IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2010-442-181
[2024] NZHC 3110

BETWEEN	RORE PAT STAFFORD Plaintiff
AND	ATTORNEY-GENERAL First Defendant
	Continued …

Hearing: 14–18 and 21–25 August; 04–08, 11–12, 14, 18–21 and 25–27 September; 2–5, 9–10, 19–20 and 24–27 October 2023
[Further material and/or submissions received 28 November, 21 December 2023, 1–2 and 27 February, 28 March, 2, 5 and 10 April, 12 and 19 June, and 1 August 2024]
(Heard at Wellington)

Appearances: K S Feint KC, S M Hunter KC, M S Smith, H K Irwin-Easthope and H Z Yang for Plaintiff
J R Gough, S M Kinsler, HTN Fong, L Dittrich, C E Sinclair and LCY Ewing for Attorney-General
D A Laurenson KC and R L Roff for Accident Compensation Corporation
B M Nathan and NSP Laing for Te Whatu Ora – Health New Zealand and Te Pūkenga – New Zealand Institute of Skills And Technology
S V McKechnie and T J Bremner for Fire and Emergency New Zealand
J Every-Palmer KC and QAM Davies for Ngāti Apa ki te Rā Tō Charitable Trust

Judgment: 30 October 2024

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 30 October 2024 at 10:00 am pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Continued …

AND

ACCIDENT COMPENSATION CORPORATION
Second Defendant

TE WHATU ORA – HEALTH NEW ZEALAND
Third Defendant

TE PŪKENGA – NEW ZEALAND INSTITUTE OF SKILLS AND TECHNOLOGY
Fourth Defendant

FIRE AND EMERGENCY NEW ZEALAND
Fifth Defendant

NGĀTI APA KI TE RĀ TŌ CHARITABLE TRUST
Intervener

KĀINGA ORA – HOMES AND COMMUNITIES and HOUSING NEW ZEALAND LIMITED
Interested Party

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PART I—EXECUTIVE SUMMARY

[1] The land the subject of this proceeding is located at the top of the South Island and is known as Te Tauihu o te Waka a Māui (Te Tauihu), the prow of Māui's canoe.[1]

[2] The customary owners of this land were the hapū of Ngāti Rārua, Te Ātiawa, Ngāti Tama and Ngāti Kōata.[2] The plaintiff, Mr Stafford, is a kaumātua and rangatira who represents the descendants of these owners in this proceeding. Both the owners and their descendants are referred to in this judgment as the Customary Owners. By agreement with the plaintiff, those who are descended from the Kurahaupō iwi who were living on the land in the 1840s are also treated as Customary Owners for the purposes of this case.[3]

[3] In 1839, the New Zealand Company purchased the Te Tauihu land for its proposed settlement in Wakatū, Nelson.[4] This was part of a much larger purchase of about 20 million acres in the lower North Island and upper South Island. The purchase was confirmed at a historic meeting between rangatira of the Customary Owners and the New Zealand Company in 1841 at Kaiteretere.[5]

[4] The main form of payment for this land was the reservation of one-tenth of the allotted land for the Nelson settlement. This land is referred to as the Tenths. The Tenths sections were to be selected in one-acre, 50-acre and 150-acre sections in the town, suburban and rural areas of the new settlement. It was intended that the Tenths would be held on trust for the Customary Owners and managed as an endowment for their future benefit. The Tenths were either to be leased to settlers or used for the building of schools or hospitals for the exclusive use of the Customary Owners. Up until the enactment of the Native Lands Act 1856, the Tenths were inalienable, and even after this date the Tenths could only be alienated in certain circumstances.

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1 The region is also referred to as "Te Tau Ihu". I adopt the spelling used by Mr Rōpata Taylor, a witness for the plaintiff.

2 This was determined by the Native Land Court in 1893. A list of the individual members of those hapū was produced by that Court.

3 The Kurahaupō iwi comprise Ngāti Apa ki te Rā Tō, Ngāti Kuia and Rangitāne o Wairau.

4 Wakatū is also spelled Whakatū.

5 Kaiteretere is also spelled Kaiteriteri. I adopt the spelling used by Mr Rōpata Taylor, see above n 1.

[5] Following the signing of te Tiriti o Waitangi | the Treaty of Waitangi in 1840 (te Tiriti and the Treaty are used interchangeably in this judgment) and the enactment of the Land Claims Ordinance 1841, the Company's purchase no longer had any effect. A Crown grant was the only way the Company could obtain land for its proposed settlement. Commissioner William Spain was appointed to make a recommendation to the Crown on whether a grant should be made to the Company. This involved an investigation into the Company's purchase to determine whether it was made on equitable terms.

[6] Commissioner Spain issued his award in 1845. He recommended that the Company be granted 151,000 acres of land located in the bays now known as Tasman Bay and Golden Bay on condition that 15,100 acres of Tenths were reserved, and pā, urupā and cultivations were excluded. It was implicit in this recommendation that the purchase terms for this land, which included the Tenths, were just and equitable.

[7] The extent of the lands to be excluded as "pā, urupā and cultivations" is a live issue in this case.[6] It was intended that the pā, urupā and cultivations would remain in customary ownership and would continue to be occupied by the Customary Owners. These three categories of land are referred to as **Occupation Lands** in this judgment. In reality, however, these categories are much narrower than the land occupied and used by the Customary Owners at the relevant time.

[8] The Crown accepted the Spain award in 1845. As a result, the Crown obtained the Customary Owners' land. This included land which had been "sold" by the Customary Owners and from which the Tenths were to be reserved and the Occupation Lands which had not been sold and remained in customary ownership.[7] By accepting the Spain award, the Crown took complete control over all the Customary Owners' land, whether it was sold or not.

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6 The meaning to be ascribed to these terms for the purpose of this proceeding is discussed below at [317]–[378].

7 Dr Carwyn Jones, an expert witness for the plaintiff, explains that the concept of "sale" is unknown in tikanga Māori and the Customary Owners likely believed that the arrangement with the Company allowed settlers to live amongst the Customary Owners but subject to their mana and control. I use the word "sale" to distinguish between the Tenths and the Occupation Lands. As I explain in this judgment, I consider the latter were not "sold" by the Customary Owners.

[9] It was from this land that the Tenths were to be reserved and the pā, urupā and cultivations excluded. Those were the terms of the Spain award, and the basis upon which the Crown had obtained the land. The Customary Owners were entirely dependent on the Crown to fulfil those terms. The failure to meet these conditions meant that the Crown obtained land to which it was not entitled, that is, land which was intended to be reserved as Tenths, or which should have been excluded as Occupation Lands.

[10] By the time Commissioner Spain issued his award, 5,100 acres of Tenths had been reserved. These Tenths were reserved in one-acre sections in the township of Nelson, and in 50-acre sections in Motueka and Moutere. These are referred to as the **Allocated Tenths** in this judgment. There is no dispute that the Crown held these Allocated Tenths on trust for the Customary Owners.

[11] The plaintiff claims there were various alienations of these Allocated Tenths which resulted in a diminution of the Tenths held on trust. These include: a surrender of Tenths sections in exchange for other sections in Te Maatū, a large wood located in Motueka (referred to as the 1844 exchanges in Te Maatū); the withdrawal of 47 town Tenths as part of the remodelling of Nelson township in 1847; and a grant of Tenths sections to the Bishop of New Zealand in 1853 (referred to as the Whakarewa grant). These transactions, and others, form part of the plaintiff's claim.

[12] The remaining 10,000 acres of rural Tenths were never reserved. These are referred to as the **Unallocated Tenths**. The reasons for failing to reserve these rural Tenths are not entirely clear. While there had been difficulties in identifying suitable land for the rural sections, there is no dispute that there was sufficient land available to allocate the rural Tenths. It is possible that Governor Grey changed course away from the Tenths scheme towards a policy of providing large reserves for Māori occupation. However, as I find in this judgment, that change in policy could not relieve the Crown of its obligation to provide these Tenths.

[13] In the early 1840s there appears to have been significant confusion about whether the Tenths were also for occupation purposes. Many of the Allocated Tenths had been reserved from Occupation Lands and were being occupied by the Customary

Owners at the time. These are referred to as the **Occupied Tenths** in this judgment. However, as was clear from Spain's award, the Tenths and the Occupation Lands were intended to be kept separate and distinct. The former were to be reserved and held on trust; the latter were to remain in the ownership of the Customary Owners.

[14] The Crown did not take steps to exclude the Occupation Lands underpinning the Occupied Tenths. Nor did it take steps to reserve the Tenth from the land it obtained when it accepted the 1845 Spain award. Reserving Tenths from Occupation Lands set up the conditions for the future loss of the Tenths section in the event that the Occupation Lands were eventually returned to the Customary Owners. Occupation of these Tenths also meant that they were not being used to generate an income or other benefits for the Customary Owners which was a key feature of the Tenths scheme.

[15] However, the Crown did take steps to exclude Occupation Lands located in Western Tasman Bay and Golden Bay (referred to as Blind Bay and Massacre Bay in this judgment). Several **Occupation Reserves** were set aside in these areas in 1846 and 1847. These remained in customary title and were administered by the Crown with the consent of the Customary Owners who had proprietary interests in those Reserves. There were various rearrangements of these Reserves from 1856 onwards. These rearrangements form part of the plaintiff's claim in this case.

Supreme Court judgment

[16] Fast forward to 2017 and the delivery of the Supreme Court's landmark decision in this proceeding.[8] The Supreme Court confirmed that the Crown had assumed responsibility to reserve the Tenths and exclude Occupation Lands. The Court made a declaration that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the Customary Owners, and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award.[9]

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8 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 [Supreme Court judgment].

9 At [1].

[17] The Supreme Court also held that:

(a) Mr Stafford had standing to bring the claim.[10]

(b) The claims were not barred by the Limitation Act 1950 to the extent the claims fell within the terms of s 21(1)(b) of that Act because they seek to recover from the Crown trust property either in the possession of the Crown or previously received by the Crown and converted to its own use.[11]

(c) The claims were not barred by the settlement of a Waitangi Tribunal claim which included some of the same claims in this proceeding. That was because there was a provision in the settlement legislation allowing the proceeding to continue.[12]

[18] Issues of liability, defence and relief were remitted to this Court to determine in accordance with the opinions of the Supreme Court.[13] This judgment determines those issues.

[19] The duties found by the Supreme Court are unique fiduciary duties which are private in nature. While te Tiriti informs these obligations, they are not obligations that arise out of te Tiriti itself. This is not a claim for breach of te Tiriti. Nor is this a claim which arises out of the general obligations the Crown owes to Māori. The Supreme Court rejected the Crown's claim that this was a case involving political or public law duties.[14] The scope of this claim is fixed by the Supreme Court's judgment, the pleadings, and the limits of the law.

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10 At [2].
11 At [4].
12 At [5] citing Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, s 25(6).
13 At [7].
14 At [294] per Elias CJ.

The competing claims and defences

[20] On behalf of the Customary Owners, the plaintiff claims that the Crown breached its fiduciary duties by failing to reserve the Unallocated Tenths (10,000 of the 15,100 acres of Tenths); by alienating the Allocated Tenths; by failing to exclude Occupation Lands (including failures in relation to the Occupation Reserves); and in relation to the Occupied Tenths.

[21] The return of land within the Spain award boundary which is held by the Crown is sought as the primary remedy for these breaches. A monetary award is also sought to compensate for land that is no longer held by the Crown and for the lost opportunity to benefit from both the Tenths and Occupation Lands. A monetary award is also sought to compensate for cultural losses arising out of the alienation of the Customary Owners' land. In total, the plaintiff claims relief in a sum ranging between $4.4 billion and $6 billion.

[22] The Crown defends the claims on the basis that the Crown did not act disloyally or unfaithfully in relation to the Tenths, and that all Occupation Lands identified at the time were excluded. The Crown challenges the plaintiff's claim to the return of land, and the calculation of the compensation sought for the lost benefits of this land. The Crown also raises affirmative defences based on laches and acquiescence, the Limitation Act, and the Treaty settlement which those represented by Mr Stafford received following a Waitangi Tribunal ruling in their favour. The Crown stands behind the Treaty settlement process and raises concerns about the impact of this litigation on future Treaty settlements.

[23] I address the various claims and defences by reference to the different land categories involved. My findings are summarised below.

Unallocated Tenths

[24] I find that the failure to reserve 10,000 acres of rural Tenths was a breach of the Crown's fiduciary duty. There was no legal justification for the failure to reserve these Tenths. Like any other fiduciary or trustee, the Crown was not at liberty to change course or simply decide that it would not reserve these Tenths. The failure to

discharge its fiduciary duty resulted in the Crown taking this land for itself and treating it as if it was Crown land. Equity cannot countenance such a result.

[25] Accordingly, I find that the land held by the Crown within the Spain award boundary is impressed with a trust in favour of the Customary Owners to the extent of the Unallocated Tenths.

[26] If the Crown no longer holds enough land to meet the full extent of the Unallocated Tenths, then it must pay a sum equal to the current market value of the land. It must also pay a sum of money which represents the value of the opportunity to benefit from the Unallocated Tenths. That sum is to be calculated by reference to the rentals which would have been earned on the land rather than the Customary Owners' lost opportunities to benefit from the land. The calculation does not include compound interest. This results in a sum significantly less than that sought by the plaintiff.

Allocated Tenths

[27] The plaintiff claimed 15 transactions involving the Allocated Tenths were a breach of fiduciary duty and breach of trust. My factual findings on each of these transactions is set out in Appendix 2 to this judgment. There was only sufficient evidence to find three transactions were a breach of trust, but only two give rise to a remedy.

[28] First, the 1844 exchanges of Tenths in Te Maatū. Te Maatū was a significant resource for the Customary Owners. I find that the 1844 exchange of Tenths was to meet the stipulation made by the Customary Owners that Te Maatū be set aside. The eight Tenths sections received within Te Maatū should have been excluded as Occupation Lands and the Customary Owners should not have had to surrender Tenths to obtain these lands. This exchange resulted in the loss of the surrendered Tenths, amounting to 400 acres. The Crown was required to replace these 400 acres of Tenths from the land it obtained in 1845. It did not. This was a breach of the fiduciary duty to reserve 15,100 acres of Tenths.

[29] Second, the withdrawal of 47 town Tenths in 1847 during the remodelling of the Nelson township. The remodelling was prompted by the Company's failure to sell all its town sections, with the result that resident purchasers were not concentrated in one place. This had an impact on the costs of infrastructure and the value of the town sections, including the town Tenths. While it was initially proposed that the Tenths sections would be treated the same as the settler and Company sections in the remodelling, that is not what occurred. The only allocated sections withdrawn in the remodelling were the 47 town Tenths and they were not replaced. This was a breach of trust and breach of fiduciary duty.

[30] Third, the 1853 Whakarewa grant. This was a grant to the Bishop of New Zealand for a school at Whakarewa. The grant included just over 918 acres of Tenths. The school was not for the exclusive use of the Customary Owners. I find that this grant was a breach of trust, but there is insufficient evidence to conclude it was a breach of fiduciary duty. Loss is not established in relation to this transaction as the Tenths and the Whakarewa School Trust Board assets have been returned to entities representing some of the Customary Owners.[15] The claim is also time-barred under the Limitation Act.

[31] The result is that the plaintiff's claims in relation to the Allocated Tenths are limited to the acres lost as a result of the 1844 exchanges and the withdrawal of the 47 town Tenths. The Crown holds 400 acres (or less, with the final acreage yet to be determined), and any withdrawn town Tenths on trust for the Customary Owners. It must pay money to compensate for land which is no longer in the Crown's hands, and money to compensate for the value of the beneficial use of that land (calculated on the basis of lost rentals).

Occupation Lands

[32] The backbone of the plaintiff's claim is that the Crown breached its fiduciary duty to exclude pā, urupā and cultivations. There are approximately 72 different sites claimed as Occupation Lands (many overlapping). My factual findings on each of the claimed sites are set out in Appendix 1 to this judgment.

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15 Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993, preamble.

[33] This is a particularly difficult claim to assess nearly 180 years after the duty arose. There is a lack of evidence regarding many of the sites, and there have been changes in landforms over time due to coastal erosion and flooding. Added to that are different conceptions of what constitutes "pā, urupā and cultivations". The dynamic and fluid ways in which the Customary Owners lived and related to the land do not translate neatly into defined and ascertainable boundaries. Yet, the law requires those boundaries to be fixed so that the Crown's fiduciary duty may be enforced. Boundaries are also important for the assessment of damages, as the plaintiff's claim is calculated on an acreage basis. The scale of the damages sought by the plaintiff means that every acre counts.

[34] I adopt a case-specific, purposive, and pragmatic approach to the meaning of "pā, urupā and cultivations". The Supreme Court's decision that the duty only extends to these three categories of land is controlling, and the duty does not extend to all occupied land more generally. The approach I adopt is more liberal than the strict definitions of "pā" and "cultivations" provided in the Spain award, but narrower than that contended for by the plaintiff. I look for multiple strands of evidence to determine whether a site was a pā, urupā or cultivation in 1845.

[35] I find that the Crown breached its fiduciary duty to exclude pā, urupā and cultivations in relation to the following sites: Mātangi Āwhio; Puketūtū; Pounamu; Te Āwhina; Te Kūmera and Raumānuka; Mārahau; and Te Maatū. The boundaries of these sites are fixed by reference to the Tenths sections allocated in the area in 1842 and 1843. Much of this land has already been returned to the Customary Owners, and the plaintiff's claim is only to the net balance of Occupation Lands lying within the boundaries of these Tenths sections.

[36] By failing to exclude these pā, urupā and cultivations from the land it obtained following the Spain award, the Crown expropriated this land for itself. I find that the Crown holds the net balance of these lands on trust for the Customary Owners. To the extent this land is no longer held by the Crown, then the Crown must compensate the plaintiff for the current market value of that land. However, because the Occupation Lands were occupied and used by the Customary Owners at the time, the lost

opportunity to benefit from these lands has not been proved. The plaintiff's remedy is therefore limited to the claim to land or the value of that land.

Occupation Reserves

[37] I did not find any breaches established in relation to the Occupation Reserves.

Occupied Tenths

[38] As already noted, some of the Allocated Tenths were reserved from Occupation Lands, rather than the land obtained by the Crown. The Crown's fiduciary duty required it to re-survey these Allocated Tenths and to separate them from the Occupation Lands. The Occupation Lands had to be returned to the Customary Owners, and the Tenths had to be reserved from the land obtained by the Crown. The Crown's failure to do this constituted a breach of both fiduciary duties found by the Supreme Court. The Crown's breach extends to the Occupation Lands listed at [35] above. The Tenths allocated in these sites comprise Occupied Tenths.

[39] In addition to the loss of Occupation Lands (as already discussed), the Crown's breaches set up the conditions for the future loss of the Tenths, and the loss of the benefits that would have been generated by those Tenths. The Crown obtained the land that would have been used to re-survey and reserve the Tenths and treated it as Crown land. In doing this, the Crown converted this land to its own use.

[40] I find that the Crown holds the land from which the Occupied Tenths would have been reserved on trust for the Customary Owners. To the extent there is a shortfall in the amount of land held on trust, then the Crown must pay a sum representing the current market value of that shortfall. The Crown must also pay a sum representing the value of the beneficial use of that land calculated on a lost rental basis.

Cultural loss

[41] The plaintiff's claim incudes a claim for cultural loss arising out of the Customary Owners' alienation from the land. A sum ranging from $150–$252 million is sought by the plaintiff.

[42] The common law has not previously recognised this head of loss. While I consider the common law can accommodate this head of loss (as it does with claims for pain and suffering), further information is required before developing the law in this new direction. That further information includes an in-depth analysis of relevant policy issues (such as whether it is preferable for the loss to be remedied at the political level through Treaty settlements), and the interrelationship with the equitable principles which govern this case. It also includes tikanga implications, such as the validation of the methodologies used to quantify the loss, and whether, and if so how, the return of land may compensate for this loss. Finally, the fact that the Treaty settlement received by those represented by Mr Stafford included a cultural redress package means the cultural harm experienced in this case has already been compensated to some extent. For these reasons, I dismiss the claim for cultural loss.

Limitation Act 1950

[43] The Limitation Act 1950 (since repealed) applies to this claim. Under s 21(1)(b) of that Act a limitation period does not apply to claims to recover trust property in the possession of the trustee, or previously received by the trustee and converted to the trustee's own use.

[44] I find that the plaintiff's claims in relation to the Unallocated Tenths, Occupation Lands, and Occupied Tenths fall within s 21(1)(b) of the Limitation Act. I also find the plaintiff's claims in relation to the 1844 exchanges in Te Maatū and the claim to the Tenths which were withdrawn during the 1847 remodelling of the Nelson township fall within s 21(1)(b). This includes the claim to recover land, the market value of the land no longer in Crown ownership, and the claim for lost rentals (which represents the value of the land to generate benefits for the Customary Owners). Both the land, and its capacity to generate benefits for the Customary Owners, were converted by the Crown when it took the land for itself and used it as Crown land.

Treaty settlement

[45] In 2012 and 2013 deeds of settlement were executed in relation to claims that the Crown had breached the Treaty in the Te Tauihu area. These deeds were given effect to by the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o

Te Waka-a-Māui Claims Settlement Act 2014 (Settlement Act). Section 25(6) of that Act preserves the ability of the plaintiff to obtain relief in this proceeding.

[46] The fact of the Treaty settlement does not act as a complete defence to this claim. As the Supreme Court found, Parliament was seeking to preserve the rights of the Customary Owners to access the Courts to vindicate their property rights when it enacted s 25(6).

[47] Nevertheless, there is an overlap between the Treaty claims and this proceeding, and so there is a risk of double recovery between that which was received as part of the settlement and the relief ordered in this proceeding. A precise calculation of the extent of any double recovery is not possible. The only evidence before the Court is two alternative sums put forward by the plaintiff. I adopt the higher of these alternatives being the sum of $48 million assessed by the plaintiff's expert witness. This sum is to be deducted from the monetary award made in the plaintiff's favour.

Laches and acquiescence

[48] The Crown says that it is prejudiced by the delay in bringing this claim, and the acquiescence of the Customary Owners in the actions of the Crown. This prejudice includes the settlement of Treaty claims in the Tauihu area.

[49] I address the lack of evidence due to the passage of time on a case-by-case basis. Many of the plaintiff's claims in relation to the Occupation Lands and transactions involving the Allocated Tenths are unsuccessful on this basis. However, the evidential prejudice to the Crown is not such that it acts as a complete defence.

[50] Moreover, the plaintiff did not act unreasonably in waiting to commence this claim. The Customary Owners have persisted in their efforts to seek redress for the Crown's actions since at least 1854. The impact of adverse Court decisions (found to be wrongly decided by the Supreme Court) and a background of impoverishment attributable to the deprivation of lands also explains the delay. When these factors are weighed against the nature of the claim, the balance of equities favours the plaintiff, and laches and acquiescence do not operate as a defence.

Relief

[51] As summarised above, I find that the Crown holds land within the Spain award boundary on trust for the Customary Owners. The trust only extends to land held by the Crown itself (referred to as the core Crown in this judgment) and does not extend to Crown entity land as sought by the plaintiff. I follow the Court of Appeal in a related case in reaching that conclusion.[16]

[52] The Crown must also pay a sum of money calculated according to the current market value of the land that it no longer holds on trust. And, it must pay a sum of money that compensates for the value of the beneficial use of the Tenths. That sum of money is to be calculated according to the rentals which would have been generated by those Tenths. Compound interest is not recoverable. While the Crown concedes that simple interest is payable, I reserve my decision on this issue pending receipt of further submissions from the parties.

[53] The extent of the land held on trust, and the sum of money that must be paid, cannot be finally determined until account has been taken of all land returned to the Customary Owners (either directly or via entities representing their interests). The evidence currently before the Court suggests the monetary award (before interest) will be substantially less than $1 billion, but it will nevertheless be a significant sum of money. Substantial awards in private law litigation, including against the Crown, are not unprecedented. Indeed, a damages award in the hundreds of millions was made against the Crown in *Equiticorp Industries Group Ltd (in stat man) v The Crown (no 3) (Judgment no 51)* in 1996.[17] The award made in this case is simply the consequence of the Crown breaching its private law fiduciary duties owed to the Customary Owners.

[54] Finally, I make no apologies for the length of this judgment. The issues raised by this case are factually and legally complex. It is also a case of public interest and there are very large sums of money at stake. My reasoning is set out in some detail in

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16 *Stafford v Accident Compensation Corporation* [2020] NZCA 164, [2020] 3 NZLR 731 [ACC Caveats case].

17 *Equiticorp Industries Group Ltd (in stat man) v The Crown (no 3) (Judgment no 51)* [1996] 3 NZLR 690 (HC).

the hope that it will assist in the final resolution of this long simmering dispute, whether it be in this Court, another Court, or by different means altogether.

PART II—OVERVIEW

[55] This part of the judgment provides an overview of this case. The key events and the Supreme Court judgment are summarised in this part. The terminology used in the judgment is defined, and the plaintiff's claim and the Crown's defence are also summarised. The role of te Tiriti and tikanga in determining this claim, and the approach I have adopted in assessing the evidence is also set out in this part.

Key events

[56] Many of the key events giving rise to the plaintiff's claim are not seriously in dispute. The parties agreed a statement of facts relating to relevant events leading up to and including 1977. The background is comprehensively covered in the judgments of Clifford J in the High Court,[18] and Elias CJ in the Supreme Court.[19] What follows is a short summary of the key events which are relevant to the issues I must determine.

