J:

I think that scenario you just gave us is pretty much what the Crown argued in its written submissions, that by 1848 that was still a situation where Māori had customary title and the Crown then effectively, by the 1848 ordinance, gave effect to

with some additions the purchases that had been made and thereby the land then became subject to the Crown's power to grant it.

MR GALBRAITH QC:

I think that's right. I think that the Crown argues that this was a continuation of the 1848 ordinance process and with great respect it quite clearly wasn't.

ELIAS CJ:

Not with all that additional land coming in.

O'REGAN J:

I think they're all – well, I think the Crown acknowledges that it did include quite a big piece of land. Nobody suggested anyone had purchased it so it certainly had its deficiencies.

ELIAS CJ:

Any other questions? No. Well, thank you, counsel, all counsel, for your extremely helpful submissions. We will reserve our decision.

COURT ADJOURNS: 4.01 PM