The land

[57] As already noted, this case concerns land at the northernmost region of the South Island known to Māori as Te Tauihu o te Waka a Māui. The land lies between Nelson and Aorere and includes land in Tasman Bay and Golden Bay (known as Blind Bay and Massacre Bay respectively in the 1840s and referred to as such in this judgment). A map of the relevant area may be found in Appendix 1.

Customary Owners

[58] The plaintiff, Mr Rore Stafford, is a kaumātua of Ngāti Rārua and Ngāti Tama descent. He is a direct lineal descendant of Ramari Herewini and her father Poria, who were both named as beneficial owners of the Tenths.

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18 *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [74]–[190] [High Court judgment].

19 Supreme Court judgment, above n 8, at [96]–[293] per Elias CJ.

[59] Mr Stafford represents the Customary Owners of the land who are descended from Ngāti Rārua, Ngāti Awa (now known as Te Ātiawa), Ngāti Tama and Ngāti Kōata. They arrived in Te Tauihu in the 1820s and 1830s as a result of migrations from the Tainui-Taranaki region.

[60] The Customary Owners who were beneficiaries of the Tenths were named in a list compiled by the Native Land Court in 1893. Through their hapū and whānau affiliations, these Customary Owners also had interests in the pā, urupā and cultivations in the area.[20]

[61] Before the arrival of the Customary Owners, the Kurahaupō iwi (Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau) lived in the area. Ngāti Apa ki te Rā Tō Charitable Trust (Ngāti Apa) intervened in this hearing to ensure the descendants of Kurahaupō ancestors (tūpuna) were included as beneficiaries in respect of any relief ordered in the proceeding.

[62] Shortly before the hearing, an agreement was reached with the plaintiff by which the Kurahaupō tūpuna were also acknowledged as Customary Owners for the purposes of this proceeding. I refer to the Customary Owners as including the Kurahaupō tūpuna and their descendants unless the context requires otherwise.

1839 New Zealand Company purchase

[63] The New Zealand Company (the Company) was formed in 1839 for the purpose of promoting colonisation in New Zealand. In May 1839, the Company's principal agent, Colonel William Wakefield, sailed for New Zealand.[21]

[64] A key feature of the Company's scheme for the purchase of land was the reservation of one-tenth of the allotted land for the benefit of Māori. This was referred

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20 High Court judgment, above n 18, Appendix 2 sets out the iwi and hapū affiliations identified with particular locations. That Appendix is to be read and understood by reference to the mana whenua rights exercised by the different groups at different times as explained in Paul Morgan's evidence given in the first High Court trial.

21 Colonel William Wakefield was the brother of Captain Arthur Wakefield. Also mentioned in this judgment is the eldest Wakefield brother, Edward Gibbon Wakefield, who was an influential member of the New Zealand Company: see Supreme Court judgment, above n 8, at [17], n 9 per Elias CJ.

to in Colonel Wakefield's instructions from the Company and in other deeds of purchase. These Tenths were regarded as the "true" consideration for the purchase and were to be held for the benefit of the Māori vendors of the land.

[65] In October and November 1839, the Company entered into deeds of purchase with Ngāti Toa at Kāpiti (Kāpiti deed), and Ngāti Awa in Queen Charlotte (Queen Charlotte deed). Under those deeds the Company purported to purchase large tracts of land (over 20 million acres) in the lower North Island and upper South Island.

[66] Both deeds included a clause guaranteeing that a portion of the land ceded by the Māori vendors would be reserved by the Company and held in trust for the benefit of "the chiefs, their tribes and families".[22] While these deeds of purchase did not specify the proportion of land to be set aside, the Supreme Court confirmed that it was one-tenth of the land granted to the Company.[23]

1840–1841

[67] Te Tiriti o Waitangi was signed on 6 February 1840. The differences between the Māori and English texts have been the subject of debate. That debate is not directly relevant to this claim, and I will refer to both versions of the document by reference to the Māori and English names which are used interchangeably.

[68] Under arts 1 and 2 of the English version of the Treaty, the power of government was ceded by Māori in exchange for a Crown guarantee of the "full exclusive and undisturbed possession" of their lands, subject to the Crown's right of pre-emption over those lands if Māori wished to sell.

[69] In November 1840, the Company and the Imperial Government entered into an agreement (1840 Agreement). That agreement set out the terms of the Company's entitlement to a Crown grant in New Zealand. Under cl 13 of the 1840 Agreement the Crown agreed to reserve the Tenths from the land to be granted to the Company. It

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22 Supreme Court judgment, above n 8, at [108] per Elias CJ.
23 At [14] and [152]–[154] per Elias CJ.

also reserved the Crown's right "in respect of all other lands" to make such arrangements as "shall seem just and expedient for the benefit of Māori".[24]

[70] New Zealand was constituted a separate colony under Imperial legislation which authorised its creation.[25] Provision was made for the administration of the new colony through a Governor and Legislative Council. The Charter adopted under that legislation (1840 Charter) gave the Governor "full power and authority", but subject to Māori rights of occupation and enjoyment of land.[26] Similar provisions were found in the Royal Instructions to the Governor which accompanied the Charter, and which the Governor was obliged to follow.[27]

[71] The Land Claims Ordinance was passed in 1841. It declared pre-Treaty land purchases null and void unless allowed by the Crown.[28] However, such purchases could be allowed by the Crown after an investigation by an appointed Commissioner. The Commissioner was required to inquire into the circumstances of the acquisition and the price paid to establish whether the purchase had been made on equitable terms. The Commissioner was then required to make a recommendation as to the terms of any grant.[29] As already noted, Commissioner William Spain was appointed to investigate the Company's purchases in Te Tauihu.

1841 Kaiteretere hui

[72] Captain Arthur Wakefield led the Company's second expedition to establish the Nelson settlement. In October 1841, he and others from the Company met with rangatira of the Customary Owners at Kaiteretere.

[73] By this time, it was unlawful for the Company to purchase land directly from Māori, and so the Company offered gifts to the value of £980 15s to the rangatira present to confirm the purchases under the Kāpiti and Queen Charlotte deeds.

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24 At [779] which sets out cl 13 of the 1840 Agreement.
25 At [296] per Elias CJ citing New South Wales and Van Diemen's Land Act 1840 (Imp) 3 & 4 Vict c 62, s 3.
26 Charter and Letters Patent for erecting the Colony of New Zealand 1840.
27 Royal Instructions (5 December 1840).
28 Land Claims Ordinance 1841 4 Vict 2, s 2.
29 Sections 3–6.

[74] Evidence given on behalf of the plaintiff establishes that the Customary Owners were in favour of the settlers coming to live amongst them, and pointed out where they could live and where they could not. However, it is unlikely that the Customary Owners intended to permanently alienate their land, and most likely understood the arrangement as an invitation to outsiders to settle amongst them.

[75] There is some suggestion that the Tenths were discussed at this meeting, and the plaintiff says that there was an agreement that Te Maatū, a large wood in Motueka, would be excluded from sale.

[76] There were several other meetings between Arthur Wakefield, his group, and the Customary Owners in 1842 and 1843.

1841–1843 selection of the Tenths

[77] In February 1841, the Company released a prospectus outlining its scheme for the proposed Nelson settlement. It was to consist of 221,100 acres, of which 201,000 acres were to be offered for sale to settlers and a further 20,100 acres were to be reserved for Māori.

[78] Each allotment was to comprise a town section of one acre, a suburban section of 50 acres,[30] and a rural section of 150 acres. The sections were to be selected via a ballot determining the priority of selection. The Tenths were selected on the same basis.

[79] A selection of town and suburban sections took place in 1842 and 1843. The selection of 5,100 acres of Tenths (100 one-acre town Tenths, and 100 50-acre suburban Tenths) were selected at the same time. As already noted these are referred to as the Allocated Tenths in this judgment.

[80] The rural Tenths were never selected. The Company had hoped to provide rural sections from the lands in the Wairau, a district south of Nelson. Attempts by the Company to survey the lands in the Wairau met with fierce opposition and eventually

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30 Occasionally the suburban sections were referred to as accommodation sections in the evidence.

lead to an affray in which both Māori and Company officials were killed. As discussed later in this judgment, Commissioner Spain found that the Wairau had not been sold and this land was not included in his recommendation for a grant.[31] It was only much later that the Wairau land was purchased by Governor Grey and settler rural sections were allocated there.

[81] The plaintiff claims that many of the Tenths selected in 1842 and 1843 were allocated over pā, urupā and cultivations and so were occupied by the Customary Owners at the time. These are referred to in this judgment as the Occupied Tenths.

1844–1845 Spain Commission

[82] As already noted, the Crown appointed Commissioner Spain to inquire into the circumstances of the Company's purchases under the Kāpiti and Queen Charlotte deeds, and to make a recommendation as to a Crown grant to the Company.

[83] The Spain Commission hearing commenced on 19 August 1844. It was adjourned two days later after the only Māori witness, Te Iti, gave evidence casting doubt on the Company's claims. The Company was permitted to make additional payments to settle its claim. Effectively, the Spain inquiry became an arbitration with Spain acting as arbitrator to determine the quantum of additional compensation to be paid.

[84] The Company made additional payments totalling £800. Of this sum, £200 was paid to Ngāti Rārua, £200 to Ngāti Tama of Motueka, £100 to Te Atiawa of Motueka, and £10 to the rangatira Ngāpiko of Ngāti Rārua and Ngāti Tama. The residue of £290 was to be paid to the Customary Owners at Massacre Bay (who refused to accept it at this time).

[85] An exchange of Tenths was also arranged during the adjournment to meet the stipulation that Te Maatū be excluded from the purchase. Eight suburban Tenths sections, totalling 400 acres, were surrendered in order to secure the Te Maatū

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[31] See below at [445].

sections. This exchange forms part of the plaintiff's claim and is discussed further in Appendix 1.[32]

[86] Three deeds of release were entered into by the Company and some of the Customary Owners on 24 August 1844. The deeds signed by the Customary Owners were written in Māori. The deeds excepted from the Company's purchase pā, cultivations, wāhi tapu and wāhi rongoā. The meaning of wāhi tapu and wāhi rongoā are considered further when addressing the scope of the Crown's duty to exclude pā, urupā and cultivations.[33]

[87] After initially refusing to accept further payment from the Company, the Customary Owners at Massacre Bay eventually acquiesced and signed a deed of release in 1846. The deed of release differed to the other three deeds in that it did not refer to wāhi tapu and wāhi rongoā.

[88] On 31 March 1845, Commissioner Spain issued his decision (Spain award). He found that Ngāti Toa did not have authority to sell all the land in Te Tauihu, but that the further payments made by the Company cured any deficiency in the original purchase. Spain made certain findings in relation to exchanges of Tenths made in Te Maatū. These are discussed in Appendix 1.[34] Spain also found that the Wairau had not been sold by Ngāti Toa.

[89] Commissioner Spain recommended that the Company be granted 151,000 acres of land, considerably less than the 221,100 acres sought by the Company. The land was located as follows:

(a) Wakatū or Nelson district: 11,000 acres.

(b) Waimea district: 38,000 acres.

(c) Moutere district: 15,000 acres.

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32 See Appendix 1 at [78]–[99].
33 See below at [370], [375] and [377].
34 See Appendix 1 at [59]–[99].

(d) Motueka district: 42,000 acres.

(e) Massacre Bay district: 45,000 acres.

[90] The Spain award saved and excepted pā, urupā and cultivations from any Crown grant as follows:

> All the pas, burying-places, and grounds actually in cultivation by the Natives, situate within any of the before-described lands hereby awarded to the New Zealand Company as aforesaid, the limits of the pas to be the ground fenced in around their 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 by the aboriginal natives of New Zealand since the establishment of the Colony; and also excepting all the Native reserves upon the plans hereunto annexed, marked No.1A, No.1B, coloured green, the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby awarded to the said Company...

[91] The plans annexed to the Spain award only showed the 5,100 acres of town and suburban Tenths identified in the districts surveyed in 1842 and 1843. Despite being referred to in the Spain award, the plans did not reflect the 1844 exchanges of Tenths. Nor did the Spain award identify the location of the rural Tenths which were yet to be surveyed.

1845 Crown grant

[92] On 29 July 1845, Governor Robert Fitzroy issued a Crown grant of 151,000 acres of land in Nelson to the Company (1845 grant). Excepted from that grant were "pas, burial places and grounds actually in cultivation" and the "Native reserves" (that is, the Tenths).

[93] The Company did not accept the grant as it was dissatisfied with the award of 151,000 acres given that the proposed settlement required 221,100 acres. The Company also considered the terms of the grant provided insufficient security of title due, in part, to the indeterminacy of the pā, urupā and cultivations to be excluded.

1846–1847 Massacre Bay Occupation Reserves

[94] Efforts to locate suitable land for the rural sections continued throughout this period. Land in western Blind Bay and Massacre Bay was identified, but there were concerns about the quality of this land.

[95] In the meantime, Governor George Grey had replaced Governor Robert Fitzroy. One of the first steps taken by Governor Grey was to negotiate the purchase of the Wairau from Ngāti Toa.[35] That purchase included the reservation of a large block of land known as the Kaituna Reserve for the Māori vendors.

[96] The reservation of large blocks of land for the "present and future wants" of Māori appears to have been Governor Grey's preferred policy at the time.[36] In 1846 and 1847, surveys were carried out in Massacre Bay and some land was reserved as Occupation Reserves. These Occupation Reserves remained in customary title, but they were managed together with the Tenths. Part of the plaintiff's claim extends to dealings with these Occupation Reserves. Whether Governor Grey intended for these Occupation Reserves to be allocated in lieu of the rural Tenths is a matter addressed when considering whether the failure to reserve 10,000 acres was a breach of fiduciary duty.[37]

1848 Crown grant

[97] Negotiations between the Company and Governor Grey for a Crown grant continued after 1845. Another Crown grant of land to the Company was issued in 1848 (1848 grant). Instead of a fixed acreage, this grant described the boundaries of a large block of land at the top of the South Island. All land the subject of the 1845 grant was included, together with the Wairau land which had been purchased by Governor Grey by this time. Excepted and reserved from the 1848 grant were "pahs, burial places, and [the Tenths] … which are more particularly delineated and described upon the plans annexed hereto".

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35 This purchase is contentious but that dispute is not relevant to the claim in this proceeding, so I do not discuss it.

36 See below at [354]–[357].

37 See below at [474]–[490].

[98] The plans annexed to the 1848 grant included the 1842 surveys of the Tenths, corrected to reflect the exchanges already effected. The plans also included the Occupation Reserves made in Massacre Bay and western Blind Bay. The rural Tenths had not been identified nor surveyed.

Company failure

[99] The Company was coming under increasing financial strain in the 1840s. The Imperial Government responded to the Company's situation by enacting the New Zealand Company Loans Act 1847 (Imp).[38] For present purposes it is sufficient to record that a loan was made to the Company under the provisions of this Act which was secured over the Company's land. Under that Act all land held by the Company which was surplus to the settlements was held on trust for the Crown and was to be returned to the Crown to the extent it was not required for settlement allotments.[39] Ownership of the land would also revert to the Crown if the Company surrendered its charter—as it did in 1850. The balance of the land the subject of the 1848 Crown grant was vested in the Crown as domain lands at this time.

Management of the Tenths

[100] In 1841, Governor Hobson appointed Edmund Halswell as "Protector of Aborigines in the Southern District of this Island and Commissioner for the Management of the Native Reserves". Management of the Tenths was transferred from Halswell to a Board in 1842. The Board comprised the then Chief Justice, Sir William Martin (who resigned shortly afterwards), Bishop Selwyn and George Clarke Senior (Chief Protector of Aborigines).

[101] From 1842 to 1845, Henry Thompson, and later his successor Alexander McDonald, acted as managers of the Tenths on instructions from Bishop Selwyn. The Native Trust Ordinance 1844 set out a statutory framework for management of the Tenths, but it was not brought into effect.

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38 New Zealand Company Loans Act 1847 (Imp) 10 & 11 Vict c 112.
39 Section 19.

[102] There was no formal appointee to manage the Tenths between January 1845 and 1848, with George Clarke Junior acting as a temporary agent during this time. In 1848 Lieutenant-Governor Eyre appointed another Board of Management. They administered the Tenths until 1853 when Governor Grey replaced the Board of Management with the Commissioner of Crown lands.

[103] The New Zealand Native Reserves Act was enacted in 1856 to provide a system of management for the Tenths. This Act also applied to land which remained in customary title (such as the Occupation Reserves) with the consent of the Customary Owners.

[104] Importantly, the Act included powers of alienation of the Tenths. The Commissioners, with the Governor's assent, were empowered to set apart lands for special endowments for schools or hospitals or other institutions for the benefit of Māori.

[105] The Native Reserves Amendment Act was passed in 1862. Under that amendment, the Governor had the power to dismiss the Commissioners and the Governor and the Executive Council were empowered to exercise any power vested in the Commissioners.[40]

[106] In 1882, the Tenths were vested in the Public Trustee under s 8 of the Native Reserves Act 1882. This marks the end of the period covered by the plaintiff's claim.

[107] By this time, the plaintiff claims that the Tenths had been diminished by exchanges and grants undertaken since they were first selected in 1842. These are discussed in Appendix 2 to this judgment. The transactions which assume prominence in this case include the 1844 exchanges in Te Maatū; the 1847 remodelling of the Nelson township; and the 1853 grant to the Bishop of New Zealand (Bishop Selwyn) in 1853.

[108] In 1892 the Public Trustee applied to the Native Land Court to ascertain the people beneficially interested in the Tenths situated in Nelson, Moutere and Motueka.

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[40] Sections 2 and 3. See also Supreme Court judgment, above n 8, at [281] per Elias CJ.

In 1893, Judge Alexander Mackay approved a list of 253 individuals who were descendants or successors of the Customary Owners. The Customary Owners represented by the plaintiff are the descendants of those on that list.

[109] Judge Mackay also confirmed that income from the Tenths was collected in a general fund, and the hapū of the Customary Owners had an interest in that fund which was proportionate to the extent of land to which they were entitled at the time of sale to the Company.

[110] In 1920 the Tenths were transferred to the Native Trustee (later to become the Māori Trustee). Following the Sheehan commission of inquiry into Māori reserved land in New Zealand, the remaining Tenths were vested in the Proprietors of Wakatū (Wakatū) under the Wakatū Incorporation Order 1977.[41] Wakatū holds those Tenths on trust for the Customary Owners.

Waitangi Tribunal claims and preservation clause

[111] The Nelson Tenths were the subject of a claim to the Waitangi Tribunal (Wai 56) filed in 1986. The background to the claim is addressed in more detail in pt X of this judgment.

[112] For present purposes it is sufficient to note that the Crown accepted before the Tribunal that it had committed several breaches of Treaty principles, including in relation to the Tenths. The Tribunal reported on the claims in 2008. Negotiations between the Crown and various iwi settlement entities then followed with negotiations suspended when this proceeding was filed in the High Court in 2010.

[113] Negotiations recommenced and deeds of settlement were subsequently signed. The Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Maui Claims Settlement Act 2014 (defined above as the Settlement Act) came into force on 23 April 2014. Under that Act, the Crown is discharged from any liability including legal or equitable liability in relation to "historical claims" including those

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[41] See Bartholomew Sheehan *Report of Commission of Inquiry into Maori Reserved Land* (Government Printer, 1975).

concerned with the Tenths.[42] There is, however, a saving provision for the present proceeding (the preservation clause).[43] The scope of that clause and the impact of the settlement is considered further in pt X of this judgment.

Supreme Court judgment

[114] The decision of the Supreme Court sets the parameters of this judgment. The determination of liability, defences, and relief must be in accordance with the opinions of that Court.[44] It is therefore necessary to consider the findings of that Court and understand the reasoning which sits behind them. What follows is a short summary of the key points, with the more detailed analysis of any particular issue addressed in this judgment where relevant.

[115] The Supreme Court's primary finding, by majority, was that the Crown owed fiduciary duties to the Customary Owners. A declaration was made in the following terms:[45]

> … the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pa, urupa and cultivations from the land obtained by the Crown following the 1845 Spain award.

[116] The Court's decision on other issues may be summarised as follows:

(a) The Court unanimously agreed Mr Stafford had standing to pursue the claim.[46]

(b) A majority, comprising Elias CJ, Glazebrook, Arnold and O'Regan JJ, held that Mr Stafford's claims were not barred by the Limitation Act to the extent they seek to recover from the Crown trust property either in the possession of the Crown or previously received by the Crown and converted to its use. Any other issues relating to limitation (including

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42 Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Maui Claims Settlement Act 2014, s 25.
43 Section 25(6).
44 Supreme Court judgment, above n 8, at [7].
45 At [1].
46 At [2].

the availability of a limitation defence to any claim for equitable compensation, and whether the claims were barred by laches) were remitted to this Court.[47]

(c) A majority, comprising Elias CJ, Glazebrook, Arnold and O'Regan JJ, held that Mr Stafford's claims were not barred by the Settlement Act. Whether it caused prejudice to the Crown, however, was to be taken into account in considering the application of the doctrine of laches.[48]

[117] Although the majority agreed on these key points, the reasoning of each of the majority Judges differed slightly, as described below.

Elias CJ

[118] The former Chief Justice considered the Spain award constituted the basis on which the land became Crown land. Her Honour said that it was in the clearance of native title (through the Land Claims Ordinance procedure) and the vesting of land in the Crown that the trust and fiduciary obligations to the Māori vendors were founded.[49]

[119] Drawing on the Canadian decision in *Guerin v The Queen*, Elias CJ considered the Crown's obligations owed to the Customary Owners were in the nature of a "private law duty".[50]

[120] The Judge went further than that, finding that the fiduciary obligations owed were obligations of trust.[51] That trust arose as a result of the Crown's role in obtaining the surrender of customary title, and through the Crown's assumption of responsibility to provide the Tenths.[52] The Judge found that when the Crown received the lands cleared of customary title, the lands were "necessarily impressed with trusts" to fulfil the conditions upon which Spain had approved the sale of the land as being on

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47 At [4].
48 At [5].
49 At [91] per Elias CJ.
50 At [385] citing *Guerin v The Queen* [1984] 2 SCR 335 at 385 per Dickson J.
51 At [393].
52 At [394].

equitable terms—namely the exclusion of the Occupation Lands and the reservation of the Tenths.[53]

[121] The Judge's findings of trust extended to the Occupation Lands.[54] Underpinning her reasoning was the fact that customary title to the Occupation Lands had been cleared by the Spain award process.[55]

[122] As for breach, Elias CJ considered that it had been established in relation to the rural Tenths and that there was sufficient certainty of subject matter for a trust to arise in relation to these lands.[56] The Judge also considered that the failure to exclude the Occupation Lands was a breach of trust,[57] as were the exchanges and grants made by the Crown prior to 1862.[58] Her Honour held that the Tenths were not intended to be occupied, and the failure to separate the Occupation Lands and the Tenths sections resulted in losses to the Tenths estate.[59] However, Elias CJ considered the extent of the breach and the nature of the loss required further consideration.[60]

[123] Her Honour considered the assets of the trusts were converted to the use of the Crown, and to that extent s 21(1)(b) of the Limitation Act preserved the claim.[61] As to laches the Judge observed that the Crown had not shown evidential prejudice that would justify a claim being barred for delay, and the historical record was relatively intact.[62] However, it was not possible to determine the application of the doctrine of laches because that doctrine was so closely linked with assessments of breach which were yet to be finally determined.[63]

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53 At [405].
54 At [437].
55 At [405] and [437].
56 At [571]–[572] and [578]–[579].
57 At [437].
58 At [438]–[439].
59 At [443].
60 At [437].
61 At [453].
62 At [459].
63 At [94].

[124] The Chief Justice also agreed with Ellen France J in the Court of Appeal that the claims for breach of trust and fiduciary duty were not barred by the provisions of the Settlement Act.[64]

Glazebrook J

[125] Glazebrook J also considered the obligations owed by the Crown were fiduciary in nature but adopted a conditional contract analysis to reach that result. In the Judge's assessment, the Company could be seen as having equitable title to the land, with that interest remaining contingent on the outcome of the Spain inquiry process and the Crown's acceptance of that award.[65] The Judge found that the Crown took assignment of the Company's conditional contract in relation to the Tenths, meaning that the Company's contingent equitable interest was effectively transferred to the Crown.[66]

[126] Glazebrook J considered that the Tenths, including the Unallocated Tenths, were held on trust.[67] Her Honour found the non-allocation of the rural Tenths was a breach of trust, and that the losses from the town and suburban Tenths and the exchanges may also have been in breach of trust.[68] However, in the absence of detailed findings on breach in the lower Courts, no definitive findings on particular alleged breaches could be made.[69]

[127] While customary title had been extinguished over the Tenths, Glazebrook J considered it had not been extinguished over the Occupation Lands as they did not form part of the Spain award or subsequent grant. To the extent Occupation Lands were treated as not belonging to the Customary Owners therefore, the Judge considered there had been an expropriation of that land.[70]

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64 At [93], citing *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [39] per Ellen France J [Court of Appeal judgment].
65 At [561] per Glazebrook J.
66 At [565].
67 At [571]–[582].
68 At [587].
69 At [587].
70 At [585].

[128] Glazebrook J said that the claim was not statute barred as it fell within the savings provision in s 21(1)(b) of the Limitation Act to the extent that it was a claim for return of trust land or proceeds.[71] The Judge noted that there may be an issue as to whether the Crown benefitted from some of the land lost to the Tenths, but considered that this did not mean that any claim for equitable compensation fell outside the exception in s 21(1)(b).[72]

[129] As for laches, the Judge held there was no forensic prejudice to the Crown that would support a laches claim, and the records for the crucial periods of 1840 to 1845 were relatively intact.[73] However, the Judge accepted that laches might be available where it was impossible to form a view as to what happened and where it was difficult for the Crown to identify the extent of Occupation Lands wrongly treated as domain lands.[74]

[130] Her Honour considered that the Settlement Act would not preclude the claim from proceeding but cautioned against double recovery.[75] She said it would be for the Crown to show double recovery but that a broad view of the settlement would be appropriate in this exercise.[76]

Arnold and O'Regan JJ

[131] Arnold and O'Regan JJ delivered a single judgment. Their Honours agreed that the Crown owed fiduciary duties in relation to the Tenths and Occupation Lands.[77] Like Elias CJ, the Judges adopted the approach in *Guerin* and determined that the Crown's fiduciary duties arose out of the Crown's assumption of responsibility for ensuring that the Tenths were dealt with as had been agreed with the Company, and that the Occupation Lands were excluded from sale.[78] They declined to determine

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71 At [686].
72 At [687].
73 At [690].
74 At [691].
75 At [716].
76 At [717].
77 At [726] per Arnold and O'Regan JJ.
78 At [726] citing *Guerin v The Queen* [1984] 2 SCR 335.

whether there was an express or other form of trust as that was not the central focus of argument.[79]

[132] In relation to the Occupation Lands, Arnold and O'Regan JJ made two points. First, they said that to the extent that the Occupation Lands were wrongly swapped for Tenths, then this fell within their Tenths analysis.[80] Second, to the extent the complaint was that the Occupation Lands were wrongly taken by the Crown, and became Crown domain lands, then the analysis was different.[81] The Judges referred to the fact that the Occupation Lands were to be excluded from the Crown grants on the basis they had never been sold. Given the Crown's acceptance of that position, and the fact that full title to land could only come through the Crown, the Crown was under a fiduciary duty in relation to any Occupation Land to which it wrongly took title.[82]

[133] As to breach, their Honours said that while there appeared, on the face of it, to be breaches by the Crown, it was not appropriate to undertake a detailed consideration of the question of breach, much less make any findings.[83]

[134] In considering the Limitation Act defence, their Honours confirmed that the statute did not preclude the possibility of a remedy for breach.[84] However, their analysis was confined to recovery of property or the proceeds of property.[85] The Judges referred to a distinction drawn in *Paragon Finance Plc v DB Thackerar and Co* between a trustee who has acquired property when already a trustee, and those upon whom an obligation to account as if a trustee is imposed as a result of wrongful conduct.[86] In relation to fiduciary obligations, that distinction was between those whose fiduciary obligations preceded the acts complained of, and those whose liability in equity was occasioned by the acts of which complaint was made.[87] The Judges considered the Crown was in the former category which led them to conclude:[88]

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79 At [726].
80 At [786].
81 At [786].
82 At [786].
83 At [789].
84 At [813].
85 At [814].
86 At [815] citing *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 408-409.
87 At [815] citing *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 414.
88 At [815].

> … to the extent the appellants claim recovery of land that came into the hands of the Crown that should have been part of the Tenths reserves as envisaged by the Spain award but was not included in those reserves, no limitation defence is available to the Crown.

[135] Both Judges agreed with Glazebrook J that it was not clear that the Crown had benefited from some of the land lost to the Tenths.[89]

[136] As for laches, their Honours agreed with Elias CJ and Glazebrook J that the historical record was relatively intact and there was no prejudice to the Crown sufficient for a laches defence.[90] However, they considered there may be shortcomings in the historical record in relation to allegations of breach which may provide a basis for the Crown to claim a laches defence.[91]

[137] The Judges thought it necessary to consider the impact of the Settlement Act before determining whether a laches defence was available to the Crown but did not consider it to preclude the plaintiff from pursuing the claim.[92] Like Glazebrook J, the Judges considered that, when determining the nature and extent of any remedy for breach, the Court should attempt to ensure there is no double recovery.[93]

William Young J (in dissent)

[138] William Young J considered most of the claims advanced on behalf of the Mr Stafford as unsound but his primary basis for dismissing the appeal was the limitation periods prescribed under the Limitation Act.[94]

[139] His Honour considered the 1845 Spain award and subsequent Crown grant as "proposals which were never implemented".[95] The critical event in William Young J's analysis was the 1848 grant. The Judge found that the 1848 grant had the practical effect of extinguishing customary title and identifying the reserves in respect of which

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89 At [816].
90 At [817].
91 At [817] and [818].
92 At [819].
93 At [826].
94 At [828] per William Young J dissenting.
95 At [880].

there was to be a trust.[96] However any claim for breach of trust was barred by the Limitation Act.[97]

[140] As for the rural Tenths, the Judge considered that the trust argument failed on the basis that the 1845 grant was not accepted and the claim was otherwise statute barred.[98]

[141] In relation to questions of standing, the Judge accepted that Mr Stafford had standing in his personal capacity only, but not to pursue claims on behalf of anyone else.

Terminology

[142] There are several terms used in this judgment which require definition and explanation.

[143] The **Customary Owners** refers to those on the 1893 Native Land Court list and their descendants who are represented by the plaintiff in this case. The Customary Owners also includes the Kurahaupō iwi as per the agreement reached between the plaintiff and Ngāti Apa shortly before the hearing.

[144] The interests of the Customary Owners in relation to the Tenths is different to the interests in relation to the Occupation Lands. All Customary Owners are beneficiaries and intended beneficiaries of the Tenths. However, different groupings of those Customary Owners will have different customary interests in the Occupation Lands through their hapū or whanaū.

[145] The use of the word **Tenths** in this judgment requires some comment. Professor Bain Attwood gave expert evidence for the Crown. He cautioned against using the term "Tenths" as he said that term was not generally used in the 1840s. Instead, the Tenths were referred to as "Native Reserves".

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96 At [909].
97 At [941].
98 At [910] and [941].

[146] That may be so, but the problem is that "Native Reserves" appears to have been used for all categories of land. There was no distinction between those Native Reserves allocated over areas that were occupied (for example, the potato cultivations in Te Maatū) and those Native Reserves which were Tenths.

[147] The use of "Native Reserves" to refer to different categories of land appears to have occasioned significant confusion in the 1840s. That confusion is apparent in some of the evidence filed in this case. To avoid that confusion plaguing this judgment, I have used "Tenths" to refer to land that was intended to be reserved and held in trust for all Customary Owners. The Tenths are distinguished from the Occupation Lands and Occupation Reserves which were intended to remain in the customary ownership.

[148] The **Unallocated Tenths** is used by the plaintiff to refer to several sub-categories of land. I have used Unallocated Tenths to refer to the 10,000 acres of rural Tenths.

[149] The plaintiff sometimes refers to the Unallocated Tenths as including those Tenths which he says should have been selected to make up any shortfall resulting from the Occupied Tenths and the alienations and exchanges of Tenths. I do not use the Unallocated Tenths to refer to this category of land, instead referring to these sections as **replacement Tenths** in this judgment.

[150] The **Allocated Tenths** are the 5,100 acres of town and suburban Tenths which were surveyed and allocated in 1842 and 1843. Some of these Allocated Tenths were allocated over Occupation Lands meaning they became Occupied Tenths. Accordingly, there is an overlap between these two categories of land.

[151] The **Occupation Lands** refers to the pā, urupā and cultivations which the Crown was required to exclude from the land it obtained after 1845. The meaning of "pā, urupā and cultivations" is considered later in this judgment.[99] For reasons explained in that same part, I consider customary title in these lands was not

[99] See below at [317]–[378].

extinguished by the Spain award. The intention was for these lands to remain in the ownership of those Customary Owners who had a proprietary interest in these lands.

[152] The **Occupation Reserves** refer to the lands reserved in Massacre Bay and western Blind Bay in 1846 and 1847. These lands remained in customary title, but they were administered together with the Tenths. Although the Occupation Reserves comprised Occupation Lands, the duties owed in relation to the management and alienation of these lands was somewhat different as I explain below.[100]

[153] The **Occupied Tenths** captures two sub-categories of land. The first subcategory captures the Allocated Tenths which were allocated over Occupation Lands. This category of land is essentially a hybrid involving both Occupation Lands and the Tenths. The second subcategory captures those Tenths which were reserved from land obtained by the Crown but which were subsequently occupied by Māori. I will refer to this subcategory as **Occupied Tenths (post)** to distinguish it from the first subcategory.

[154] Finally, the **Tenths shortfall** is used by the plaintiff to refer to the acres missing from the 15,100 acres of the Tenths estate. The Tenths shortfall is said to have been occasioned by the failure to reserve the rural Tenths; the failures in relation to the Occupied Tenths; and the alienations and exchanges of the Allocated Tenths.

[155] For reasons which will become clear in the course of this judgment, I have found it necessary to draw a distinction between the act or breach which is said to contribute to the Tenths shortfall, and the nature of the loss which arises. Accordingly, I do not use Tenths shortfall in the same way as the plaintiff.

Claim and Defence

Plaintiff's claim

[156] The plaintiff's claim follows the Supreme Court decision. The plaintiff says that the Supreme Court has already mapped out the relevant legal principles and gone a considerable way to determining his claim.

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[100] See below at [410]–[416].

[157] In the plaintiff's submission the fiduciary duties found by the Supreme Court are ongoing and should be enforced. Alternatively, the plaintiff says breach is established for which a remedy is sought. On the question of breach, the plaintiff says that:

(a) the Occupation Lands were not identified and excepted as the Spain award required;

(b) the full Tenths entitlement was not reserved because some Allocated Tenths overlapped with Occupation Lands, and the Unallocated Tenths were never reserved; and

(c) the Allocated Tenths and Occupation Lands were diminished through exchanges and alienations.

[158] As a result of these breaches, the plaintiff says the Customary Owners were rendered almost landless, alienated from their traditional resources, and did not receive the intended benefit from the Tenths.

[159] The losses claimed in this case comprise loss of land (12,976.68 acres of Tenths, and 29,155.41 acres of Occupation Lands), lost rental, loss of use, and cultural loss. The return of land still held in Crown hands within the Spain award boundary (including land owned by Crown Entities) is sought. To the extent this land cannot be returned, the plaintiff seeks an award of equitable compensation instead, plus additional compensation for the other heads of loss. The total quantum of relief claimed is between $4.4 billion and $6 billion.

[160] In response to the affirmative defences put forward by the Crown, the plaintiff says that the claim is not statute barred because it falls within either s 21(1)(a) or (b) of the Limitation Act. Furthermore, laches and acquiescence do not apply. Nor does the Settlement Act prevent the plaintiff from receiving a remedy and, at most, a deduction between $5.98 million and $48 million should be made from the sum to be awarded to avoid double recovery.

Crown's defence

[161] The Crown acknowledges the plaintiff and the grievances before the Court. Reference is made to the Crown's prior acknowledgement and apology for the historical wrongs it committed which are reflected in the Treaty settlements reached with the Customary Owners and others. Although it accepts that the preservation clause in the Settlement Act does not prevent this claim from proceeding, the Crown says that the claim cannot succeed.

[162] The Crown defends the plaintiff's claim by first attempting to unpack it into its component parts. It says the plaintiff advances three cases:

(a) a claim for the return of trust property;

(b) a claim for breach of a historical fiduciary duty at points in time in the past; and

(c) a request for orders or directions that the Crown give effect to a contemporary "Treaty informed" fiduciary duty in the present.

[163] In response to these three cases, the Crown says:

(a) no land is currently held on trust (of any kind);

(b) none of the alleged breaches can be established at this remove in time; and

(c) the claims are barred by the Limitation Act and by laches and acquiescence.

[164] More specifically, the Crown says that any trust that arose in relation to the Allocated Tenths only arose with the 1848 grant (the date the Crown says customary title was extinguished, and the land vested in the Crown) and the Crown is not liable for any breaches prior to this date.

[165] The Crown denies that a trust arose in relation to the Unallocated Tenths. It says the fiduciary duty is to be measured by the conduct of the Crown at the time, and not by the outcome (that is, the fact that 10,000 acres were not reserved). It also says there is insufficient certainty of subject matter for there to be a trust in relation to the Unallocated Tenths.

[166] As for the Occupation Lands, the Crown says that these lands (as defined in the Spain award) were, in fact, reserved. Even if they were not, the Crown says there is insufficient certainty of subject matter to constitute a trust over the Occupation Lands. To the extent the Occupation Lands remained in customary title because they were not sold, the Crown says that any claim of expropriation of that land by the Crown lies outside these proceedings and has been apologised for and redressed through the relevant Treaty settlements.

[167] The Crown raises an affirmative defence based on the Limitation Act. It says the plaintiff's claim falls outside the exceptions in s 21 of the Limitation Act and so is statute barred. In addition, the Crown submits that the claim is defeated by laches and acquiescence and that the Treaty settlements compensate for much or all of the loss claimed by the plaintiff.

Te Tiriti o Waitangi and tikanga Māori

[168] Counsel for the plaintiff submits that the unique nature of the fiduciary duties owed by the Crown mean that te Tiriti and tikanga are relevant to this case.

[169] Starting with te Tiriti, the presence of that constitutional document is felt very strongly in this case. For example:

(a) Te Tiriti informed the Supreme Court's decision that the Crown owed fiduciary duties.[101]

(b) The guarantees in art 2 of the English text of the Treaty are relevant to the scope of the fiduciary duty to exclude pā, urupā and cultivations.[102]

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101 Supreme Court judgment, above n 8, at [385] per Elias CJ.
102 See below at [329]–[331].

(c) The overlap between the Treaty settlement and this proceeding is relevant to the assessment of equitable compensation.[103]

(d) The plaintiff relies on te Tiriti to support its claim that the "Crown" includes Crown entities, and the land remedies it seeks therefore attach to the latter's land.[104]

[170] Despite that strong presence, this is *not* a claim for breach of the Treaty. The fiduciary duties found by the Supreme Court are not sourced in the Treaty. Nor do they arise out of the general relationship between the Crown and Māori.[105] The Crown was not acting in its government or political capacity when it assumed the obligations to the Customary Owners which are at issue in this case.

[171] The fiduciary duties found by the Supreme Court arose out of a specific land transaction and are owed to an identifiable class of beneficiaries, namely the Customary Owners. They are duties owed in relation to specific parcels of land, namely the Tenths as well as pā, urupā and cultivations. In essence, the claim is private in nature, and the key issues in this case fall to be decided according to principles of private law.[106]

[172] This brings me to consider the relevance of tikanga in this case. Tikanga is a system of law which has been described as the Māori common law.[107] It includes all the values, standards, principles, and norms subscribed to in Te Ao Māori to determine appropriate conduct.[108]

[173] The Supreme Court has confirmed that tikanga forms part of the law of New Zealand and it will be recognised in the development of the common law where

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103 See below at [890]–[899].

104 See below at [569]–[607].

105 Supreme Court judgment, above n 8, at [391] per Elias CJ, [590] per Glazebrook CJ, [784] and [784], n 1012 per Arnold and O'Regan JJ.

106 As Binnie J said in *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96], the Crown "wears many hats and represents many interests". The political and governmental hat worn by the Crown must be distinguished from the private law hat it wears in this case.

107 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at Appendix: Statement of Tikanga at [24] and [26]. This Appendix was authored by Sir Hirini Moko Mead and Professor Pou Temara.

108 See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.5] citing E T Durie "Will the settlers settle? Cultural conciliation and law" (1996) 8 Otago LR 449 at 452.

relevant.[109] Williams J observed that tikanga will be relevant when the facts suggest it is and the common law has not otherwise excluded it, or where the common law is developing and such development would benefit from a consideration of relevant tikanga principles.[110]

[174] There is no dispute that tikanga is relevant to this case. A claim on behalf of a Māori collective for the return of ancestral land engages tikanga directly.

[175] The plaintiff's customary witnesses gave evidence of tikanga, particularly as it related to their claim to land. The plaintiff also called expert evidence on tikanga from Dr Carwyn Jones. Dr Jones identified five central concepts in tikanga: whanaungatanga, mana, tapu and noa, utu and ea, manaakitanga and kaitiakitanga.[111] He described each of these concepts in general terms. Dr Jones also gave evidence on Māori society, the relationship of Māori with land, and the intergenerational effects of wrongful alienation of land.

[176] Dr Jones considered that a tikanga-based approach to remedies would follow a three-stage approach set out by Sir Hirini Moko Mead, namely, *take* (the reason for the action), *utu* (the principle of balance and reciprocity), and *ea* (state of resolution).[112] Dr Jones also gave evidence on the Treaty settlement process and post-settlement governance entities. Finally, he offered expert comment on the role of rangatira in Māori legal tradition.

[177] Counsel for the plaintiff submits that weight should be given to how certain issues are viewed under tikanga, and cites the following examples:

(a) Occupation Lands should be assessed in accordance with how the Customary Owners used the land.

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109 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.

110 At [265] per Williams J.

111 Dr Jones translated these concepts as follows: whanaungatanga (relationships), mana (authority), tapu and noa, utu and ea (reciprocity and balance), and manaakitanga and kaitiakitanga (nurturing and stewardship). He did not provide a translation for "tapu and noa".

112 See Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 31.

(b) Weight should be placed on the Māori perspective as to the identity of the Crown in relation to the scope of Crown land.

(c) The Court should focus on what would be required to restore balance, or achieve ea, as a response to the Crown's wrongs.

(d) Loss should be assessed bearing in mind that the impact of the losses is intergenerational and the nature of time in Te Ao Māori means the collective bears the losses, inclusive of both tūpuna and descendants.

[178] As is apparent from these examples, the plaintiff advances tikanga both as a lens through which evidence or legal arguments are to be assessed, and as a matter of substantive law.

[179] The first of these applications is straightforward. Judges are well accustomed to balancing different considerations and weighing different perspectives when assessing evidence and legal principles. Indeed, this case involves the assessment of historical evidence regarding the Crown's and Company's (competing) objectives in the mid-1840s. It also involves an evaluation of legal principles derived from Canadian and United Kingdom jurisprudence. Considering issues through a tikanga lens ensures all relevant legal considerations and the perspective of the Customary Owners are reflected in the analysis.

[180] A substantive application of tikanga raises different issues. Counsel for the plaintiff submits that the content of the fiduciary duties found by the Supreme Court must be informed by tikanga as well as English private law rules of equity. This is what Williams J terms the "dialogue" between tikanga and the common law.[113] It involves the weaving together of two systems of law.

[181] In *Ellis v R (Continuance)*, the Supreme Court identified some risks in managing this dialogue. Winkelmann CJ said that care must be taken not to pick and choose elements of tikanga, thereby depriving it of its essential value or distorting the

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113 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [265]–[271] per Williams J.

concepts.[114] Furthermore, the Supreme Court emphasised that the task of the courts is limited: judges are not mandated to pronounce on or develop the content of tikanga.[115]

[182] The evidence I received on tikanga (both from Dr Jones and other customary witnesses) was substantially helpful. However, I would have been assisted by further evidence and/or submissions directed towards the dialogue between the tikanga described in that evidence and the private law concepts relevant to this case.

[183] For example, while there was evidence describing the relevant tikanga concepts, there was little evidence on how they might apply to the specific circumstances of this case. There was no evidence of tikanga practice in analogous circumstances. That is, there were no examples of how tikanga might respond to a situation of land being taken by someone who was holding it on behalf of another.[116] Nor was there any evidence directed to whether, as a matter of tikanga, the Customary Owners might have a different relationship with the Tenths (lands which had been "sold", were not for occupation, and were to be held in trust) than with their Occupation Lands (lands which were to be occupied by them and retained in their possession). Importantly, I did not receive evidence on how the return of land might compensate for losses and harm suffered in the past.

[184] Nor did I receive much assistance on how tikanga might interrelate with the equitable principles in this case.[117] For example, while counsel placed emphasis on the centrality of land to Māori identity as meaning priority should be placed on proprietary remedies, it was not clear to me if (or how) that affected the claim for equitable compensation.

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114 At [180] per Winkelmann CJ.

115 At [181] per Winkelmann CJ.

116 I accept that there may not be analogous examples in tikanga. Evidence confirming that fact may have itself been relevant to this case.

117 For an example of tikanga concepts being applied in a trust case see *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [124]. This case is an example of tikanga concepts being applied in a trust context. There, the Court observed that "[i]f fiduciary duties are applied to Māori land administration without due regard to whanaungatanga, the former may frustrate the positive expression of the latter" which would be contrary to the underlying values of equity.

[185] Similarly, there were no submissions on how the cyclical concept of time in Te Ao Māori might interrelate with equitable principles which require a trust asset to be valued as at the date of judgment rather than the date of breach. And, it was not clear to me how a focus on utu and ea would lead to a materially different result from the application of equitable principles aimed at restoring that which was lost due to the Crown's breach. Indeed, this may be an example of both systems of law being substantially aligned.[118]

[186] Without the necessary evidence and submissions in this case, I consider the risks highlighted in *Ellis* are enlivened. These are particularly acute in the claim for cultural loss. As explained further in that part of the judgment, I have discomfort in assigning a value to the loss of the Customary Owners' relationship to land in the absence of tikanga evidence endorsing that approach.[119]

[187] None of this should be interpreted as criticism of counsel or the witnesses who gave evidence on these issues. The claim for cultural loss in particular raises significant and complex issues which are not easy to address in the context of a private law claim. Nor do I underestimate the complexities in weaving tikanga with state law as part of an incremental process. This proceeding (and judgment) should be read and understood as a contribution to an ongoing discussion about how that might be achieved.

[188] In summary, tikanga is engaged and has application in this case. However, I have trod lightly and with caution in those areas where there is insufficient evidence and/or submissions regarding the interrelationship between tikanga and the common law.

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118 As Williams J has noted, tension between tikanga and the common law is not a given: see *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [269].

119 See below at [767]–[772].

Assessing the evidence

[189] As Clifford J said in the first High Court decision, this is a trial and not an inquiry.[120] The Evidence Act 2006 governs the admissibility and evaluation of the evidence.

[190] The evidence called at trial comprised that evidence adduced before Clifford J in the first High Court trial and additional evidence adduced before me. Much of it covered historical matters. I have approached that evidence mindful of the standards of the time and wider historical context to which it relates.

[191] Expert evidence was called for both sides and the plaintiff also called customary knowledge (kōrero tuku iho) evidence. A three-day site visit to many of the areas the subject of the claim was invaluable in connecting the evidence heard in Court with the land at the heart of the plaintiff's claims.

[192] Mapping evidence was also adduced in Court with a sophisticated system (ArcGIS) developed to show the boundaries of the Occupation Lands sites the subject of the plaintiff's claim and the Tenths sections allocated in the region. The factual findings set out in the Appendices to this judgment refer to that mapping system.

[193] The kōrero tuku iho evidence called on behalf of the plaintiff was mainly directed to the claimed sites of the Occupation Lands. It comprised traditions and oral histories handed down through the generations. This evidence spanned topics such as who was living in a particular area at a particular time, whether a place was tapu,[121] and specific oral histories related to a site. The evidence was relied upon to show the extent of the boundaries of a particular site.

[194] This evidence was ruled admissible at the first trial in 2011. The Crown does not seek to reopen that ruling or to challenge the admissibility of this evidence. Nor does the Crown challenge the credibility of the witnesses who gave this evidence. Nevertheless, the Crown submits that limited weight can be attributed to this evidence. That is for a variety of reasons, including: that some of the evidence drew on sources

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120 High Court judgment, above n 18, at [8].
121 "Tapu" meaning "sacred" in this context.

which are not strictly customary in nature; there was a lack of rigour in the way the knowledge was transferred; and the evidence was incomplete.

[195] The Crown also says there was a lack of precision as to location, boundaries and dates of occupation which render this evidence unreliable. Finally, the Crown says that the hearsay nature of the evidence, covering events which occurred nearly 180 years ago, means the evidence cannot easily be challenged and that creates a prejudice for the Crown in defending the case.

[196] The plaintiff refutes much of what the Crown says. Counsel for the plaintiff submits that reliance on oral history is often necessary as there may not be written or physical records relating to a particular site. Customary evidence is also an expression of tikanga where statements of whakapapa connect individuals to the land and it expresses knowledge about families and communities.

[197] Counsel for the plaintiff points to the acceptance of customary evidence in other legal forums, for example, in the resource management context and other recent High Court cases, and the internal controls in place to ensure the evidence is relevant.[122] Both the plaintiff and the Crown refer to principles arising out of Canadian jurisprudence on the assessment of customary evidence in that jurisdiction.[123]

[198] Moreover, counsel for the plaintiff submits that written history is not objectively more accurate than oral history and written records can be subject to human error, reflect bias, or a lack of understanding—or in some cases simply be made up. For example, counsel submits that caution should be applied when considering the historical maps adduced in evidence as they will reflect a Eurocentric world view and may have been drawn up for purposes altogether different to that relied upon in this trial. They will also reflect the instructions given to their authors and may also reflect cultural misunderstandings for example, as to what would be regarded as a "cultivation".

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122 See for example *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [39]; and *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [68].

123 See for example *Mitchell v MNR* 2001 SCC 33, [2001] 1 SCR 911.

[199] A similar note of caution is made by the plaintiff in relation to the archaeological evidence. As Professor Richard Walter, the expert archaeologist called by the Crown, made clear, carbon dating cannot tell us anything about the age of artifacts post-1800. That means a lack of archaeological evidence as to occupation in an area as at 1845, does not mean the area was not occupied as at that date. The absence of evidence is not evidence of absence.

[200] As a matter of principle, I do not consider there is much to be gained by determining questions of weight according to the category of evidence. Nor is there utility in ranking one category of evidence ahead of another. I do not regard kōrero tuku iho as inherently less reliable than any other category of evidence. Indeed, there appears to have been acceptance of the reliability of this evidence by government officials in the early decades of the new colony.[124] Clifford J must also have been satisfied that this evidence was sufficiently reliable to render it admissible in this Court.

[201] That is not to say that the kōrero tuku iho given in this Court is to be accepted without question. There are fallibilities in all sources of evidence. What is required is an evaluation of the specific evidence adduced in this Court. Evaluations around the accuracy of evidence, its helpfulness, and any unfair prejudices that might arise, form part of the Judge's role in determining a claim. Judges are accustomed to evaluating expert evidence and disentangling opinion evidence which falls outside a witness's expertise from that on which they are qualified to give evidence. This case is no different in that respect.

[202] Where evidence is derived from a variety of sources (such as historical, archaeological, and kōrero tuku iho) then I have considered all sources together. The rope metaphor used by Judges to explain the assessment of circumstantial evidence is of assistance here: a single strand of the rope may not support a particular weight, but the combined strands are strong enough to do so. Ms Irwin-Easthope (who addressed

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[124] See Richard P. Boast "The Native Land Court and the Writing of New Zealand History" (2017) 4 Law & History 145 at 156. The acceptance of whakapapa is described as a reliable form of oral history in the Native Land Court. This was reflected in a decision of Chief Judge Fenton in the Native Land Court decision of 1868. Edward Shortland (a Native Protector employed by the colonial government) also regarded the whakapapa-based narratives as reliable and generally accurate.

this aspect of the closing submissions on behalf of the plaintiff) used a whakataukī of Kingi Pōtatau te Wherowhero to similar effect:

> Kotahi te kohao o te ngira e kuhuna ai te miro ma, te miro pango, te miro whero.
>
> The white, black, and red threads pass through a single hole of the needle.

PART III—DUTY

Overview

[203] The Supreme Court found that the Crown owed fiduciary duties to reserve 15,100 acres of Tenths and to exclude pā, urupā and cultivations. Despite that decision, issues about the content of the duties owed by the Crown persist.

[204] Those issues fall under two broad heads. The first concerns the nature of the duties found by the Supreme Court. This is important because the scope of the duty determines how breach is to be measured. In this case the issue is whether breach is to be measured by reference to the failure to achieve a certain outcome (reservation of 15,100 acres of Tenths, and the exclusion of pā, urupā and cultivations) or is it by reference to the standards of conduct expected of a fiduciary? This is integral to the Crown's defence of the claim in relation to the Unallocated Tenths. That is because the Crown accepts it did not reserve 10,000 acres but nevertheless says that this is not a breach of fiduciary duty as there is no evidence that the failure to reserve fell below the standards of conduct expected of a fiduciary.

[205] The second issue concerns whether the fiduciary duties owed by the Crown give rise to obligations of trust. This depends, at least in part, on whether (and if so when) customary title was extinguished, and the date at which the land came into the hands of the Crown. The nature and content of the duty in relation to each category of land raises separate and distinct issues, each of which are considered below.

[206] To set the context for the analysis of these issues, I start with some general observations about the nature of the duties found by the Supreme Court.

General observations

[207] The Supreme Court made a declaration that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the Customary Owners and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award. There are several features of this declaration which require highlighting.

[208] Most obviously, the declaration refers to "fiduciary duties", rather than duties owed by a fiduciary. The distinction is important because not every duty owed by a fiduciary will be a fiduciary duty.[125] In some cases, the duty owed by a fiduciary will be analogous to a duty to exercise skill and care, such as a duty to manage trust property. However, the plain meaning of the Supreme Court's declaration suggests that the duties owed by the Crown are fiduciary in nature and not obligations owed by a fiduciary. The Court's reasoning also supports that conclusion as I explain further below.

[209] There are two different duties at play. The first duty is to "reserve 15,100 acres". This is the duty owed in relation to the Tenths. The second duty is to "exclude … pā, urupā and cultivations". This is the duty owed in relation to the Occupation Lands.

[210] Both duties are expressed to be for the benefit of the Customary Owners. However, there are different interests involved in each category of land, and the composition of the Customary Owners to whom each duty is owed may also differ. The duty in relation to the Tenths is owed to all Customary Owners; whereas the duty in relation to the Occupation Lands is owed to those Customary Owners (or the hapū or whānau) who held customary interests (referred to as customary title in this judgment) over the specific pā, urupā and cultivations.

[211] The duties relate to the reservation and exclusion of land from "the land obtained by the Crown following the 1845 Spain award". I consider this refers to the

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[125] See *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA); and *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) at 16.

land which came into the Crown's hands when it accepted the Spain award. The duties found by the Supreme Court attach to that land and any equitable interest in that land continues until the duties have been discharged. This is relevant to the proprietary remedies sought by the plaintiff in relation to the different categories of land, and the Allocated Tenths in particular.

[212] The focus of both duties is on land. They specifically relate to the *reservation* and *exclusion* of land from the land obtained by the Crown. Insofar as the duty relates to the Tenths, it requires the identification and reservation of trust assets. Insofar as it relates to the Occupation Lands, the duty requires the identification and exclusion of pā, urupā and cultivations from the land obtained by the Crown.

[213] The duties are expressed as distinct duties. The obligation to reserve 15,100 acres of Tenths is "in addition" to the duty to exclude pā, urupā and cultivations. This is particularly important for the Occupied Tenths. As Occupation Lands had to be excluded from the land obtained by the Crown, they could not be used as Tenths. And, as Tenths had to be reserved from the land obtained by the Crown, they could not be reserved from Occupation Lands. Neither duty was discharged if Tenths were allocated over Occupation Lands.

[214] The duties require positive steps to be taken by the Crown, that is, they are prescriptive and executory in nature. Performance requires 15,100 acres to be reserved, and pā, urupā and cultivations to be excluded. As discussed further below, this suggests breach is the failure to either reserve or exclude these categories of land.

[215] The declaration made by the Supreme Court does not extend to the preservation or management of the Tenths once reserved. There were no binding findings on the Crown's duties once the Tenths were reserved. I have considered and determined the terms of trust for the Allocated Tenths in the sections which follow. It is these duties, and not those found by the Supreme Court, which provide the yardstick for measuring breach in relation to the Allocated Tenths.

[216] Relatedly, the duties do not extend to the Crown's administration of any trust subsequently established. For example, the duties found by the Supreme Court do not

say anything about the Crown's obligation to save or invest trust assets, or to make distributions from the trust to the Customary Owners. Indeed, the duties are not expressed as duties of trust at all. This informs the analysis of the correct counterfactual for assessing equitable compensation, as set out in pt VII.

[217] Finally, as previously stated, the fiduciary duties in this case arise out of a specific land transaction. They are not fiduciary duties owed at large by the Crown to Māori. Nor do they spring from te Tiriti, although te Tiriti is an important part of the relevant context in which these duties arise and may amplify the obligations.[126]

[218] These general observations set the scene for an analysis of the Crown's claim that breach of the duties is to be assessed by reference to the conduct of the Crown, rather than outcome. That issue is considered next.

An outcome-based duty?

[219] The plaintiff's claim proceeds on the basis that the failure to reserve the Unallocated Tenths, and the transactions which resulted in the alienation of the Allocated Tenths, are all breaches of the fiduciary duty to reserve 15,100 acres of Tenths. That is, any diminution in the Tenths estate is automatically a breach of the fiduciary duty found by the Supreme Court. Similarly, the plaintiff says the failure to exclude the Occupation Lands is also a breach of fiduciary duty. On the plaintiff's case, breach does not depend on *why* the Tenths were not reserved or *why* the Occupation Lands were not excluded.

[220] The Crown says that this approach is inconsistent with fiduciary law. Counsel submits that it is not possible to have a fiduciary obligation to achieve a certain outcome (the reservation of 15,100 acres, or the exclusion of pā, urupā and cultivations) because there is no room for discussion as to whether the obligation was performed loyally.[127] The Crown submits that the obligations to reserve 15,100 acres and exclude Occupation Lands must be understood as promissory obligations to be

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126 Supreme Court judgment, above n 8, at [391] per Elias CJ, [590] per Glazebrook J, [784] and [784], n 1012 per Arnold and O'Regan JJ.

127 This submission draws on an example given by Professor Lionel Smith of an obligation to pay £100: see Lionel Smith "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608 at 610.

performed by a fiduciary. Therefore, breach is to be measured by the standards of conduct expected of a fiduciary, and not by reference to outcome.

[221] The issue applies to both the reservation of the Tenths and the exclusion of the Occupation Lands. However, as already noted, the issue is particularly important to the Crown's defence of the claim in relation to the Unallocated Tenths. That is because the Crown admits that 10,000 acres of Tenths were not reserved, but nevertheless says that this does not amount to breach of a fiduciary duty because there is no evidence that the Crown acted below the standards expected of a fiduciary in failing to reserve those Tenths.

[222] I do not consider the duties found by the Supreme Court can be properly understood as promissory obligations owed by a fiduciary. It is clear from the majority's decision that the duties to reserve and exclude are fiduciary duties. The fact that the duties are expressed as positive obligations to achieve a certain outcome does not alter that conclusion. Whether an obligation is fiduciary in nature is a matter of substance not form and it does not turn on semantics or the labels assigned to a duty. Rather, it will depend on the relationship between the parties, the content of the obligation, and the circumstances in which that obligation arises.

[223] The Supreme Court has already undertaken an analysis of those factors in this case and concluded that the obligations owed were fiduciary in nature. As the majority found, the obligations assumed by the Crown were obligations of undivided loyalty owed to the Customary Owners.[128] Elements of loyalty and the assumption of trust-like responsibilities are hallmarks of a fiduciary obligation.

[224] The fact that the Crown obtained the land of the Customary Owners on condition that 15,100 acres of Tenths were reserved, and Occupation Lands were excluded, was central to the Supreme Court's conclusion.[129] Moreover, the failure to reserve the Tenths and exclude the Occupation Lands from the land obtained by the Crown meant the Crown automatically obtained that land for itself. A simplified

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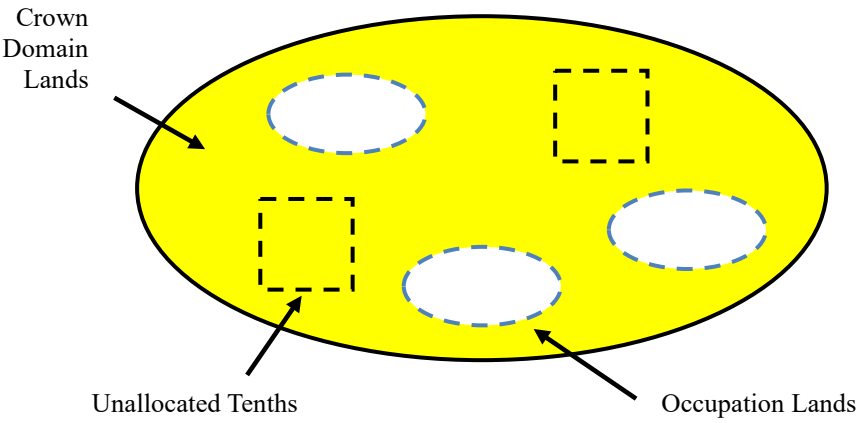
128 Supreme Court judgment, above n 8, at [582] per Glazebrook J and [785] per Arnold and O'Regan JJ.

129 At [395] and [405] per Elias CJ.

diagram may assist understanding. Set out below is a visual representation of the land obtained by the Crown on acceptance of the Spain award:

LAND OBTAINED BY THE CROWN



[225] The duties to reserve and exclude attach to the land obtained by the Crown (the entire large oval). It is from this land that the Unallocated Tenths (dotted rectangles) were to be reserved and the Occupation Lands (dotted ovals) excluded. If the Crown did not reserve the Unallocated Tenths or exclude the Occupation Lands, then the land became Crown land and was treated as such. Effectively, this was an expropriation of land belonging to the Customary Owners whether in their capacity as beneficiaries of the Tenths, or as hapū and whānau having proprietary interests in the Occupation Lands. Disloyalty is manifest in that outcome.

[226] The circumstances which gave rise to the duties found by the Supreme Court together with the advantage which automatically accrued on the failure to discharge the fiduciary duty mean that the failure to reserve the full acreage of Tenths, and the failure to exclude Occupation Lands will, on its face, be a breach of fiduciary duty.[130] It will be for the Crown to point to any circumstances which justify the failure to comply with its duties. In the absence of such justification, breach is established. For the reasons set out later in this judgment, I do not consider the Crown can justify its

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130 This is not to say that personal advantage or benefit is a requirement before breach of fiduciary duty may be established. It is not. Disloyalty may take many different forms and is not limited to profit or advantage by the fiduciary. However, where there is profit or advantage at the expense of another it is likely to be a strong indicator of breach of a fiduciary duty.

failure to reserve 10,000 acres of rural Tenths, and its failure to do so means breach is established in relation to the Unallocated Tenths.

[227] This analysis is consistent with the approach followed by Elias CJ and Glazebrook J in relation to the Unallocated Tenths.[131] Both Judges found that the Crown could not provide a reasonable justification for the failure to reserve 10,000 acres of rural Tenths.[132] The Crown makes much of the fact that Arnold and O'Regan JJ declined to make any similar findings. If breach is to be measured by outcome then there is no reason why a finding of breach could not have been made in the Supreme Court. The Crown says that the inference from their Honours failure to make that finding is that breach is to be measured by the conduct of the Crown rather than outcome.

[228] I consider that inference reads too much into their Honours' decision. The Judges declined to make findings of breach because the Courts below had not made any such findings and the evidence before the Court was incomplete.[133] That cannot be relied on to support the Crown's submission on the nature of the duty.

[229] Moreover, and contrary to Crown counsel's submission, I do not accept that the Canadian cases discussed by the majority support the Crown's construction of the fiduciary duty found by the Supreme Court. The nature of the fiduciary duty owed is necessarily fact-specific. For example, the fiduciary duties at issue in *Guerin* and *Williams Lake Indian Band v Canada* involved the exercise of a discretion by the Crown.[134] In this case, the fiduciary duty is expressed more narrowly. The terms of surrender were the reservation of 15,100 acres and the exclusion of pā, urupā and cultivations. For the reasons already expressed, disloyalty is inherent in the failure to meet those conditions.

[230] The Crown also relies on the Manitoba Court of Appeal's observations in *Manitoba Métis Federation Inc v Canada* that breach of a fiduciary obligation is

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131 Supreme Court judgment, above n 8, at [92] and [94] per Elias CJ, and [536] and [587] per Glazebrook J.

132 At [92] and [94] per Elias CJ, and [536] and [587] per Glazebrook J.

133 At [789] per Arnold and O'Regan JJ.

134 See *Guerin v The Queen* [1984] 2 SCR 335; and *Williams Lake Indian Band v Canada* 2018 SCC 4, [2018] 1 SCR 83.

measured not by the end-result of the fiduciary's actions, but by whether the fiduciary's conduct has fallen below the applicable standard.[135] The Court also emphasised that the assessment was to be considered against the context of the times, and not in hindsight.[136] Similar statements were made by the Supreme Court in *Williams Lake Indian Band*.[137]

[231] These statements of general principle are not in dispute. They affirm that a fiduciary exercising a discretion cannot be required to deliver a perfect solution. But that is different altogether from saying that a fiduciary duty cannot be expressed as a positive and executory duty. To interpret the Canadian Courts' statements in this way would be to unduly restrict the circumstances in which fiduciary obligations arise—a position which appears antithetical to the very foundations of fiduciary law.

[232] A similar response may be made to the Crown's reliance on Lady Arden's statements in *Children's Investment Fund Foundation (UK) v Attorney-General* in which she draws a distinction between contractual obligations and those of a fiduciary nature.[138] Much of the analysis required to draw that distinction has already been completed in this case with the Supreme Court expressing the duties to reserve and to exclude as fiduciary in nature. There is nothing in Lady Arden's statements of principle that is at odds with that approach.

[233] It follows that I consider the failure to reserve the full 15,100 acres, and the failure to exclude pā, urupā and cultivations constitutes a breach of fiduciary duty. It will be for the Crown to justify its failure to comply with its fiduciary duties and show why it does not constitute a breach. For the reasons outlined in the following part of this judgment, the Crown has not done that in relation to the Unallocated Tenths, and its admission that it failed to reserve 10,000 acres of rural Tenths is enough to establish breach.

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135 *Manitoba Métis Federation Inc v Canada* [2010] MBCA 71, 255 Man R (2d) 167 at [545]. The Manitoba Court of Appeal's decision that a fiduciary duty existed was overturned by the Supreme Court of Canada on appeal. However, there was no adverse comment about the Court's general approach: see *Manitoba Métis Federation v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623.

136 *Manitoba Métis Federation Inc v Canada* [2010] MBCA 71, 255 Man R (2d) 167 at [545]–[548].

137 *Williams Lake Indian Band v Canada* 2018 SCC 4, [2018] 1 SCR 83 at [48].

138 *Children's Investment Fund Foundation (UK) v Attorney-General* [2020] UKSC 33, [2022] AC 155 at [51] per Lady Arden JSC.

Extinguishment of customary title and vesting of land

[234] The other issue that remains unresolved by the Supreme Court decision is whether the fiduciary obligations found by the Supreme Court give rise to obligations of trust. Whether a trust came into existence raises questions about whether, and if so when, customary title was extinguished, and whether land was "vested" in the Crown as trustee.

[235] The plaintiff relies on the reasoning of Elias CJ in the Supreme Court on these issues. Counsel submits that customary title was extinguished and the Crown took ownership of the land when the Crown accepted the Spain award in 1845. At that point in time the land became the domain lands of the Crown. These lands were impressed with a trust in favour of the Customary Owners to ensure fulfilment of the terms of the Spain award, namely the reservation of the Tenths and the exclusion of the Occupation Lands.

[236] The Crown disagrees. The Crown says the Spain award procedure "cleared" the burden of customary title, but it did not "extinguish" it. On the Crown's case, extinguishment only occurred when the Crown granted the land to the Company in 1848. It was at this time that the land "vested" in the Crown.

[237] To answer these questions, it is necessary to consider the nature of the legal title acquired by the Crown in 1840 and the procedure under the Land Claim Ordinance. That is set out at [96]–[107] of Elias CJ's judgment in the Supreme Court and what follows is largely taken from her Honour's judgment.[139]

The Crown's title to land, and the Land Claims Ordinance 1841

[238] The nature of the legal title acquired by the Crown starts with the signing of te Tiriti o Waitangi. Under arts 1 and 2 of the English version of the Treaty, the Crown acquired sovereignty over New Zealand's lands, and the exclusive right of pre-emption.

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139 Supreme Court judgment, above n 8.

[239] Sovereignty did not extinguish Māori customary title, however, and the Crown did not obtain unfettered title to all land in New Zealand. As Tipping J said in *Attorney-General v Ngāti Apa*, sovereignty meant that customary title was integrated into what became the common law of New Zealand.[140] Accordingly, the Crown acquired "radical" (underlying) title to the land which was burdened by customary rights and interests to that land.[141] For ease of reference, I shall refer to these rights and interests in the land as customary title.[142]

[240] Land could only become Crown land if customary title was first lawfully extinguished.[143] Extinguishment could occur in a variety of ways.[144] The Crown points to the 1848 grant as extinguishing customary title in this case. However, I consider the focus should be on a much earlier step in the process, namely the sale of the land by the Customary Owners to the Company, and the inquiry into that sale by Commissioner Spain under the Land Claims Ordinance.

[241] A sale would only extinguish customary title if the sale was with the "free consent of the native occupiers".[145] Sales after 1840 could only be made to the Crown in accordance with the Crown's right of pre-emption. However, for sales that occurred pre-1840 (such as the sale to the Company in this case), the legal situation was somewhat different. The purchaser's title derived from these pre-1840 sales was declared null and void under s 2 of the Land Claims Ordinance. A process was

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140 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [183] per Tipping J.

141 At [21] per Elias CJ.

142 The concept of Māori customary title should not be equated with the concepts and incidents of title as known in the common law of England: see *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [184] per Tipping J. The existence and content of customary interests in land are determined as a matter of tikanga: see *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [49] per Elias CJ and [184] per Tipping J.

143 Supreme Court judgment, above n 8, at [510] and [568] per Glazebrook J citing *R v Symonds* (1847) NZPCC 387 at 390 per Chapman J and 393–394 per Martin CJ; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [30]–[40] and [47] per Elias CJ, [147]–[148] per Keith and Anderson JJ and [183] per Tipping J; and *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [28] and [68] per Elias CJ.

144 For example, customary title could be extinguished by statute and by operation of the Native Land Court investigating ownership and granting freehold titles: see *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [39] per Elias CJ. See also *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252 at [40]–[41] per Miller J citing *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [34], [47], [49], [86] per Elias CJ and [185] per Tipping J.

145 *R v Symonds* (1847) NZPCC 387 (SC) at 390. This passage was also adopted by the Privy Council in *Tamaki v Baker* (1901) NZPCC 371 at 384. See also *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23–24 per Cooke P.

established under that Ordinance by which Commissioners were appointed to investigate and report on applications for a grant of land.[146]

[242] The investigations by the Commissioners were to include consideration of whether the pre-1840 sales of land had been agreed on equitable terms.[147] If satisfied of an entitlement to a grant, a Commissioner was required to report that to the Governor with a recommendation as to the grant (not to exceed 2,560 acres unless specially authorised by the Governor).[148] As is now well known, Commissioner Spain was appointed in this case and it was his recommendation which formed the basis of both the 1845 and 1848 grants to the Company.

When was customary title extinguished?

[243] Elias CJ found that the Governor's acceptance of the Commissioner's recommendation of grant (which could only be on the basis that the sale was made on equitable terms) extinguished customary title and the land became domain lands of the Crown.[149] I respectfully agree and adopt her analysis in relation to land that was sold.

[244] To explain further, Spain's award under the Land Claims Ordinance procedure (that being the Spain investigation) confirmed that the sale was a true sale made on equitable terms, that is, it was a sale made with the free consent of the Customary Owners. A sale with the free consent of the Customary Owners was sufficient to extinguish customary title. The burden on the Crown's title was removed and the land became Crown lands, able to be granted to others.

[245] Accordingly, I do not accept the Crown's submission that customary title was "cleared" at 1845, but was not extinguished until the grant of 1848. I do not consider a distinction may be drawn between clearance and extinguishment of title in this context. The terms mean the same thing. Both explain the process by which the Crown's title became unburdened by customary title. I consider that occurred in 1845 in relation to the land sold by the Customary Owners.

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146 Land Claims Ordinance 1841 4 Vict 2, s 3.
147 Section 3.
148 Section 6.
149 Supreme Court judgment, above n 8, at [93] and [188] per Elias CJ.

[246] It follows from this analysis that I consider any trusts arose when the land became Crown land. This is the "land obtained by the Crown following the 1845 Spain award" referred to in the Supreme Court declaration. Land obtained by the Crown was cleared of customary title on acceptance of the Spain award. At this point in time, the Crown held the land sold by the Customary Owners subject to the obligations to reserve 15,100 acres for their benefit and, in addition, to exclude their Occupation Lands from that land. It was not necessary for a separate "vesting" of land to occur to find the existence of a valid trust.

[247] This analysis only applies to the lands which were *sold* by the Customary Owners to the Company. As discussed later in this part, I do not consider the Occupation Lands were sold by the Customary Owners. The Land Claims Ordinance process was concerned with the terms of sale and purchase or other forms of alienation of land. In the absence of a sale or alienation, customary title was not extinguished.

[248] The plaintiff submits that customary title was extinguished over the Occupation Lands and raises a conveyancing point in support. Counsel submits that the conveyancing arrangements for the Crown grant envisaged that the *whole* of the land would be granted to the Company, with the Company then having the responsibility for excluding the Occupation Lands, reserving the Tenths, and excluding any other private purchases. Once that had occurred, the land to be reserved and excluded would then be re-conveyed back to the Crown.

[249] In support of this conclusion, counsel for the plaintiff points to the plain meaning of "saving and always excepting" as used in the Spain award. Reference is also made to a memorandum by Attorney-General William Swainson from 1847.[150] This memorandum was in response to a request by Governor Grey for a legal opinion on how to address the Company's concerns which led it to refuse to accept the 1845 grant. These concerns included the uncertainty arising from the exclusion of Occupation Lands given the extent of these lands had not been ascertained.

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[150] Extracts from this memorandum are set out at Supreme Court judgment, above n 8, at [173] per Elias CJ.

[250] In his legal advice, Swainson referred to the 1845 grant (which was in the same terms as the Spain award) and stated that it had purported to convey 151,000 acres to the Company and then excepted the "Native Reserves" and the pā, urupā and cultivations. Swainson considered it would "greatly simplify" the new deed of grant to "convey that land only to which the Company was entitled, instead of first including the Reserves and then excepting them".[151]

[251] This advice casts some light on what may have been in the minds of the relevant actors at the time both grants were prepared. It is of some assistance in construing the meaning of the Spain award and what may have been intended by the words "saving" and "excepting" in the award. However, it is only one interpretation of those words and far from definitive. Another possible interpretation is that the word "saving" refers to the Tenths, and the word "excepting" applies to the Occupation Lands. That is, "saving" and "excepting" are synonyms for reserving and excluding.

[252] Irrespective of the proper interpretation of the words "saving" and "excepting", I do not consider the anticipated conveyancing arrangements in relation to the grants alters the legal analysis as to the extinguishment of customary title. Whatever the Crown was purporting to convey in the 1845 and 1848 grants it only had power to convey that land over which customary title had first been extinguished. For pre-1840 purchases, that could only occur if the Māori proprietors had freely agreed to alienate their land; the Land Claims Ordinance investigation had been completed; and the Commissioner's recommendation was accepted by the Governor.[152]

[253] That legal position is consistent with the exclusion of the Wairau district from the Spain award on the basis that Commissioner Spain was not satisfied that it had been sold. It is also consistent with the fact that the Occupation Reserves later made

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151 As it transpired, that advice was not adopted in the 1848 grant. Only the identified Tenths and Occupation Lands were excluded from that grant. The remaining land was transferred to the Company with an obligation to reconvey the Tenths which had not yet been selected: see Supreme Court judgment, above n 8, at [187] per Elias CJ.

152 See Supreme Court judgment, above n 8, at [91] and [99] per Elias CJ. This is consistent with Spain's opinions expressed in an interim report for the Governor. Spain said that the Company could not ask for a Crown grant irrespective of whether native title had been properly extinguished because "the Crown could not grant what the Crown did not possess". Similar views were expressed by Lord Stanley in a letter to the Company dated 10 January 1843.

in Massacre Bay and western Blind Bay were recorded as remaining in customary title.

[254] This conclusion is also consistent with art 2 of the English text of the Treaty (which guarantees to Māori full exclusive and undisturbed possession of their lands); the 1840 Charter (which explicitly withheld the power to affect the rights of Māori to the "actual occupation or enjoyment" of their lands); and the Royal Instructions which confirmed that grants were to be made from lands belonging to the Crown.[153] These instruments make clear that there was no intention to extinguish customary title over lands which were not sold; those lands were to remain with the Customary Owners.

[255] To sum up, I consider customary title over the land sold by the Customary Owners was extinguished in 1845 when the Crown accepted the Spain award. Upon acceptance of that award, the land became Crown land able to be granted to the Company. Any trusts which came into existence arose at this time and it was not necessary for a separate "vesting" of the land. However, customary title was only cleared over land which was sold, and the Occupation Lands were not sold by the Customary Owners.

[256] The nature of the fiduciary duties as they relate to each category of land is considered next.

Unallocated Tenths

[257] The first issue to be considered is whether the duty to reserve 15,100 acres gives rise to obligations of trust in relation to the Unallocated Tenths. This is mentioned here in the context of a discussion about duty but is discussed again later when addressing the plaintiff's claim for proprietary remedies.[154]

[258] The plaintiff says it is unnecessary to embark on a separate analysis of this issue. That is because the plaintiff says that the Supreme Court determined by a majority that an institutional constructive trust arose in relation to the

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153 At [100]–[101] and [297]–[298] per Elias CJ citing Charter and Letters Patent for erecting the Colony of New Zealand 1840; and Royal Instructions (5 December 1840), cl 37.

154 See below at [611]–[614].

Unallocated Tenths. That assertion rests on Arnold and O'Regan JJ's discussion around the application of the exception found in s 21(1)(b) of the Limitation Act.[155]

[259] I do not consider this issue has been finally decided. Arnold and O'Regan JJ explicitly said that they did not determine whether there was an express "or other form of trust" and they did not make any findings regarding certainty of subject matter.[156] I do not consider there to be a binding judgment on this question in those circumstances.

[260] Nevertheless, I consider the weight of the majority's reasoning suggests that the fiduciary duty to reserve 15,100 acres gives rise to obligations of trust. This means that the land obtained by the Crown following the 1845 Spain award was impressed with a trust in relation to the rural Tenths. The nature of that trust was an express trust (or something very close to it) or an institutional constructive trust, as I explain below.

[261] The reasons for reaching that conclusion are drawn from the judgment of Elias CJ. In brief, the obligations of trust arise out of the circumstances in which the Crown obtained the land following the 1845 Spain award, and the Crown's assumption of responsibility for the Tenths.

[262] The Crown assumed responsibility towards Māori in relation to their lands through te Tiriti, the 1840 Charter, and the Royal Instructions. A new legal order was imposed whereby the Crown exerted control over the Customary Owners' pre-existing property interests. Those interests were inalienable except to the Crown and only through the Land Claims Ordinance process.

[263] It was through the Land Claims Ordinance process that the purchase by the Company was declared equitable, and the recommendation of a grant could be made. Spain's recommendation meant the transaction between the Customary Owners and the Company was found to be made on equitable terms. The provision of the Tenths as the primary consideration for the Company's purchase was central to this determination.

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155 Supreme Court judgment, above n 8, at [815] per Arnold and O'Regan JJ.
156 At [726] per Arnold and O'Regan JJ.

[264] As explained above, the effect of the Crown's acceptance of the Spain award was to clear the land of customary title. It was at this stage that the land came into the hands of the Crown. That land was impressed with a trust to ensure the conditions of surrender were met. One of those conditions was the reservation of 15,100 acres of Tenths.

[265] The Crown's assumption of responsibility in relation to the Tenths is also relevant to the existence of a trust. That assumption is reflected in cl 13 of the 1840 Agreement whereby the Crown accepted the Company's obligations in relation to the Tenths. It is also reflected in the Crown's positive acts of responsibility taken in relation to the Tenths. Those include the reservation of the Allocated Tenths in 1842 and 1843, and the practical management of the Tenths from that time onwards.

[266] Moreover, the arrangement between the Crown and the Customary Owners in relation to the Tenths resembles an express trust. It was always intended that the Crown would hold the Tenths on trust. The land came into its hands on that basis. It held the land obtained after the 1845 Spain award on trust pending reservation of the Tenths.

[267] Even if wrong on the express trust analysis, then I consider an institutional constructive trust arose in relation to this land. An institutional constructive trust is "one which arises by the operation of the principles of equity and whose existence the Court simply recognises in a declaratory way".[157] An institutional constructive trust serves to protect property interests, and shares many of the same features of an express trust.[158]

[268] The fiduciary obligation in relation to the Tenths, and the Customary Owners' beneficial interest in the land obtained by the Crown following the 1845 Spain award, pre-dated the Crown's failure to reserve the 10,000 acres of rural Tenths. The imposition of an institutional constructive trust in these circumstances protects the

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157 *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172 per Gault, Keith and Tipping JJ. See also the principles discussed below at [537]–[544].

158 Jessica Palmer "Constructive Trusts" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 335 at 337.

Customary Owners' beneficial interests in the land obtained by the Crown, at least to the extent of the 10,000 acres which were not reserved.

[269] Accordingly, I consider the fiduciary duty to reserve 15,100 acres of Tenths gave rise to obligations of trust in relation to the Unallocated Tenths. The land which came into the hands of the Crown in 1845 when customary title was extinguished was impressed with a trust for the benefit of the Customary Owners.

Allocated Tenths

[270] The Allocated Tenths category of land is somewhat anomalous. That is because, self-evidently, the Allocated Tenths were surveyed and reserved. It is also because the parties agree that the Allocated Tenths were held on express trust by the Crown.

[271] As already signposted, I consider the duties in relation to the Allocated Tenths are different to those found by the Supreme Court. My reasons for reaching that view are set out in the following section. I then turn to make findings as to the terms of trust upon which the Allocated Tenths were held. This analysis is relevant to the measure by which breach is to be determined. It is also relevant to the proprietary remedies sought by the plaintiff for the breaches involving the Allocated Tenths.

[272] Other issues to be determined in relation to the Allocated Tenths concern when the trust arose and whether (and if so when) it came to an end.

Are the duties separate to those found by the Supreme Court?

[273] The plaintiff's claim in relation to the Allocated Tenths is premised on an obligation to *maintain* the trust estate at 15,100 acres of Tenths. It is alleged that the alienations of the Allocated Tenths resulted in a diminution of the Tenths estate and this was a breach of the fiduciary duty found by the Supreme Court.

[274] A distinction between the duties found by the Supreme Court and the duties owed in relation to the Allocated Tenths was drawn in the plaintiff's pleading.[159] However, the plaintiff's case at trial was not premised on a distinction. I sought further submissions on this issue. Specifically, I sought submissions on whether a duty to *reserve* the Tenths was separate and distinct from the duty to *preserve* those Tenths.

[275] Counsel for the plaintiff submits that the duty to *preserve* the Tenths is inherent in the fiduciary duty to *reserve*. It is said that the respective duties are two sides of the same coin. That is because the duty to reserve was for the purpose of implementing the Tenths' scheme. Counsel submits that reserving the Tenths would be an illusory protection if there was not an ancillary fiduciary duty to preserve the land once reserved.

[276] I agree with these submissions. Drawing fine distinctions based on the difference to reserve and preserve risks stripping the duty to reserve of any substantive content. The Crown's duty was to get in the trust assets. The purpose of doing so was to hold those assets on trust. A realistic approach to the Crown's fiduciary duties is required. Moreover, as discussed in the following section, I consider there was a duty to preserve (or at least not to alienate) the Tenths up until 1856.

[277] Nevertheless, I consider there is a distinction between the duties found by the Supreme Court and those owed in relation to the Allocated Tenths in this case. The distinction is between getting in the trust assets (the duty to reserve) and then managing those trust assets thereafter. The plaintiff's claim in relation to the alienation of the Tenths is not a breach of the fiduciary duty to get in the trust assets. That duty was discharged when the Allocated Tenths were reserved. Rather, the claim in relation to the alienation of the Allocated Tenths is a breach of the Crown's duty to preserve the Allocated Tenths. It follows that I do not agree with the plaintiff's attempt to cast

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159 The plaintiff pleads that the "Crown owed fiduciary duties to the Customary Owners to represent their best interest in the creation and administration of the Nelson Tenths Reserves and in preserving their Occupation Land". Five separate duties are pleaded as particulars of those fiduciary duties. Those particulars include: a duty to reserve 15,100 acres of Tenths; a duty to exclude Occupation Land; a duty to preserve the Tenths and not to allow the trust property to be diminished; a duty to act reasonably, honourably and with good faith and to consult and obtain the free and fully informed consent of the Customary Owners in relation to a change to their entitlement that was prejudicial to their interests; and a duty not to profit from or be enriched by its fiduciary role.

every breach in relation to the Allocated Tenths as a breach of the fiduciary duty found by the Supreme Court.

[278] This distinction matters for two reasons. First, it means that a different yardstick will be used to measure breach of fiduciary duty in relation to the Allocated Tenths. It is not enough to point to a diminution of the trust estate below the 15,100 acres threshold. The plaintiff will need to show that the Crown breached its trust duties in relation to the Allocated Tenth. To establish its claim to an equitable remedy, the plaintiff will also need to show that the breach of trust was a breach of fiduciary duty.[160]

[279] On this latter point, the Crown submits that the duty to preserve the trust property is one of care, diligence and skill which does not import standards of fiduciary law.[161] Accordingly, the Crown says breach of the duty to preserve does not lead to an equitable remedy. I have addressed each of the transactions with the Allocated Tenths in Appendix 2. My analysis of each transaction takes precedence over any general comments I make in this section. However, I have accepted that some of the alleged breaches of trust will not be breaches of fiduciary duty. For example, I consider allowing the Customary Owners to occupy Tenths after they were reserved (the Occupied Tenths (post)) was a breach of trust, but it was not a breach of fiduciary duty. For the reasons explained in pt IX, claims which are not based on a breach of fiduciary duty are barred under the Limitation Act.

[280] Alienation of the Allocated Tenths, however, falls into a different category. If the trust duty is to preserve the trust property in the sense of not alienating it (as I have found), it is difficult to see how alienation of that trust property could be anything other than a breach of fiduciary duty. Such conduct is not the same as making an imprudent investment with trust property or failing to secure a certain return. Rather, it is alienating the very property that was to be held on trust for the Customary Owners.

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160 Andrew S Butler "Breach of Trust" in *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 225 at 258.

161 Andrew S Butler "Fiduciary Law" in *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 471 at 497.

[281] The second reason why the distinction between the duties owed in relation to the Unallocated Tenths and Allocated Tenths matters relates to the availability of proprietary remedies. As discussed in more detail in pt VI, the plaintiff claims an institutional constructive trust in relation to the land obtained by the Crown following the 1845 Spain award in respect of the diminution of the trust estate resulting from the alienation of the Allocated Tenths.

[282] I do not consider an institutional constructive trust can be established in relation to that land. The Crown's duties in relation to that land were discharged on reservation of the Allocated Tenth. The Crown no longer held the land it obtained following the 1845 award pending fulfilment of its duty to reserve. The land obtained by the Crown was released from the Customary Owners' equitable interest. Thereafter, that interest, and the Crown's duties, attached to the Allocated Tenth. That is, the preceding equitable duty was only in relation to the Allocated Tenth, and not the land obtained by the Crown. Any proprietary remedies are in relation to the Allocated Tenth and not to the land obtained by the Crown.

[283] To recap, I consider the duties owed in relation to the Allocated Tenths are different duties to those found by the Supreme Court. That has significance for the measure by which breach is to be determined, and the nature of the proprietary remedies sought by the plaintiff in relation to the alienation of the Allocated Tenths.

Terms of trust

[284] As I have determined that any duties owed by the Crown in relation to the Allocated Tenths are separate from the duties found by the Supreme Court, it is necessary to determine the nature and content of those duties.

[285] The specific questions to be answered include whether the Allocated Tenths were to be held as an endowment for the benefit of all Customary Owners; whether the land was alienable; and whether occupation of the Allocated Tenths by some of the Customary Owners were within the terms of the trust.

[286] The starting point is to consider the origins of the Tenths scheme. It appears to have been developed in response to humanitarian concerns about the impact of

colonisation on indigenous populations.[162] Nevertheless, the detail of the scheme was, as Dr Vincent O'Malley described in his evidence, "cloudy and ambiguous".

[287] Early records suggest that the scheme would allow the Customary Owners to share in the value arising out of European settlement in the area. That value would be the primary form of payment to Māori vendors for their land. To achieve this, Tenths sections were to be "pepper-potted" among the settler sections, with accrued funds being used to meet the needs of Māori.[163]

[288] Some documentary records suggest the scheme was to benefit rangatira and their whānau. The idea was to create a Māori aristocracy with the land held on trust to ensure it was not sold for a sum significantly lower than its worth.[164] There was some suggestion that Māori might eventually abandon their existing homes and cultivations in favour of residences on the new Tenths.

[289] These conceptions of the scheme were to some extent reflected in the Company's deeds of purchase which referred to reserves being held in trust for the "future benefit of the said Chiefs, their families and heirs". The Kāpiti deed referred to a portion of land "suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes, and their families". The Queen Charlotte deed was in nearly identical terms to the Kāpiti deed.

[290] However, the idea of the Tenths being used for occupation, and only by the chiefs and their families, was at odds with statements made by the Company Secretary, John Ward, when questioned by the Imperial Parliament's Select Committee on New Zealand in July 1840. He testified that the intention was for the Tenths to be held in trust for the "inalienable use" of Māori, and the proceeds would be applied for the benefit of those Māori who had surrendered the lands.

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162 Waitangi Tribunal *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 47.

163 At 47.

164 Edward Wakefield was recorded saying that "if [the Company] placed the property at once at [the Customary Owners'] disposal, they would sell it for a trifle".

[291] The inalienability of the Tenths was reflected in the deeds of purchase with the stipulation that the reserves were to be held "for ever". This was consistent with the idea of an endowment which would grow in value together with the settler sections. It was also consistent with the Crown's rejection of the Company's proposal to advance £5,000 which would be secured on the Tenths. This was rejected on the basis that the Company's requirement of a power of sale was inconsistent with the inalienability of the Tenths.

[292] Although clear that the Crown intended to hold the Tenths on trust, the specific terms of that trust remained undefined in the early 1840s. The 1840 Agreement between the Company and Crown simply recorded that the Company had "entered into engagements for the reservation of the lands for the benefit of the Natives". It did not provide any further detail regarding the purpose of these Tenths or the terms of the scheme.

[293] Later proposals for the management of the Tenths by a set of trustees envisaged funds being generated from the reserves and used to build schools and take measures to benefit Māori. It was expected that funds generated from the Tenths would be expended within the settlement or district in which the income was derived. One of the early trustees, Bishop Selwyn, had plans to build institutions (hostelries, schools, hospitals and a chapel) using revenues generated from leasing the Tenths.[165]

[294] The idea of an inalienable endowment with funds being used for the exclusive benefit of the Māori vendors was reflected in the Native Trust Ordinance dated June 1844 which ultimately did not come into force. Under that Ordinance, a permanent alienation of the land was not permitted (although exchanges of Tenths of equal value were). Rental income was to be devoted to the establishment and

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165 See also Supreme Court judgment, above n 8, at [243] per Elias CJ and [746] per Arnold and O'Regan JJ. In a letter dated 13 September 1842, Bishop Selwyn wrote to his mother stating that the reserves were very valuable with buildings on them yielding a rental of between £300 and £400 per annum. He went on to say that it was intended that the income would be used to found institutions "for the improvement of the Natives; in Religion, in habits, in useful arts, in health, and in every way that may be likely to advance them in the scale of society; and to promote their spiritual good".

maintenance of schools and in the provision for the sick, as well as other matters "conducive to the bodily and spiritual welfare of the Native race".[166]

[295] In 1848, the appointment of a new Board of Management for the Tenths was approved by Governor Grey. Lieutenant-Governor Eyre wrote to Governor Grey setting out his understanding of the former arrangements regarding the Tenths. He recorded that they were set aside for the advantage and benefit of Māori and that the original intention had been that there was no power of alienation, except for the power to let or lease the land. The funds were to be devoted entirely to objects connected with the general welfare, advancement and improvement of Māori.

[296] The New Zealand Native Reserves Act provided for the management of the Tenths by local panels comprising a minimum of three Commissioners.[167] The Commissioners had a discretion to exchange, sell, lease or otherwise dispose of the Tenths for the benefit of Māori.[168] However, a sale, exchange, or lease in excess of 21 years, had to have the prior written approval of the Governor.[169] Monies received were to be applied for the benefit of Māori for whom such lands had been set apart. Special endowments for schools, hospitals, or other institutions "for the benefit of the said aboriginal inhabitants" with the assent of the Governor were also provided for under the Act.[170] Where lands had been reserved which remained in customary title, the Governor could, with the agreement of the Customary Owners, declare the lands to be subject to the provisions of the Act.[171] It was on this basis that the Occupation Reserves were managed by the Crown on behalf of the Customary Owners.

[297] The review of this history shows that the objectives and purposes of the Tenths trust were not crystal-clear and appear to have evolved over time. Nevertheless, I consider it possible to discern some key terms of trust. These arise out of the Supreme Court's decision, and the fact that the Tenths constituted the main consideration for the purchase of lands. I explain further below.

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166 Native Trust Act 1844, s 5.
167 New Zealand Native Reserves Act 1856, s 3.
168 Section 6.
169 Section 7.
170 Section 8.
171 Section 14.

[298] The Supreme Court clarified that the Tenths were separate and distinct from the Occupation Lands. The Occupation Lands were to be retained by the Customary Owners for occupation purposes. This is consistent with the promises made in the Treaty, the 1840 Charter and the Royal Instructions. It is also consistent with terms of the Spain award which provided for the reservation of the Tenths, and, in addition, the exclusion of pā, urupā and cultivations.[172] This is important because it confirms there was no intention to allow Māori to occupy the Tenths and the Tenths were being provided for an entirely different purpose.

[299] Furthermore, the Tenths were not to be used for general government purposes. As the Supreme Court found, the duties owed in relation to the Tenths were different to any political trust duties owed to Māori. The Crown owed duties of undivided loyalty in relation to the Tenths and the land could not be used for hospitals, schools or other government purposes.[173]

[300] That is consistent with the Tenths being held as an endowment. The fact that the Tenths were intended to comprise valuable pieces of land which would increase in value as the settlement grew was promoted by the Company at the outset. Edward Gibbon Wakefield described an endowment of up to three million sterling created by the Tenths when questioned by the Imperial Parliament Select Committee on New Zealand in July 1840.

[301] This increase in value and the fact that the Tenths were to be held in trust supports the view that the land was intended to be inalienable in the hands of the trustees. Inalienability was also something mentioned by the Company in the early days of the scheme and was reflected in the words "for ever" as they appeared in the Company's deeds of purchase. Inalienability is consistent with the endowment purpose of the Tenths.

[302] In addition to increasing in value, the Tenths were to be managed for the benefit of *all* Customary Owners. I do not consider this extended to allowing individual

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172 See Supreme Court judgment, above n 8, at [14] per Elias CJ where these considerations are summarised.

173 This is consistent with the finding in the Supreme Court judgment, above n 8, at [582] per Glazebrook J.

Customary Owners to occupy the Tenths—unless they were paying a market rental to do so. Early statements by Edwards Gibbon Wakefield and others about the creation of a Māori aristocracy appear to have been based on a misunderstanding of the nature and organisation of Māori society. In any event, it is clear from statements made on behalf of the Company around the same time that the Tenths were to be applied for the benefit of all Māori who had surrendered their lands and not just for the benefit of a few.

[303] Management for the benefit of all Customary Owners could include the leasing of the Tenths. It appears that this was what was envisaged with the land being used to generate an income which would then be applied for the benefit of the Customary Owners. However, I do not consider this was the only permissible use of the land. Using the land for the benefit of the Customary Owners could extend to allowing structures to be built (for example, hostelries or schools) for the use of those Customary Owners, so long as it was an exclusive use. Institutions intended for the use of those who were not Customary Owners would not be consistent with the obligation of loyalty owed by the Crown to the Customary Owners.

[304] These terms of trust did not apply indefinitely. As Elias CJ found, the New Zealand Native Reserves Act altered the terms of the trust.[174] After this date the Tenths could be alienated but only in accordance with the terms of that statute.[175] Similarly, the Tenths were able to be devolved to the Customary Owners for whose benefit they were reserved so long as the Governor consented.[176] Breaches which post-date the enactment of this statute must be measured by reference to these statutory terms of trust.

[305] To sum up, I consider the Tenths were originally intended to be an endowment for the Customary Owners. The Tenths were not to be used for occupation as the Occupation Lands were for that purpose. The Tenths were inalienable, at least until the enactment of the New Zealand Native Reserves Act in 1856. The Tenths were to be managed for the exclusive benefit of *all* Customary Owners rather than a select

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174 Supreme Court judgment, above n 8, at [404] per Elias CJ.
175 New Zealand Native Reserves Act 1856, s 7.
176 Section 15.

few. Beneficial use could include leasing of the lands with the rental income applied for the benefit of all Customary Owners. It could also include the building of structures on the Tenths but only so long as they were for the exclusive use and benefit of the Customary Owners.

When did a trust arise and did it come to an end?

[306] The Allocated Tenths were surveyed and reserved in 1842 and 1843. A question arises as to when the trust over the Allocated Tenths was formed, and whether, and if so when, it came to an end.

[307] The plaintiff says that the trust arose in 1845; the Crown says it arose in 1848. The plaintiff says that the trust duty remains and is enforceable. The Crown says the New Zealand Native Reserves Act brought any trust to an end.

[308] I consider an express trust arose in 1845, on acceptance of the Spain award.[177] It was at this point that customary title over the Allocated Tenths was extinguished, and the land came into the hands of the Crown. As outlined above, that occurred in 1845 and not 1848.[178]

[309] The next question is whether, and if so when, that trust came to an end. The Crown contends that a private law trust subject to the jurisdiction of equity did not continue beyond the enactment of the New Zealand Native Reserves Act. Counsel for the Crown submits that this Act established a statutory regime that excluded the potential for any parallel private law trust, and that any issues concerning the administration of the trust after 1856 fall to be determined under the provisions of that legislation.

[310] As discussed in the previous section, there is no real doubt that the New Zealand Native Reserves Act altered the scope of the terms upon which the Allocated Tenths were held on trust. The Commissioners appointed under that Act were vested with the full powers of management. These included the power to

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177 The plaintiff does not contend for a trust earlier than 1845 and so it is not necessary to consider whether an express trust, or other form of trust, may have arisen earlier than this date.

178 See above at [243]–[246].

exchange, sell, lease and otherwise dispose of the Tenths as they saw fit.[179] They were also vested with the power to set aside land as special endowments, such as churches, burial grounds and hospitals.[180] Any claim of breach post-1856 must take account of the statutory powers exercised under this Act.

[311] However, I do not accept that the New Zealand Native Reserves Act extinguished the trust then in existence. There is nothing in that Act which suggests that is the case. Rather, the object of the New Zealand Native Reserves Act was to provide for an "effective system of management" of the Tenths.[181] Furthermore, the Governor still retained control over the management of the Tenths which included the ability to set rules for the conduct of business which had the force of law.[182] And, any alienation (including a lease for longer than 21 years), was not valid without the assent in writing of the Governor.[183] Rather than bringing the existing trust to an end, the New Zealand Native Reserves Act simply specified the basis upon which the trust was to be managed.

[312] This conclusion is consistent with Elias CJ's observations that the 1856 Act itself did not alter the underlying nature of the Crown's fiduciary responsibilities when dealing with the land.[184] Glazebrook J agreed with this conclusion.[185] Accordingly, I consider the trust continued to exist beyond 1856, although the terms of trust differed after that date.

[313] However, the Crown's duties as an express trustee of the Allocated Tenths came to an end when they were vested in the Public Trustee in 1882. Counsel for the plaintiff confirms that relief is not sought in respect of trust property vested in the Public Trustee in 1882.

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179 New Zealand Native Reserves Act 1856, s 6.
180 Section 8.
181 Preamble.
182 Section 4.
183 Section 7.
184 Supreme Court judgment, above n 8, at [404] per Elias J.
185 At [541] and [541], n 692 per Glazebrook J. I do not consider this conclusion to be contrary to Clifford J's conclusion in in the High Court judgment, above n 18, at [176]. Rather, I consider his Honour was referring to the fact that the plaintiff's claim for breach after 1856 had to engage with the terms of the New Zealand Native Reserves Act 1856, which it did not do. That is altogether different to a conclusion that the statute brought the entire trust to an end.

[314] To recap, the trust in relation to the Allocated Tenths arose in 1845. The terms of the trust were altered in 1856 by the New Zealand Native Reserves Act, but the trust did not come to an end at that time.

Occupation Lands

[315] The second of the two duties found by the Supreme Court required the Crown to exclude pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award.

[316] This section addresses:

(a) the meaning to be ascribed to "pā, urupā and cultivations" for the purposes of this case;

(b) how the boundaries of the Occupation Lands sites are to be fixed; and

(c) whether the fiduciary duty to exclude pā, urupā and cultivations imported obligations of trust.

Defining pā, urupā and cultivations

[317] The scope of the land which the Crown was obliged to exclude depends on the meaning to be ascribed to "pā, urupā and cultivations".

[318] Ascribing meaning to these terms is no easy task. The issue raises differences in the way Māori and Pākehā relate to land, and the way the Crown understood how the Customary Owners lived and used the land in the 1840s. The issue also confronts the tension between excluding the lands which had not been sold on the one hand and identifying the lands available for settlement of the new colony on the other.

[319] The terms pā, urupā and cultivations are referred to in the Spain award. That award contains specific definitions of the meaning of pā and cultivations as discussed further in this judgment.[186] These definitions did not appear in the deeds of release

[186] See below at [323]–[324].

signed during an adjournment of the Spain inquiry. These deeds were written in te reo Māori and they referred to wāhi tapu and wāhi rongoā—terms not found in the Spain award. The meanings of these terms are discussed later in this judgment.[187]

[320] The plaintiff says that the meaning of pā, urupā and cultivations should be informed by: the constitutional protections operating at the time; the way Māori would have understood what they had sold; and the way Māori used the land. Drawing on the references in the deeds of release to wāhi tapu and wāhi rongoā, the plaintiff says "pā, urupā and cultivations" should be interpreted to include the areas that Māori occupied and cultivated, wāhi tapu, and areas that Māori used for foraging of resources for healing and for food.

[321] The Crown, on the other hand, submits that the definitions which appear in the Spain award should be applied literally. That is because the Spain award is the source of the fiduciary duty found by the Supreme Court. The Crown submits that the reservation of areas of wāhi tapu (except urupā or burial grounds), and areas used for foraging or harvesting of resources, fall outside the scope of the Crown's fiduciary duty.

[322] There are several threads to explore in determining the scope of "pā, urupā and cultivations", each of which are addressed below.

(a) Spain award

[323] The Spain award contained definitions of pā, urupā and cultivations as follows:

> ... saving and always excepting as follows;— all the pas, burying-places, and grounds actually in cultivation by the natives, situate within any of the before described lands hereby awarded to the New Zealand Company as aforesaid, the limits of the pas to be the ground fenced in around their 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 by the aboriginal natives of New Zealand, since the establishment of the Colony; and also excepting all the native reserves upon the plans hereunto annexed, marked No. 1A., No. 1B., coloured green, the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby awarded to the said Company

[187] See below at [370], [375] and [377].

[324] According to this definition, therefore:

(a) "pā" were limited to the ground fenced in and around "Native houses", including the ground in cultivation or occupation around the adjoining houses without a fence; and

(b) "cultivations" were those tracts of country which are "now used by the Natives for vegetable productions, or which have been so used by the aboriginal Natives of New Zealand since the establishment of the Colony".

[325] These definitions arose out of a meeting on 29 January 1844 between Governor FitzRoy, Commissioner Spain, George Clarke Junior (a Protector of Aborigines), Thomas Forsaith (Sub-Protector of Aborigines), William Wakefield and others. The meeting concerned the Wellington settlement with a point of discussion being the Company's insistence that pā and cultivations be included in any grant.

[326] Views expressed at the meeting on the meaning of "pā" ranged between a settlement, a village, and a fortified village or houses within a fence. As for cultivation grounds, Governor FitzRoy indicated that he understood the term to refer to tracts of country presently used for vegetable productions, or which had been so used since the establishment of the colony.[188]

[327] The Crown says that these definitions should apply literally as the Spain award is the source of the fiduciary duty. They represent a compromise between the tension, between the need to ensure Māori retained their land on the one hand, and the need to provide sufficient land for settlement on the other. They also provide certainty as to the boundaries of the Crown's fiduciary duty and the standards to apply in measuring breach.

[328] I accept that the definitions achieve these objectives. The difficulty, however, is that they do not accurately capture the way the Customary Owners lived on the land

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[188] Waitangi Tribunal *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 126.

at the time. Nor do they appear to have been applied in practice or "on the ground" as is discussed further below.[189] A literal application of these definitions may also be at odds with the Crown's policy around the exclusion of these lands as reflected in New Zealand's constitutional documents considered next.

(b) Constitutional framework and Crown's intentions

[329] New Zealand's early constitutional documents record the Crown's intention to protect Māori rights and interests in their lands. The 1840 Charter for New Zealand stated that nothing in the letters patent would affect Māori rights "to the actual occupation or enjoyment in their own persons, or persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives".[190] In the English text of the Treaty of Waitangi, art 2 guaranteed to Māori:

> full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties which they may collectively or individually possess so long as it is their desire to retain the same in their possession.

[330] Those constitutional safeguards were reflected in statements of policy and correspondence around the same time. For example:

(a) In 1841, Governor Hobson pledged that the Government would "protect the aborigines in the possession of their pahs and cultivated grounds, unless it is proved that they have sold them".

(b) In 1842, the Colonial Office informed the Company that Māori were entitled to remain in possession of the grounds they were actually occupying or cultivating and that Company agents should be instructed accordingly.

(c) Upon hearing that the Company was selecting pā as Tenths in Wellington, Governor Hobson remonstrated with the Company saying that he would not sanction Māori residences being included in the Tenths reserves unless they had been "indisputably sold".

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189 See below at [350]–[357].
190 Supreme Court judgment, above n 8, at [100] per Elias CJ.

(d) The minutes of the 1844 meeting where the definitions of pā and cultivations were discussed record that Commissioner Spain was clear that his instructions did not allow for the dispossession of Māori of their pā and cultivations.

[331] These documents reflect the Crown's intention at the time which was to ensure those lands which had not been "indisputably sold" by Māori remained in their possession. The difficulty with this threshold is that, according to Dr Jones, Māori did not have a conception of sale. To understand what lands the Customary Owners intended to retain for themselves, it is therefore necessary to understand the Customary Owners' relationship with the land.

(c) The way the Customary Owners lived on the land

[332] Understanding the Customary Owners' relationship with land is a large and significant topic and the constraints of this judgment mean it is only possible to touch on it briefly.

[333] Dr Jones gave expert evidence on behalf of the plaintiff. He explained that "Māori have a profound attachment to the land to which they belong, because it is central to their identity". He referred to the identity of iwi and hapū as being closely entwined with their tribal territory as reflected in pepeha, whaikōrero, waiata and mōteatea. He gave a high-level description of customary tenure:[191]

> Rights to land depend primarily on inheritance through whakapapa (*take tūpuna*, and hence Māori recite their whakapapa to the land to legitimise their rights), complemented by other legitimate *take* (sources of rights) recognised in the Māori legal tradition, the most common of which were discovery (*take taunaha*), conquest (*take raupatu*) or gift (*take tuku*). In traditional customary tenure, it was extremely important to maintain customary rights through occupation or regular use, a concept which is commonly referred to through the metaphor of 'ahi kā' (keeping the fires burning). That does not mean that customary title only extended to land actually occupied, as the entire rohe would be subject to customary title rights. In the traditional way of life, communities were highly mobile and tended to move around their territory to take advantage of seasonal resources and to confirm their rights to the land. Failure to maintain ahi kā would result in rights being lost or severely weakened over time.

[191] Emphasis in original.

> It follows from what I have said above that land was not a commodity in traditional Māori society. It was (and is) an ancestor. Therefore, rights to control and benefit from the land were conditioned by kaitiakitanga responsibilities to take care of the mauri (life force) of the land. The rights were collective and were characterised by the responsibility that all members had to the community that controlled and cared for the land.
>
> …
>
> Māori customary law has no concept of sale, and only recognised permanent alienation in certain defined exceptions, in particular, where lands had been acquired by conquest (raupatu) and then cemented by occupation. The victorious tribe would secure their rights to the land either by inter-marriage with the former occupants, or by eliminating or driving them away altogether. Land could also be given to newcomers, but unlike the law of gifting, *take tuku* did not always sever rights of the donor completely, but rather created a reciprocal relationship between the donor and donee.

[334] The way the Customary Owners used the land is also relevant here. Mr Rōpata Taylor, one of the descendants of the Customary Owners and witness for the plaintiff, gave evidence about this. He referred to Māori land tenure as taking a "whole of landscape" approach where there was no distinction drawn between "domestic" and "wild" and where Māori were not confined to one area of residence. Mr Taylor described this as an "integrated approach" which "takes into account the interconnected nature of our environment and the cyclical nature of the seasons" and where "[the Customary Owners'] whakapapa to the land connected them to their entire rohe". Expanding on this explanation, Mr Taylor said:

> The fluidity of movement between kāinga is best understood as cyclical and relational. That is to say that our people ranged across our entire rohe from the mountains to the sea, moving according to the seasons, the lunar calendar, the migration of taonga species, and their relationships to one another, as it was very important to maintain strong and dynamic relationships with others who held authority over the land.
>
> Our tūpuna planted their māra (gardens) in the flat land around papakāinga, but they also had extensive gardens further afield. Cultivation plots were typically rotated after a year or two, and the land left in fallow for a few years to recover. Forests would not be clear felled for cultivation, instead we used a type of companion planting where we planted around the trees. We revere our ancestor trees, and they nurtured the birds that were an important part of our traditional diet. There was a gardening season, then they would allow the land to rest. Our main crops included kūmara and Māori potatoes. Kūmara tupu would be planted from mid to late October, after the frosts had gone, and we harvested them in March/April. Between planting and harvesting was summer, and the whole whānau were engaged in working in the māra over this time.

> There was a season for fishing and gathering shellfish that kept our people close to the coast between September to March. In Mārahau, my ancestors would harvest crabs, scallops, oysters, cockles, pipi, pūpū and mussels during this period. They would travel to Moturoa in the Waimea Estuary to collect tuatua, and would move across the region to trade with their relatives in Golden Bay and the Sounds for pāua and kina.
>
> There were also seasons for eeling or whitebaiting in the rivers, for birding in the forests, for gathering resources for textiles, for canoe building and replacing lashings on buildings. Mountain neinei, to make raincapes, was gathered from atop our maunga Wharepapa, above the Motueka plain. My tupuna were tōhunga, and they would make an alcoholic fermented drink from the palm of the kiekie plants that grew in the canopy of the trees in Te Maatū. This drink was a tool to commune with the divine and would assist with the invocation of karakia.
>
> Trade was also an important part of the economy, and we had commercial crops. We traded with both other tribes and Europeans. We traded in kaimoana (seafood), pigs, potatoes, kūmara, wood, flax (used for linen and rope) and minerals.
>
> The extensive gardens and zones that were being traded pre-European times provided a solid base for our people. On the arrival of the settlers, our tūpuna saw the potential for trade, eventually obtaining trading ships, trading as far as Australia. We were among New Zealand's first exporters and that is part of who we are today.

[335] This way of living and relating to the land was not reflected in the Wellington meeting which resulted in the definitions in the Spain award. However, Governor Grey appears to have recognised aspects of it in his memorandum dated 7 April 1847 in which he wrote:

> The natives do not support themselves solely by cultivation, but from fern-root,—fishing,—from eel pond,—from taking ducks,—from hunting wild pigs, for which they require extensive runs,—and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it …

[336] The way the Customary Owners lived and related to the land is at odds with a strict application of the definitions set out in the Spain award. A literal application of those definitions (for example, the requirement that a pā be fenced) would undermine the very purpose that the Crown was trying to achieve in excluding those lands in the first place. This suggests a more liberal approach to the meaning of pā, urupā and cultivations should be adopted in this case.

(d) Deeds of release

[337] The deeds of release also provide insight into what the Customary Owners would have understood at the time. Three of these deeds were executed on 24 August 1844 during an adjournment of the Spain hearing. Further payments were made by the Company at this time, and there was discussion about an exchange of Tenths to meet the stipulation that Te Maatū was to be reserved.[192] As counsel for the plaintiff submits, these deeds of release are the only written document signed by the Customary Owners. Effectively, they are deeds of purchase for the Te Tauihu land.

[338] The deeds signed by the principal chiefs of the Customary Owners were in Māori and provided:[193]

> KUA homai ki a matou, i te rua tekau ma wha o Akuhata i te tau kotahi mano waru rau wha tekau mā wha e ngā Kai Whakariterite o te Wakaminenga o Nui Tireni i Ranana, he mea utu mai e Wiremu Wekepiri (William Wakefield) e te kai mahi o tāua Whakaminenga e rua rau Pauna moni (£200) he tino utunga he tino whakaritenga, he wakamahuetanga rawatanga i to matou papa katoa i o matou wahi katoa i roto i o mātou whenua katoa, kua tuhi tuhia ki roto i te pukapuka kua whakapiria ki tenei na; ara ko nga wahi katoa i Whakatu, i Waimea, i Te Moutere, i Motueka, i Riwaka, i Te Taitapu (Massacre Bay), i Nui Tireni, *ko nga pa ia, ko nga Ngakinga, ko nga Wahi Tapu, ko ngā Wahi rongoa*, anake, e toe ki a mātou, a ka whakaae matou kia tuhia e matou o matou ingoa ki tētahi pukapuka tuku wenua a muri na, me e kiia mai kia tuhia ki nga kai Whakariterite o taua Whakaminenga, i o mātou, wahi katoa i roto i aua wenua heoti ano ngā wahi e waiho mō mātou, ko nga wahi kua korerotia ra i mua.

[339] Neither party called independent expert evidence on the meanings of "pā" "ngakinga", "wāhi tapu" and "wāhi rongoā" as used in these deeds, or the common understanding of these terms in the 1840s.[194] However, Dr Richard Walters was called by the Crown as an expert archaeologist. During cross-examination, it became apparent that he also had linguistic expertise, and gave evidence on the meaning of "pā", as discussed below.

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192 See Appendix 1 at [78]–[99] for further discussion on the 1844 exchanges at Te Maatū.

193 Emphasis added.

194 "Ngakinga" is translated by Mr Taylor as "cultivations". The Waitangi Tribunal notes that "ngakinga" can also mean clearings: see Waitangi Tribunal *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 177.

[340] Alexander Mackay included a translation of the Motueka deed of release in his compendium:[195]

> Paid to us this day, the 14th of August, 1844, by the Directors of the New Zealand Company, at London, through William Wakefield, their principal Agent, the sum of £200 on final payment for the relinquishment of all our claims to the land mentioned in the deed to which this is affixed; that is to say, to all our land at Whakatu, Waimea, Moutere, Motueka, Riwaka and Te Taitapu (Massacre Bay), in New Zealand, excepting our pahs, cultivation, burial-places, and wahi rongoa. And we hereby agree to sign a deed to that effect if called on to do so, to the Directors of the New Zealand Company. The only lands that remain to us are the places above-named.

[341] Mr Taylor also provided a translation in his evidence which differed to the Mackay translation. Most significantly, Mr Taylor translated the words italicised in the Māori text above to mean "our areas of occupation, cultivations, wāhi tapu, and wāhi rongoā".

[342] In translating "pā" to mean "occupation", Mr Taylor said that he understood pā to come from papakāinga which can best be described as occupation. However, Dr Walters said that pā did not derive from papakāinga and described the word pā as meaning fence or enclosure. He considered a pā is commonly understood as referring to a kāinga or village.

[343] Alexander Mackay translated the term "wāhi tapu" as burial places. However, Mr Taylor gave evidence that while burial places (or urupā) were wāhi tapu, the term was broader than that and could refer to places that were prohibited, restricted, sacred, or which commemorated an important event.

[344] The phrase "wāhi rongoā" was not translated by Alexander Mackay. He noted that it was difficult to give a correct interpretation of the term as there was nothing to indicate the meaning that it was intended to convey.

[345] The meaning of "wāhi rongoā" was briefly considered by the Waitangi Tribunal in the context of a claim relating to the Wellington Tenths.[196] The

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195 Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 1 at 67.

196 Waitangi Tribunal *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 177.

deed of release considered in that case had translated "Native Reserves" (the Tenths) as "wāhi rongoā". The Tribunal surmised that this was probably because "rongoā" could mean "to preserve".[197] However, the Tribunal noted that this was likely to have been confusing for Māori, who may have understood "wāhi rongoā" to mean the places for gathering medicinal plants.[198]

[346] Mr Taylor said in evidence that "wāhi rongoā" was not restricted to a gathering place for medicinal plants but could describe areas of foraging and places of physical, spiritual, and social healing. His interpretation of wāhi rongoā was that it was part of the overall customary practice of going into the wilderness to source resources that were culturally significant or important.

[347] Many of the claimed sites of Occupation Lands were claimed on the basis they were "mahinga kai" which I understand to refer to food gathering places.[199] However, there was no evidence directed towards how Mr Taylor's definition of "wāhi rongoā" corresponded with "mahinga kai". Nor was there any evidence or submissions directed to the relationship between wāhi rongoā and ngakinga (cultivations) nor ngakinga and mahinga kai.

[348] If "wāhi rongoā" was understood to mean places for gathering medicinal plants, then it is possible that it was understood as referring to those parts of Te Maatū which were received in the 1844 exchanges. I say that because the phrase only appears in the deeds of release signed on 24 August 1844 and it does not appear in the Massacre Bay deed of release.[200] The deeds that contain the phrase were executed after plans of the Tenths to be exchanged were shown to the Customary Owners present at the Spain Commission hearing. That exchange was made to meet the stipulation that Te Maatū was to be set aside for the Customary Owners.[201] There is

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197 At 177; and Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at 212.

198 Waitangi Tribunal *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 177; and Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at 210–212.

199 See for example, Mātangi Āwhio, Eel Pond and Mahitahi River, Mānuka Island, Moturoa, Grossis Point, Te Kūmera and Raumānuka, Mārahau, Waingaro, Onekakā and Aorere.

200 Only the English version of this deed of release is in evidence but there is nothing in that version which suggests the phrase "wāhi rongoā" would have appeared in a Māori version of the deed (if such a version exists).

201 The 1844 exchanges at Te Maatū are addressed in Appendix 1 at [78]–[99].

no dispute that Te Maatū was regarded as a wāhi rongoā. Mr Taylor explained that it was a place regarded as the Customary Owners' "medicine cabinet" because of the plants with pharmaceutical properties found there.

[349] I accept that the deeds of release deserve significant weight given they are the only document signed by the Customary Owners. However, the ambiguity in some of the terms used and the lack of independent expert evidence on these terms diminishes the weight otherwise due. And, as explained below, I consider the terms used must be construed in accordance with the Supreme Court's declaration which is limited to "pā, urupā and cultivations".

(e) The measures used to identify Occupation Lands

[350] Some guidance to meaning may also be derived from the land which was identified as Occupation Land and set aside. That includes the areas initially reserved as Tenths in 1842 and 1843, and the areas later reserved as Occupation Reserves.

[351] Turning to the land selected as Tenths, I have already referred to the considerable confusion regarding the purpose of the Tenths in the early days. It seems clear that in some cases the Tenths were selected over areas which were occupied. In Wellington, this approach was expressly referred to by Edmund Halswell.[202] He reported to Governor Hobson in 1842 that he had taken care in selecting reserves in the Wellington region and beyond to include pā and cultivations. He was immediately reprimanded, with Governor Hobson instructing Willoughby Shortland to respond 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".[203]

[352] It seems likely that the selection of Tenths by Thompson in 1842 and 1843 took place on the same basis that Edmund Halswell had indicated, that is, in areas which the Customary Owners were occupying at the time. That is evident from the allocation

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202 Edmund Halswell's role was described as "Protector of Aborigines in the Southern District of this Island, and Commissioner for the Management of the Native Reserves".

203 Supreme Court judgment, above n 8, at [147] per Elias CJ citing a letter from William Hobson (Governor) to Willoughby Shortland (Colonial Secretary of New Zealand) (27 July 1842).

of Tenths over those parts of Te Maatū which contained extensive potato cultivations.[204]

[353] Some of the areas in which Tenths were allocated, such as those allotted over Matangi Āwhio in Nelson, do not fit easily into the literal definitions in the Spain award. As I discuss in more detail in relation to that site, Matangi Āwhio appears to have been an extensive trading post for Māori travelling into the area.[205] Therefore, the measures used to identify Occupation Lands in the early 1840s appear to be more liberal than those provided for in the Spain award.

[354] Guidance may also be drawn from the areas which were later set aside as Occupation Reserves in Massacre Bay. By 1847, when the Occupation Reserves were being surveyed, Governor Grey's policy was to ensure that sufficient land was reserved "for the present and future wants of the natives of that district". The instructions to the surveyors were captured in the following extract of a letter from Matthew Richmond to Donald Sinclair dated 29 June 1847:[206]

> His Excellency then mentioned, that as it was understood the natives in the District were not numerous, it was not necessary that the whole quantity of land specified in Mr. Commissioner Spain's Report should be set apart as Native Reserves; but what was considered sufficient, in addition to the Cultivations as marked off by the Surveyor General, for their present and future wants; nor should the portions where the Coal mine exists, or any other part that is particularly valuable to Europeans, be included in the Block or Blocks you, after consulting with the Company's agent, determine upon to be excepted in the Crown Grant for the use of the natives.

[355] The plaintiff is critical of these instructions, submitting that they reflect a prioritisation of the Crown and Company interests over those of the Customary Owners.

[356] This criticism may well be justified when it comes to coal. However, it is difficult to draw conclusions from a single passage within a letter without

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204 See Appendix 1 at [68]–[77].
205 See Appendix 1 at [22]–[31].
206 A letter from Matthew Richmond (Superintendent of the Southern Division) to Donald Sinclair (Police Magistrate) (29 June 1847).

understanding the broader context.[207] For present purposes, the important point is that the measure by which the Occupation Reserves were to be identified and set aside ("present and future wants") appears to have been broader than a strict interpretation of the definitions in the Spain award.

[357] I consider weight should be given to the measures used to select Occupation Lands "on the ground". Those measures represent a pragmatic and purposive approach to the identification of Occupation Lands, rather than a strict application of the Spain award definitions. The "present and future wants" touchstone used in selecting the Occupation Reserves is also a much broader standard than the definitions in the Spain award, suggesting a more liberal approach to the identification of pā, urupā and cultivations.

(f) Fishing, coastal and public resource areas

[358] Public reserves were allocated in some of the areas claimed by the plaintiff. For example, Town Reserve H was allocated in the land surrounding the Eel Pond in Nelson.[208] Other public reserves were allocated in places of safe harbour or fishing (for example, Te Pukatea), and were excepted from the 1848 Crown grant to the Company.

[359] On the one hand, the fact that public reserves were allocated in areas of occupation could evidence a breach of the Crown's fiduciary duty to exclude pā, urupā and cultivations. These lands were taken for public use, rather than being set aside for the Customary Owners.

[360] On the other hand, the fact that public reserves were set aside in these areas suggests the Crown did not regard areas of public resource to fall within the definition of pā, urupā and cultivations. In other words, the positive decision to make public reserves in some areas is indicative of the measures used by the Crown to identify and exclude pā, urupā and cultivations.

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207 For example, a report of the meeting between Arthur Wakefield and the Massacre Bay Customary Owners in 1842 records that agreement was reached that land could be taken and there would be no obstruction in taking the coal.

208 See Appendix 1 at [32]–[38].

[361] This may be an area where the law governing the reservation of public areas might have an impact on the scope of the Crown's fiduciary duties. Neither party made submissions on the legal or policy framework underpinning the setting aside of public reserves or how that may be reconciled with the Crown's fiduciary duties owed to the Customary Owners.[209] Similarly, neither party made submissions as to how the plaintiff's claim to coastal and marine areas might interrelate with present day legislation such as the Marine and Coastal Area (Takutai Moana) Act 2011.

[362] Ultimately, I did not consider it necessary to seek further submissions on this issue. That is because I addressed each claimed site according to the evidence adduced in relation to that site. As set out in Appendix 1, I do not find any fishing or coastal areas meet the definitions of "pā, urupā and cultivations".[210]

(g) Weaving the threads together: how should pā, urupā and cultivations be construed?

[363] Each of the threads considered above pull in different directions. My task is to weave them together to form a measure by which the question of breach may be determined in this case. I have found it an immensely difficult process and one for which there is no perfect answer. It is necessary to stress that the approach I have adopted is case-specific and should not be regarded as having general application.

[364] The first point to make reflects the parameters of this claim. The Supreme Court has already set the boundaries of the duty by restricting it to the exclusion of "pā, urupā and cultivations". It is only those three categories of land which are to be excluded, and not occupation land more generally. Not all land belonging to the Customary Owners will fall within these three terms.

[365] In addition, there is a need for certainty in defining what is meant by "pā, urupā and cultivations". The Crown had to know what land was to be excluded so that it could comply with its fiduciary duty. That is, the land to be excluded had to be ascertainable, and the fiduciary duty had to be enforceable.

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209 I note that s 6 of the Land Claims Ordinance 1841 4 Vict 2 prohibited areas required for the purpose of public utility and land situated on the seashore within 100 feet of high-water mark being included in a Crown grant.

210 See for example Appendix 1 at [29] and [221]–[224].

[366] Moreover, I consider the terms need to be interpreted in light of the constitutional protections for Māori embodied in te Tiriti and the 1840 Charter, and the purpose of excluding pā, urupā and cultivations from the land obtained by the Crown. The pā, urupā and cultivations were excluded because they had not been "indisputably sold".[211] These were to remain in the possession of those Customary Owners who had an interest in them.

[367] The scope of these terms also needs to take account of the "present and future wants" standard by which the Occupation Reserves were selected. It would be incongruous to have one measure for the exclusion of Occupation Lands in some regions, and a different measure for exclusion of those Lands in other regions. The "present and future wants" standard favours a more liberal interpretation of "pā, urupā and cultivations".

[368] Weight should also be given to the measures that were used "on the ground" to identify areas of occupation—either through the initial selection of the Tenths or the Occupation Reserves. I accept that these selections will have been made through an anglocentric lens and may not have reflected how the Customary Owners lived on the land. Nevertheless, they provide the most contemporaneous evidence of the areas occupied at the time. That is important given the difficulties posed by changing landforms and the high mobility of the Customary Owners during the 1840s. These measures tend to favour a more flexible approach in determining what is a pā, urupā or cultivation than the definitions set out in the Spain award.

[369] The deeds of release also favour a liberal interpretation. These set out what the Customary Owners who signed the deeds of release would have understood they were retaining at the time. Those deeds which were signed in 1844, during the adjournment of the Spain inquiry, must, however, be interpreted in context. This includes construing them in light of the plans annexed to those deeds and against the background of the discussions which had taken place during the adjournment of the Spain inquiry.

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211 Supreme Court judgment, above n 8, at [127] and [147] per Elias CJ.

[370] Moreover, the Supreme Court's decision that the duty only extends to "pā, urupā and cultivations" is controlling when it comes to construing these deeds of release. This means that wāhi tapu and wāhi rongoā as used in these deeds must be construed in a way which makes them consistent with the Supreme Court decision. This points to a more limited interpretation of these terms than that put forward by the plaintiff.

[371] It follows from the above, that I do not consider the definitions in the Spain award should be applied literally. To do so would be at odds with the constitutional protections for Māori, the purpose of excluding the lands in the first place, the measures which were used to identify Occupation Lands, and the deeds of release. Rather, I consider a purposive and pragmatic approach which is driven by a site-by-site assessment is to be preferred.

[372] For the purposes of determining breach in this case, I have adopted a meaning of pā which is more expansive than that provided in the Spain award, but narrower than "occupations" more generally. I have looked for evidence of a settlement with a degree of permanence about it. By "settlement", I mean something of a scale which might indicate a kāinga or village. By "permanence" I do not mean that the Customary Owners had to be always present; rather, that there was evidence of regular and consistent use.

[373] This means a collection of whare or structures which were used seasonally would fall within the definition, but places used for intermittent shelter would not. Similarly, pā that were once occupied but had been abandoned prior to the Spain award, or sites that were never used by the Customary Owners, would fall outside the scope of the Crown's fiduciary duty.

[374] Lands immediately surrounding the settlement would also be captured within the meaning of "pā". This is consistent with the Spain award, and the "present and future" wants measure used to select the Occupation Reserves. Ascertaining the extent of these lands is considered further when addressing the question of boundaries.

[375] "Urupā" is translated as "burial grounds" and does not require further explanation. The Crown's fiduciary duty extended to the exclusion of burial grounds from the land obtained by the Crown following the Spain award. I consider "wāhi tapu" as used in the deeds of release must be construed to mean urupā also. There is no other way of reconciling this term with the scope of the fiduciary duty as fixed by the Supreme Court.[212]

[376] The term "cultivations" includes those areas which were planted as at 1845. I consider the term is wide enough to encompass Māori forms of cultivation and would include, for example, companion planting or the sowing of potatoes around the base of a tree. The term is also broad enough to include areas which were used for cultivation prior to 1845 but, as at 1845, were left fallow and so did not include any plantings or cultivations at that time.

[377] Construed in context, I consider "wāhi rongoā" as used in the deeds of release most likely referred to the Tenths, or those areas of Te Maatū which the Crown agreed to reserve to fulfil the stipulation that Te Maatū be excluded. Beyond that, the phrase must be construed in a way which fits the Supreme Court's parameters of "pā, urupā and cultivations". A wāhi rongoā located adjacent to a pā could fall within the grounds surrounding the pā, and so fall within the definition of "pā". Some wāhi rongoā may also fall within the definition of cultivations. However, unless there is evidence of a "pā" (as earlier defined) I do not consider a standalone area used for harvesting or fishing or gathering of food (such as "mahinga kai") falls within the meaning of "pā, urupā and cultivations". These areas would fall outside the scope of the fiduciary duty found by the Supreme Court.

[378] Finally, determining whether a site falls within the definition of "pā, urupā and cultivations" is an area where sufficiency of evidence matters. As is apparent from the determinations made in Appendix 1, there are many sites where there is simply not enough evidence to determine whether the site was a pā, urupā or cultivation, whatever

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212 Alexander Mackay translated "wāhi tapu" to mean "burial grounds" in his translation of the deeds of release. There are other examples of wāhi tapu being used to refer to urupā, such as in relation to the notes and sketches taken of Taupō pā. There is no expert evidence about the use of "wāhi tapu" in the 1840s more generally, and no independent expert evidence on how the Customary Owners who signed the deeds of release may have understood it.

definitions are ascribed. This underscores the fact that whether there is a breach of fiduciary duty to exclude pā, urupā and cultivations is to be determined on a site-by-site basis and by reference to the evidence relevant to that site.

Fixing boundaries

[379] Determining whether specific sites were occupied at the relevant time is one thing, but deciding on the boundaries of those occupied sites is another thing altogether.

[380] Glazebrook J recognised that it might be difficult for the Crown to identify the extent of the Occupation Lands wrongly treated as domain lands, and a defence of laches may therefore be available with regard to those lands.[213] I consider that to be a prescient observation.

[381] More recently, in an unrelated case, the Court of Appeal has observed that "customary rights did not have tidy straight line territorial boundaries" quoting the Waitangi Tribunal's observations that "[a] difficulty occurs today when people, both Māori and Pākehā, try to translate this customary network of rights and connections into an environment of 'straight-line' boundaries".[214]

[382] Yet, the framing of this case requires these difficulties to be confronted head on. Fixing boundaries with precision really matters in this case. The Crown's fiduciary duty to exclude pā, urupā and cultivations must be enforceable as a matter of law and that depends on the extent of the sites to be excluded. Relatedly, for a trust to arise (whether express or constructive) there must be certainty of subject matter, as discussed later in this judgment.[215] It also matters for the remedies sought in this case. Proprietary remedies can only attach to identifiable land. The calculation of equitable compensation also turns on the total acreage of land falling within the boundaries of Occupation Lands. The scale of the remedies sought by the plaintiff make it clear that every acre counts.

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213 Supreme Court judgment, above n 8, at [691] per Glazebrook J.

214 *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252 at [363] per Cooper P and Goddard J quoting Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 18.

215 See below at [545]–[569].

[383] The Occupation Lands sites claimed by the plaintiff were mapped by Mr Moka Apiti. He worked with the customary witnesses called by the plaintiff to demarcate the boundaries using current day and historical maps alongside the customary evidence. The boundaries were also mapped by reference to the contours of the land (such as ridgelines) and inferences drawn from the way the Customary Owners would have used the land at the time.[216]

[384] Mr Apiti's evidence was not challenged by the Crown. There is no issue taken with Mr Apiti's methodology nor his skill and expertise. Nevertheless, the mapping exercise undertaken by Mr Apiti is only as reliable as the information he used to map the claimed boundaries. I consider that information has some inherent uncertainties which undermines the reliability of the mapping evidence regarding the extent of the claimed Occupation Lands sites.

[385] Those inherent uncertainties include the difficulty in ascertaining boundaries at this remove in time. The landscape has altered over the last 180 years, and the original maps from the 1840s do not correlate exactly with present day landforms. One of the starkest examples of that is the claim to Goodalls Island which was formerly an island but is now attached to the mainland.[217]

[386] There is also evidence of coastal erosion and flooding and there is no dispute that the Motueka river changed its course in the 1840s. These factors may have contributed to the Customary Owners moving to and from sites such as Wakapaetūarā in the mid-1840s.[218] Changes in the landforms since 1840 may mean that the old maps, land features, and the inferences which may be drawn from those land features, are not reliable indicators of boundaries that existed in 1845.

[387] Moreover, the way the Customary Owners lived on the land does not lend itself to fixing boundaries with the degree of certainty required in this case. As previously

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216 For example, Mr Taylor said determining boundaries involved asking questions such as where the zones would have been if the Customary Owners were living in the area now; where would crops have been planted; and where would they have positioned themselves to ensure those who might be entering the districts could be seen from different directions. The prevailing wind and where the sun rises also informed the "reading" of the land to determine boundaries.

217 See Appendix 1 at [182].

218 See Appendix 1 at [172]–[179].

discussed, the Customary Owners did not live in defined square acre sections. They ranged across the district depending on the seasons and lunar calendar.[219]

[388] Mr Taylor's evidence was also predicated on "zones" of occupation. He explained that boundaries of sites "do wax and wane" reflecting the "organic" way the Customary Owners lived on the land. There is an inherent imprecision in taking organic and fluid forms of living and translating them into fixed and ascertainable boundaries to meet the requirements of the law.

[389] That fluidity in boundaries, and the potential indeterminacy in the extent of the pā, urupā and cultivations, was one of the reasons the Company refused to accept the 1845 Crown grant. It led to the Wellington meeting where the definitions which found their way into the Spain award were discussed.[220] I have already rejected those definitions as being too prescriptive in deciding whether sites were Occupation Lands. However, the fact that this issue was live in the 1840s underscores the difficulty back then of deciding which sites were to be excluded. Those difficulties are compounded many times over when the exercise is being undertaken nearly 180 years later.

[390] The complexity of that exercise was apparent in some of the evidence given at trial. There were several occasions where changes to the boundary of a site were made during oral evidence. For example, the claimed boundary of Anatimo was extended to include Wainui falls. Similarly, the occupation boundary of Motupipi was extended to include Grove Reserve. There were also occasions where the evidence for the plaintiff was inconsistent both as to the nature of a site of Occupation Lands and its extent. If boundaries are being fixed by reference to inferences drawn from the use of a site, then the evidence of use must itself be certain. Conflicting or inconclusive evidence regarding the nature and use of a site undermines the reliability of the plaintiff's claimed boundaries.

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219 The Waitangi Tribunal noted that instead of rigid boundaries between the Customary Owners in Te Tauihu, there were overlapping or contestable zones in which two or more iwi had interests. See Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at 93.

220 See above at [330] and [335].

[391] That does not mean that the exercise of determining boundaries should be abandoned altogether. Some guidance may be obtained from the Tenths that were allocated in 1842 and 1843, at least in relation to the Occupation Lands located within the town and suburban areas. There was generally agreement between the witnesses for each party as to the location of the Tenths.

[392] As discussed earlier in this judgment, due to confusion in the purpose of the Tenths scheme, the Allocated Tenths were often (but not always) allocated in areas occupied by the Customary Owners at the time. It seems clear that, at least in some cases, the Crown was attempting to discharge its duties (albeit mistakenly) by allocating Tenths in areas which were occupied at the time. These Tenths were effectively reserved areas for occupation, rather than areas to be used as Tenths.

[393] To that extent, the boundaries of these Tenths are a good indication of the extent of an occupied site. Reliance on these Tenths boundaries also has the advantage of giving weight to the decisions that were made at the time and "on the ground". In that way it mitigates the risks of determining 1845 issues through a 2024 lens.

[394] I accept that Occupation Lands did not conform to the straight lines of the Allocated Tenths, and those surveying lines do not correspond with the way the Customary Owners lived on the land at the time. I also accept that there is every possibility that Occupation Lands could have been less than or more than the Tenth allocated in the area. Reliance on the boundaries of the Tenths to determine the boundaries of occupied lands also runs headlong into the translation difficulties highlighted by the Waitangi Tribunal and referred to by the Court of Appeal.[221] However, given the nature of this case, it is difficult to see any other practical alternative.

[395] For the same reasons, I consider weight should be given to the boundaries of the Occupation Reserves set aside in Massacre Bay. They represent the best evidence of the decisions made at the time. The extra land added to the Occupation Reserves

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[221] See Court of Appeal judgment, above n 64, at [80], n 62 per Ellen France J; and Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at 211–212.

was to provide for the Customary Owners' future wants and needs and was in addition to the area to be excluded under the Spain award.[222] This suggests the boundaries of these reserves delineated the extent of the Occupation Lands adopting a more liberal approach.

[396] Counsel for the plaintiff is critical of the extent of these Occupation Reserves, saying that the surveyors who made them were directed to prioritise the Company's interests over the interests of the Customary Owners. That position may or may not be correct. I accept that there is evidence that the surveyors were directed to exclude coal mines, but broader inferences of bias must be treated with some care. The surveyors are not here to give evidence, nor to have propositions of bias put to them directly. Except for the coal mine sites (of which there was one), the surveyors' approach to identifying areas required for the Customary Owners' "present and future wants" are unknown.

[397] On balance, while I accept that the boundaries of the Occupation Reserves may not have encompassed all the land which the plaintiff now says should have been included, as Elias CJ said, it nevertheless is the best evidence there is.[223]

[398] For these reasons, I have relied on the Tenths and Occupation Reserves in determining the extent and boundaries of Occupation Lands which were to be excluded in the exercise of the Crown's fiduciary duty.

A trust over the Occupation Lands?

[399] The next question concerns the nature of the duty owed in relation to the Occupation Lands, specifically, whether the duty involves obligations of trust.

[400] The Judges of the majority differed in their conclusions regarding the Occupation Lands:

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222 See the discussion around the selection of the Massacre Bay Occupation Reserves above at [350]–[357]; and Supreme Court judgment, above n 8, at [210]–[213] per Elias CJ.

223 Supreme Court judgment, above n 8, at [142] and [154], n 165 per Elias CJ.

(a) Glazebrook, Arnold and O'Regan JJ considered that the Occupation Lands were still held in customary title in 1845 on the basis they had not been sold, and the Spain award (and subsequent grant) excluded them.[224]

(b) Glazebrook J accepted that there was an expropriation of this land by the Crown to the extent the Crown treated it as domain lands free from customary title.[225]

(c) Elias CJ, on the other hand, considered that the Spain award had cleared customary title and the Crown was constituted a fiduciary/trustee to fulfil the terms of the surrender, one of which was to exclude the Occupation Lands.[226]

[401] The plaintiff adopts Elias CJ's analysis and says that a trust over the Occupation Lands did arise. That is because: (a) the Crown's acceptance of the Spain award extinguished customary title to the Occupation Lands; and (b) the Crown became trustee of these lands, pending the anticipated process for identification and exclusion of these lands.

[402] Because exclusion of the Occupation Lands did not occur (except in relation to the Occupation Reserves) the plaintiff says that the Crown still holds the Occupation Lands on trust. And, to the extent the Crown has alienated that land, it has done so in breach of trust. In the alternative, the plaintiff says that if the Occupation Lands remained in customary title and were wrongly treated as domain lands of the Crown, then the Crown has wrongly expropriated that property in breach of its fiduciary duties and an institutional constructive trust arises.

[403] The Crown disagrees with the plaintiff's analysis. On the Crown's case, extinguishment of customary title only occurred in 1848. To the extent Occupation Lands were not excepted from the 1848 grant, then the Crown accepts that there was a misappropriation of property but disagrees that the Crown became a trustee. That is

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224 At [569] and [585] per Glazebrook J and [752] and [762] per Arnold and O'Regan JJ.
225 At [585] per Glazebrook J.
226 At [388], [405], [407], [411], [417] and [437] per Elias CJ.

because the Crown was not the owner of the land (as the land was granted to the Company in 1848) and there is insufficient certainty of subject matter to constitute a trust. Even if these hurdles can be overcome, the Crown says that the only trust that arises is a remedial constructive trust which does not fall within the exception in s 21(1)(b) of the Limitation Act.

[404] The starting point for analysis is whether customary title was cleared to these lands, and if so, when. The Judges forming the majority in the Supreme Court expressed differing views on this issue.[227] As I have already explained, I consider customary title was only cleared by the Spain award process in relation to lands that were *sold* by the Customary Owners. Land that was not sold remained in customary ownership.

[405] To elaborate, I consider pā, urupā and cultivations were excluded from the land granted to the Company because these lands had not been indisputably sold and were to be retained by the Customary Owners. That is consistent with the preservation of Māori rights in the English text of the Treaty, the 1840 Charter and the Royal Instructions. It is also consistent with customary title remaining over the Occupation Reserves.

[406] For the reasons explained earlier, I do not consider the method by which the land was to be conveyed to the Company changes this analysis.[228] The Occupation Lands were of a different character to the Tenths. Title was not taken to those lands as they were to remain in the ownership of the Customary Owners. These lands were to be carved out from the land obtained by the Crown.

[407] As at 1845, I consider the Crown's title in relation to these lands was still burdened by customary title and the Occupation Lands were not domain lands of the Crown. The Occupation Lands were subject to the Crown's control, but the Crown did not hold legal title to those lands. Accordingly, there was no split in the legal and beneficial title to the land which is a key feature of an express trust.

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227 See above at [400].
228 See above at [248]–[255].

[408] Nor was there any intention to create an express trust in relation to the Occupation Lands. Unlike the analysis in relation to the Tenths, there was no assumption of trust-like responsibilities in relation to the Occupation Lands.[229]

[409] It follows that I do not consider an express trust arose in relation to the Occupation Lands. The duty to exclude pā, urupā and cultivations from the land obtained by the Crown was a fiduciary duty and not a duty of trust. However, as explained in the land remedies part of this judgment, I consider an institutional constructive trust arises in relation to any Occupation Lands still in the hands of the Crown. This forms the basis of the plaintiff's claim to a proprietary remedy in respect of the Occupation Lands.[230]

Occupation Reserves

[410] The Occupation Reserves raise different issues again. The background to the selection of the Occupation Reserves is canvassed above at [350]–[357], and below at [442]–[473].

[411] These Occupation Reserves remained in customary title. They were, however, administered together with the Tenths with the consent of the Customary Owners. That is made explicit by s 14 of the New Zealand Native Reserves Act which allowed the Governor to manage land over which customary title had not been extinguished (including, therefore, the Occupation Reserves) with the "assent" of the proprietors.

[412] I do not consider the Crown held the Occupation Reserves on trust for the Customary Owners. These lands were not Crown lands, and the Crown did not hold legal title to these lands as trustee. There was no intention to create an express trust in relation to the Occupation Reserves.

[413] I agree with the Crown that the fiduciary duty to exclude the Occupation Lands was discharged insofar as the Occupation Reserves are concerned. To the extent the

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229 For the reasons explained in relation to the Occupation Reserves, I consider the relationship between the Crown and the proprietors of those Reserves was akin to agency and did not amount to an assumption of trust.

230 See below at [625]–[634].

plaintiff's claim is that additional Occupation Lands should have been set aside (that is, that the Occupation Reserves should have been bigger or there should have been more of them), then the approach is the same as the Occupation Lands category of land. Whether the Crown breached its fiduciary duty will depend on whether additional Occupation Lands should have been excluded (or added to the existing Occupation Reserves).

[414] The analysis is different insofar as it relates to the claim that these Occupation Reserves were alienated by the Crown without consent of the Customary Owners. That allegation relates to an alleged breach of a different fiduciary duty altogether. It does not relate to the failure to exclude the Occupation Lands (that duty having been discharged), but to the management of the Occupation Reserves by the Crown.

[415] The management arrangements between the Crown and Customary Owners gave rise to a different type of relationship between the Customary Owners and the Crown. Rather than the Crown holding the Occupation Reserves in trust for the benefit of the Customary Owners, I consider the Crown was managing the Reserves on behalf of the Customary Owners with their consent. The Crown was effectively acting as an agent for the proprietors of the Occupation Reserves. While that arrangement may well be fiduciary, it is nevertheless entirely different to the fiduciary duties found by the Supreme Court.

[416] There was no evidence directed towards this duty or the agency relationship in general. I consider it to be a duty which falls outside the scope of the issues remitted to this Court for determination. In any event, the issue is somewhat moot, as I have not found breach to be established in relation to the alienation of the Occupation Reserves for the reasons explained in Appendix 2.[231]

Occupied Tenths

[417] Many of the Allocated Tenths surveyed in 1842 and 1843 were allocated over Occupation Lands. This appears to have stemmed from confusion (at least by some Crown officials) regarding the purpose of the Tenths and whether they were to be for

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231 See Appendix 2 at [55]–[64].

the use and occupation of the Customary Owners. However, as New Zealand's early constitutional documents make clear, the Occupation Lands were for occupation, and the Tenths were to be reserved in addition.[232] The Supreme Court's judgment puts that issue beyond doubt.

[418] The Occupied Tenths are a hybrid category of land. They are at once Occupation Lands and Allocated Tenths. Two subcategories sit within the Occupied Tenths category of land: those Tenths which were allocated over Occupation Land in 1842 and 1843, and those Tenths which became occupied by the Customary Owners *after* they were allocated (referred to as Occupied Tenths (post)).

[419] Starting with the first sub-category, the Occupied Tenths, it is necessary to separate out the Occupation Land from the overlying Tenth. The duty in relation to the Occupation Land was to exclude pā, urupā and cultivations. That duty arose in 1845. To the extent there were Occupation Lands which had been wrongly reserved as Tenths, then performance of the Crown's fiduciary duty required the Crown to re-survey that land to exclude the Occupation Lands.[233] The failure to do so was a breach of the fiduciary duty to exclude pā, urupā and cultivations.

[420] However, as explained later in this judgment, the breach of that duty did not result in a loss of use of the Occupation Lands. That is because the Occupation Lands the subject of the Occupied Tenths were, in fact, occupied and in that sense those who had a customary interest in those lands benefited from their use.

[421] Turning to consider the Tenth component of the Occupied Tenth, the relevant duty is the fiduciary duty to reserve 15,100 acres for the benefit of the Customary Owners. The Tenths allocated over Occupation Lands were so reserved. However, unlike the Allocated Tenths category of land, I do not consider this discharged the Crown's fiduciary duty. That is because reservation of the Tenth was to be from the *land obtained by the Crown* following the 1845 Spain award. Tenths were not to be reserved from the Occupation Lands. This flows from the fact that the duty to reserve 15,100 acres of Tenths was "in addition" to the duty to exclude the Occupation Lands.

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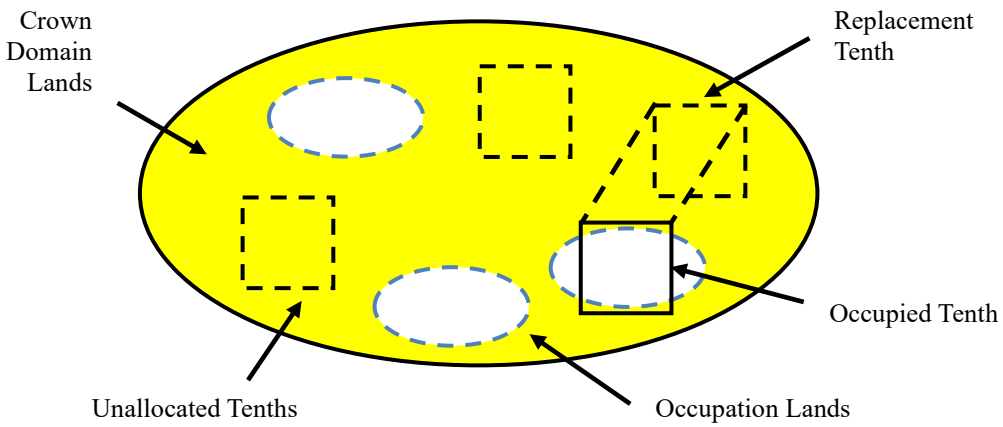
232 See above at [298].
233 See Supreme Court judgment, above n 8, at [156] per Elias CJ.

While a Tenths section may have been technically reserved and recorded as a Tenth, in reality, it was Occupation Lands. In that sense it was like the Tenths section had not been reserved at all, and the duty to reserve was not discharged.

[422] This means that when the Crown's fiduciary duties arose on acceptance of the Spain award in 1845, the Crown could not rely on the Occupied Tenth as discharging its obligation to reserve 15,100 acres. That Tenth had to be re-reserved from the land obtained by the Crown. The failure to reserve that Tenth from those lands advantaged the Crown as that land was treated as if it was domain lands of the Crown, free of any obligation to reserve the Tenths.

[423] To explain the point further, the diagram used earlier is reproduced, but with an image showing the Occupied Tenth, and its replacement:

LAND OBTAINED BY THE CROWN



[424] The Tenth had to be allocated from the land obtained by the Crown, being the Crown domain lands, and not from the dotted oval representing the Occupation Lands. The failure to allocate from the land obtained by the Crown meant that the Crown obtained more land than it was otherwise entitled. To discharge its duty properly, a replacement Tenth from the land obtained by the Crown had to be reserved.

[425] To this extent, the scope of the duty owed in relation to the Tenths component of the Occupied Tenths is essentially the same as the Unallocated Tenths. Failure to comply with the duty is, on its face, a breach of fiduciary duty. As I explain later in

this judgment, I consider breach of the fiduciary duty in relation to the Occupied Tenths will give rise to an institutional constructive trust over the land obtained by the Crown in relation to a replacement Tenth.

[426] Finally, the duty owed in relation to the second subcategory, Occupied Tenths (post) is slightly different. The Tenth component of the Occupied Tenths (post) was not allocated over Occupation Lands. That means the Tenth was properly reserved. The duties owed in relation to the Occupied Tenths (post) are not the fiduciary duties found by the Supreme Court, but are duties owed by the Crown in its capacity as trustee of the Allocated Tenth.

[427] I consider the occupation of Allocated Tenths was a breach of the terms of trust. However, as I explain later in this judgment, I do not consider the breach of trust was also a breach of fiduciary duty.[234] This means the plaintiff's claim in relation to this category of Occupied Tenths does not survive the Limitation Act and is statute barred. This is explained further in pt IX of this judgment.

Summary of conclusions on duty

[428] Insofar as the duty relates to the **Unallocated Tenths**, the Crown must provide a reasonable justification for its failure to reserve 15,100 acres of Tenths. In the absence of that justification, breach of fiduciary duty will be proved. The Crown's duty to reserve 15,100 acres of Tenths gave rise to obligations which were analogous to an express trust, or give rise to an institutional constructive trust.

[429] The duty to reserve 15,100 of Tenths was discharged insofar as it relates to the **Allocated Tenths**. The Crown held the Allocated Tenths on trust on the terms summarised at [284]–[305] of this judgment. The trust over the Allocated Tenths arose in 1845 and was not extinguished by the New Zealand Native Reserves Act.

[430] The Crown's fiduciary duty in relation to the **Occupation Lands** was to exclude pā, urupā and cultivations as defined at [363]–[378] of this judgment. The

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234 See below at [505].

fiduciary duty did not give rise to express trust obligations and the Occupation Lands were not held pursuant to an express trust.

[431] The claim in relation to the size of the **Occupation Reserves** is to be considered on the same basis as the Occupation Lands. However, the claim in relation to the management of the Occupation Reserves involves a different fiduciary duty to that found by the Supreme Court. There is no pleading nor evidence directed towards this duty. It falls outside the scope of this proceeding.

[432] The duty in relation to the **Occupied Tenths** is muti-faceted. The Crown's duty to exclude pā, urupā and cultivations required it to re-survey the Occupied Tenths and exclude Occupation Lands. Occupation Lands were to be excluded, and the Tenths were to be reserved from the land obtained by the Crown. Failure to do so was a breach of both fiduciary duties.

[433] The duties owed in relation to the Occupied Tenths (post) category of land were duties of the Crown as trustee. Allowing the Occupied Tenths (post) to be occupied was a breach of trust but it was not a breach of fiduciary duty.

PART IV—BREACH

[434] The plaintiff claims that the Crown breached its fiduciary duties in numerous ways.[235] Some of these claims overlap.

[435] The claims in relation to the Occupation Lands are advanced on a site-by-site basis. These are addressed in Appendix 1. The claims of breach in relation to the Allocated Tenths and Occupation Reserves are alleged on a transaction-by-transaction basis. These are addressed in Appendix 2.

[436] The fact that these factual findings are contained in Appendices to this judgment does not diminish their significance or importance. Indeed, these factual findings are the life blood of this judgment and are at the heart of the alleged hara or

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[235] Some of the alleged breaches were not pleaded in the fifth amended statement of claim. However, these breaches were addressed in evidence, and the Crown did not oppose amendments being made to the pleadings. I granted leave to amend the statement of claim accordingly: see *Stafford v Attorney-General* HC Auckland CIV-2010-442-181, 7 March 2024 (Minute No 9).

wrongdoing which triggered this claim. They have been gathered together in Appendices for ease of reference and to aid in the navigation of this judgment.

[437] The plaintiff has multiple claims relating to Te Maatū in Motueka. It is claimed as Occupation Lands and is also the site of alienations and exchanges of Allocated Tenths in 1844 and 1849 which are said to have diminished the Tenths estate. All Te Maatū claims are addressed under the one heading in Appendix 1 to this judgment.[236]

[438] The remaining allegations of breach are addressed in relation to each category of land, starting with the Unallocated Tenths.

Unallocated Tenths

[439] The Crown admits that it failed to reserve the Unallocated Tenths, namely the 10,000 acres of rural Tenths. Nevertheless, the Crown says that this is not a breach of fiduciary duty as there is no evidence that the Crown acted below the standards of a fiduciary in failing to reserve the 10,000 acres. The Crown says the available evidence shows the Crown acted loyally and in good faith in attempting to reserve the rural Tenths.

[440] As explained in the duty part of this judgment, this is not the correct approach to the claim for the Unallocated Tenths. The Crown must provide justification for the failure to reserve the rural Tenths. In the absence of such justification, breach of the fiduciary duty found by the Supreme Court will be proved. Accordingly, the focus of this part is on whether there is any justification for the failure to reserve the 10,000 acres.

[441] This requires considering the historical evidence. As the Unallocated Tenths form the largest part of the plaintiff's claim in relation to the Tenths, I have set out that evidence in some detail. As is apparent in the following sections, the evidence relating to the rural Tenths has many untied threads. Those threads are tangled with the

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236 See Appendix 1 at [59]–[112].

purchase of the Wairau in 1847, the Kaituna reserve made in the Wairau, and the Massacre Bay Occupation Reserves.

The search for suitable land 1840–1844

[442] From the early 1840s, the Company was seeking to identify suitable land for the rural sections (each of which were to comprise 150 acres). With the town and suburban sections having been selected in the Nelson and Motueka districts, the initial focus appears to have been on western Blind Bay and Massacre Bay.

[443] At the end of August 1842, Arthur Wakefield travelled to Massacre Bay and a hui was held between his party, approximately 10 rangatira, and about 100 others. Presents were handed over on behalf of the Company. A report of this meeting given during the Spain Commission hearing indicated that agreement was reached that land could be taken and there would be no obstruction in taking the coal.

[444] However, there was continuing opposition to the Company's claims in the area. Further presents were distributed in December 1842, but the Company's survey activities were curtailed by those who had not received any share of these presents. This restricted the area available to the Company and so their attention then turned to the Wairau district.

[445] Despite several warnings from Ngāti Toa chiefs to leave the Wairau alone, surveys in the area continued. That resulted in an armed clash at Tuamarina on 17 June 1843 which left several dead on both sides. Surveying in the Wairau district was stopped after this clash. Commissioner Spain found that the Wairau had not been sold and so it fell outside the boundaries of the Spain award. Governor FitzRoy subsequently cleared Ngāti Toa of blame in the Wairau clash, declaring the Company to be in the wrong. However, this provoked strong opposition from the Company and Nelson settlers who were demanding rural sections to be made available.

[446] In January 1844, a plan prepared by Frederick Tuckett (the Company's chief surveyor) showed the surveyed rural sections as at that date. Of those rural sections surveyed, the majority within the Spain award boundary were located in Moutere, Tākaka, Motupipi and Aorere. According to Samuel Stephens, a Company surveyor,

a large proportion of these sections were poor quality. Later additions to these plans showed "Native Reserves coloured red", but it is not clear when these additions to the plans were made, nor why the rural Tenths were not set aside at this time.

Massacre Bay deed of release

[447] The deeds of release prepared during the adjournment of the Spain Commission hearing had not been signed by those Customary Owners resident at Massacre Bay. George Clarke Junior and Edward Meurant (Protector of Aborigines and his interpreter) had proceeded to Massacre Bay in an effort to persuade the leading rangatira to sign the final deed but were met with resistance. Clarke reported to Spain that the Customary Owners at Motupipi had positively refused to accept the sum awarded.[237]

[448] In 1845 a small number of Massacre Bay rangatira travelled to Nelson and signed a document agreeing to accept the payment. However, delays in payment and the absence of important rangatira meant that the money was not paid over until May 1846. The deed of release was executed at this time, but disputes over money continued.

[449] There is some evidence that the Company (or at least William Fox, the Resident Agent of the Company) believed that the Company still had a duty to provide the rural Tenths at this time. Fox had written to Sinclair (the Chief Police Magistrate) stating that he might "distribute" the rural sections when the release money was paid to the Customary Owners at Massacre Bay. Fox asked Sinclair whether he had the authority to select rural Tenths for the Customary Owners in the district. The clear implication of that question is that the rural Tenths would be selected at the same time the release money was paid.

[450] Sinclair was later informed that Governor Grey (who had replaced Governor FitzRoy soon after delivery of the Spain award) wished him to select the reserves at Massacre Bay, and he accompanied Fox to obtain signatures on the deeds

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[237] A letter from George Clarke Junior (Protector of the Aborigines) to William Spain (Land Claims Commissioner) (7 September 1844) in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 1 at 63.

of release. However, rural sections were not distributed then and the rural Tenths were never selected. Occupation Reserves at Massacre Bay and western Blind Bay were, however, selected in 1847 as discussed further below.[238]

Purchase of the Wairau and the Kaituna reserve

[451] At around this same time, Governor Grey negotiated the purchase of the Wairau. As noted previously, Commissioner Spain was not persuaded that the Wairau district had been sold and so had not recommended that this land be granted to the Company. Purchase of the Wairau was concluded on 18 March 1847. In addition to financial compensation, the agreement included a reserve in the Kaituna Valley. That reserve was estimated to contain some 117,000 acres.[239]

[452] Governor Grey requested Richmond to write to Wakefield to inform him that the Company could select those parts of the Wairau necessary to complete their obligations to the settlers. Correspondence between Richmond, Wakefield and Fox around this time suggests there was some confusion about whether the Kaituna reserve alleviated the Company's duties in relation to the rural Tenths. For example, Fox queried whether it would be necessary to make Tenths reserves in Massacre Bay if rural sections for the settlers were surveyed there. He indicated his view that the Kaituna reserve was more than sufficient to meet any reserve requirements.[240] This view appears to have been formed on the assumption that the Customary Owners at Massacre Bay were of the same "tribe" as those for whom the reserve was made in the Wairau. However, this was not correct. As noted by the Supreme Court, the reserve was for the "Ngati Toa vendors" and "was not available for the Maori of Massacre Bay".[241]

Massacre Bay Occupation Reserves

[453] In other correspondence from 1847, Governor Grey is reported to have confirmed that the Customary Owners at Massacre Bay were entitled to have land

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238 See below at [453]–[462].

239 Supreme Court judgment, above n 8, at [216] per Elias CJ and [530] per Glazebrook J. Dr O'Malley gave evidence that the reserve was estimated to contain 117,248 acres.

240 Notably, the 24 April 1847 edition of the Nelson Examiner also stated that reserves made in the Wairau were in lieu of the Tenths.

241 Supreme Court judgment, above n 8, at [185], n 194 and [203] per Elias CJ.

reserved as the Wairau purchase negotiations had not included them. However, as recorded in this correspondence, the basis upon which these reserves were to be selected differed to that set out in the Spain award. William Wakefield recorded that Governor Grey had agreed to the Company proposal that:[242]

> … independently of the pahs and cultivations as much land as their wants are likely to require should be reserved for the natives of Massacre Bay in lieu of the portions destined for such purpose by the New Zealand Company.

[454] According to this letter, the reserves were in addition to the pā and cultivations and were for the Customary Owners' "wants". Significantly, the assumption was that this land was to be reserved in lieu of the Tenths.

[455] Wakefield went on to record Governor Grey's view that the area to be reserved under the Spain award (independent of Occupation Lands) was much more than was needed. It was suggested that a portion of land comprising 500 acres be set side without consultation as to location, but "adapted to supply their future wants". Wakefield concluded that:

> … the reserves in [Massacre Bay] according to the scheme of the Nelson Settlement and in the [Wairau] and at [Motueka] shall then be considered made without a continuance of the system of choices.

[456] In other words, the reservation of a block of land comprising approximately 500 acres would alleviate the need to provide Tenths in the area according to the ballot system.

[457] Richmond wrote a letter to Sinclair on 29 June 1847 confirming his appointment to select the reserves at Massacre Bay. Richmond stated that as the number of Māori in the district were not numerous, "it was not necessary that the whole quantity of land specified in Mr Commissioner Spain's Report should be set apart as Native Reserves". Rather, the land to be set aside was what was considered sufficient for the "present and future wants" of Māori. This correspondence corroborates Wakefield's earlier account of Governor Grey's views.

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242 Letter from William Wakefield (Colonel) to Matthew Richmond (Superintendent of the Southern Division) (19 June 1847).

[458] Letters from both Sinclair and Fox confirm that they understood their instructions were to select land sufficient for the present and future wants of Māori, but which would be less than the entire quantity of 4,500 acres (being 10 per cent of the 45,000 acres allocated in Massacre Bay) specified in the Spain award.

[459] In August 1847, Sinclair and Heaphy commenced surveying of the Massacre Bay Occupation Reserves. The process involved taking a census of resident Māori, inspecting the present reserves, and then calculating the land required for the "present and future wants" of the resident population.

[460] Sinclair reported that he had not, as originally intended, been able to lay out the extra land in one block due to "family jealousies, which prevailed among the Natives". He had therefore "straightened the edges" of existing Occupation Reserves and provided the remaining extra land in a number of parcels in close proximity to these reserves. A plan produced by Sinclair shows the land set aside under the Spain award with the land added to these reserves.

[461] Originally, 737 acres had been surveyed and agreed to be set aside as Occupation Reserves. Sinclair and Heaphy surveyed an additional 826 acres. This comprised 116 acres used to straighten the edges of the existing cultivation reserves, 510 acres surveyed as additional blocks of land, and a block of 200 acres set aside at Wainui. That made a total area of 1,563 acres set aside as Occupation Reserves. This equates to approximately 6.49 acres for each of the 241 Māori counted by Sinclair as living in Massacre Bay at that time.

[462] Dr O'Malley referred to a letter from Alfred Domett, the New Munster Colonial Secretary, dated 27 March 1848 which he said indicated that some officials believed that the rural Tenths remained to be allocated. Mr James Parker, a witness for the Crown, disputed Dr O'Malley's interpretation of this letter. The letter is not particularly strong evidence one way or the other as to what officials believed regarding the rural Tenths. We cannot now know what the officials in 1848 may have known or understood in relation to the rural Tenths and the Occupation Reserves. The best that can be said is that there is some evidence that some thought the additional land reserved was in lieu of the Tenths.

Governor Grey's intentions

[463] The Crown adduced evidence directed at understanding Governor Grey's motivations and intentions with respect to the Tenths generally. This tends to support the view that the Occupation Reserves were made in substitution for the Tenths, as set out below.

[464] Grey's views about the Tenths were summarised in his testimony before the Smith Nairn Commission in 1879–1881:[243]

> Smith: It was part of the plan of the Company to set apart a certain proportion of the lands for the benefit of the natives?
>
> Grey: I don't think that any land I bought was bought under that agreement. The original purchases of the New Zealand Company were in that way, but I think their subsequent purchases were not. Their view was to give one-tenth back again. It was to be laid out in small sections, and every tenth section was to belong to the natives. I found this system gave rise to such frequent disputes as to trespass, that I went upon the plan of keeping very large reserves for them. Such was my intention.
>
> Smith: The Imperial Government recognised that system of the New Zealand Company setting apart one acre for every ten?
>
> Grey: I think in their instructions to me they did not.
>
> Nairn: Do you remember when that was repealed?
>
> Grey: I think that the time I came here it had ceased. From the time I came here I think it ceased, because, for example, as well as I recollect, I bought a great part of Wellington back again. The natives did not admit that the sale of the Wellington district was complete, and when I repurchased, I paid a considerable sum of money and made large reserves for them, and the whole of the tenths vanished in that repurchase.

[465] What is evident from this testimony is Grey's belief that the Tenths scheme had been abolished by the time he took office. Later in his testimony he said that he was not bound to provide the Tenths. That view appears to have related to the purchases that Grey himself negotiated directly (such as the Wairau purchase) rather than any purchases by the Company.

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[243] Mr James Parker gave evidence that the Smith Nairn Commission was formed to investigate grievances in the South Island arising from Kemp's Deed and the Akaroa, Otago and Murihiku purchases.

[466] Grey went on to explain that his intention was to give the Māori vendors "considerable reserves" with something akin to those kept for the "North American Indians" in the United States. He described his general thoughts on the nature and purpose of these reserves as follows:

> I should say generally this: that the impression upon my mind was, that each chief would have as much property kept for him as would enable him hereafter to live comfortably as a European gentleman, and that every native farmer should have a farm kept for him, with sufficient land to run their stock on besides. That was decidedly my conception of what should be done, at the least.

[467] Mr Parker summarised Grey's approach as follows:

> In summary, there is good evidence that Grey viewed the tenths system unfavourably. The tenths had caused problems in Wellington. Misunderstandings about the respective purposes of beneficial and occupation reserves had led to disputes. The distinction between the two reserve types was muddied from the beginning. Grey argued the tenths did not adequately meet the present needs of Māori, describing them as "insufficient for their present wants, and ill adapted for their existing notions". Moreover, beneficial reserves were not a good match for the Governor's new land purchasing policy.
>
> Occupation reserves were a better fit for Grey's objectives. The benefits were less abstract and more immediately explicable to Māori. They avoided the confusion that had resulted from the tenths system and thereby reduced the chance of conflict between settlers and Māori over reserve land. Grey argued that Māori required extensive runs for their existing methods of subsistence, and occupation reserves "in continued localities" were better adapted to fulfil this requirement. Importantly, occupation reserves were a key component of Grey's new approach to purchasing land from Māori.

[468] Dr O'Malley takes no issue with Mr Parker's recitation of this evidence insofar as it relates to Grey's views on reserves generally. I adopt it as an accurate reflection of Governor Grey's intentions with respect to the Tenths scheme and Occupation Reserves.

[469] However, that does not mean that Governor Grey considered himself free to abandon the Tenths scheme altogether. Counsel for the plaintiff relied on two letters which they say show Governor Grey knew he was bound by the Spain award and the obligation to provide the Tenths.

[470] The first letter dated 6 July 1845 is from Lord Stanley (Colonial Secretary at the time) to Governor Grey as he was en route to take up his post. The letter refers to the Spain award, the payment of £800 by the Company (which led to the deeds of release) and instructs Grey to issue a Crown grant "for the quantity of land which this additional payment was intended to secure to the Company".

[471] The second letter is dated 7 April 1847 and is from Governor Grey to Earl Grey who was by then Colonial Secretary. Grey quotes from the Spain report dealing with the Wairau, and the decision to exclude the Wairau from the recommendation of a Crown grant. Grey goes on to say:[244]

> *These decisions I understood to have been received and adopted by the local Government nearly eight months previously to my arrival in the colony. I did not, therefore, think that I could legally or with propriety question them*: and this, not only on account of the bad impression my doing so would have produced upon the Ngatitoa tribe, but upon the numerous native population throughout the whole islands who, had I adopted such a course, must have lost all confidence in the decisions of our Courts.

[472] It is apparent from these letters that Governor Grey was well aware of the obligation to provide the Tenths. The only way of reconciling these letters and Governor Grey's testimony at the Smith Nairn Commission is to interpret his policy of providing Occupation Reserves as only applying to the purchases he personally negotiated (such as the Wairau purchase) while remaining obliged to provide the Tenths. On that basis, Governor Grey could not have intended the Massacre Bay Occupation Reserves to be a substitute for the Tenths.

[473] Despite different points of emphasis being placed on all this evidence, Dr O'Malley and Mr Parker agree that we will never be sure what Grey's intentions were with regard to the rural Tenths. In any case, the 10,000 acres of rural Tenths were never reserved.

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244 Emphasis added.

Was the failure to allocate the rural Tenths justified?

[474] What conclusions may be drawn from this evidence as to why the rural Tenths were not set aside and whether such a failure was justified? There are several possible explanations.

[475] First, it is not disputed that there were difficulties in identifying rural sections of sufficient quality within the Spain award boundaries. The Company had been relying on the Wairau district being included in its Crown grant to meet the requirements of the settlers. Spain's determination that the Wairau had not been sold caused difficulties in meeting the obligations owed to the settlers who had purchased rural sections.

[476] Nevertheless, these difficulties did not frustrate the Crown's obligation to provide the rural Tenths. Dr O'Malley and Mr Parker agreed there were sufficient lands available within the Spain award boundary, and within Massacre Bay and Blind Bay in particular, to allocate the rural Tenths in full. While that land may not have been of prime quality, that cannot excuse the failure to reserve any land at all.

[477] Second, it seems likely that Governor Grey changed course away from the Tenths and towards a policy of providing large reserves for occupation. That change was precipitated by difficulties caused by the Tenths in Wellington which can be seen in Te Tauihu (Motueka in particular) also. These larger reserves were based on the number of Māori living in the area, to be provided in a single block where possible, and were intended to be large enough to accommodate Māori forms of subsistence and cultivation. The Kaituna reserve was a perfect example of the new policy in action.

[478] But it is far from clear that Governor Grey intended this new policy to apply to purchases where the Tenths formed part of the consideration. His answers to the Smith Nairn Commission suggest that his policy only applied to those acquisitions which he negotiated himself, such as the purchase of the Wairau.

[479] It is possible that Governor Grey considered the duty to reserve the Tenths was an obligation of the Company and not the Crown. Professor Attwood, an expert called by the Crown, was of that view. Nevertheless, Governor Grey's letter dated 7 April

1847 indicates that he considered himself bound by the Spain award—at least insofar as the determination that the Wairau had not been sold is concerned. Governor Grey did not think he could "legally or with propriety question" the decision to exclude the Wairau. It is not clear why he would regard himself as bound by some aspects of the award, but not others.

[480] Third, it is possible that the Massacre Bay Occupation Reserves were seen as a substitute for the obligation to provide the rural Tenths. That seems to have been the understanding of Fox and Sinclair, and it would explain the general enlargement of the existing reserves (land in addition to pā and cultivations) rather than the surveying of separate parcels of land to be held in trust for the Customary Owners. But there is no direct evidence that Governor Grey acceded to the Company's requests in this respect. It would be strange if he did. As Professor Attwood emphasised in his evidence, there was little trust between the Crown and the Company at this time.

[481] In any event, the Massacre Bay Occupation Reserves could not discharge the obligation to reserve the Tenths. The amount reserved was 1,563 acres—far short of the 10,000 acres promised. Furthermore, the Occupation Reserves remained in customary title, and their primary purpose was to provide sufficient land for the Customary Owners "present and future wants"; whereas the purpose of the Tenths was to provide an endowment for the benefit of all Customary Owners.

[482] Moreover, Governor Grey appeared to recognise that a distinction was to be drawn between the Occupation Reserves and the Tenths. In a memorandum dated 14 September 1846, Governor Grey observed that in addition to the Tenths, it would be necessary to secure the existing cultivations and blocks of land required for future cultivation.[245] The Occupation Reserves discharged the duty to exclude the Occupation Lands, but they did not discharge the duty to reserve Tenths.

[483] Fourth, it is also possible that the Kaituna reserve may have been taken into account in calculating the acreage to be set aside. It seems that the Company was lobbying for this result. Given Ngāti Rārua's presence in Massacre Bay and

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[245] Although this memorandum refers to Wellington, the statement has equal application to the position in Nelson.

Blind Bay, the Company may have been contending that the Kaituna reserve met (at least partially) the Tenths commitments to the Customary Owners in those districts.

[484] However, if Governor Grey acceded to that position (and there is no evidence that he did), then it was in error. The Kaituna reserve related to a separate purchase of land (the Wairau) that fell outside the Spain award. The vendors of that land were not the same as the Customary Owners and provision of that reserve could not relieve or mitigate the obligation to provide 10,000 acres of rural Tenths. There was no reasonable basis upon which Governor Grey might have thought that the Kaituna reserve relieved the obligation of the Crown to provide the rural Tenths.

[485] I accept that there is no evidence that Governor Grey made a deliberate decision not to reserve the rural Tenths. Dr O'Malley opined that if such a decision was made you would have expected it to be documented. I agree. The fact that no record exists tends to suggest that a deliberate decision was not made. Given the equivocality in the evidence, I cannot accept the plaintiff's submission that Governor Grey openly disregarded instructions to issue a Crown grant in compliance with the terms of the Spain award even though he knew he was bound by it. There is no evidence that he acted contumeliously or unconscionably in failing to provide the rural Tenths.

[486] However, for the reasons discussed in the duty part of this judgment, I do not consider elements of unconscionability or contumelious conduct are required to establish a breach of fiduciary duty in this case.[246] The Crown owed a fiduciary duty to reserve 15,100 acres of Tenths. In the absence of a reasonable justification for the failure to reserve 10,000 acres, breach of that fiduciary duty will be established.

[487] None of the possible explanations canvassed above provide reasonable justification for the failure to provide that which was promised. A change of policy in relation to the Tenths (if that is what occurred) does not justify a decision to abandon the rural Tenths altogether. Governor Grey was free to negotiate the terms of any new purchases that he concluded directly (as he did with the Wairau). But he was not free to recalibrate the very basis upon which the Crown obtained land from the Customary

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246 See above at [219]–[233].

Owners. Those terms included a condition that 15,100 of Tenths would be reserved for the Customary Owners.

[488] Nor would it be reasonable for Governor Grey to think that departing from that duty would better meet the needs of the Customary Owners. The Tenths were the primary consideration for the purchase of land. Their purpose was to provide an endowment for the Customary Owners. The Kaituna reserve and the Massacre Bay Occupation Reserves were for occupation purposes. They were not reserved as Tenths and were not held as an endowment for the benefit of *all* Customary Owners. Provision of these Reserves did not justify the failure to reserve the Tenths.

[489] The role of the Crown in obtaining the surrender of the Customary Owners' land, and the assumption of trust-like responsibilities with respect to the Tenths, meant the Crown was obliged to reserve 15,100 acres of Tenths. The failure to reserve 10,000 acres resulted in the Crown obtaining for itself the land that was intended to be held in trust for the Customary Owners. This was a breach of fiduciary duty. Breach is accordingly established in relation to the Unallocated Tenths.

[490] However, the plaintiff's claim does not seek recovery of the full 10,000 acres. An offset is applied for land acquired by Wakatū since. I require further submissions on the question of offsets for land returned or acquired by Wakatū more generally before the final acreage of land the subject of this breach may be determined.

Allocated Tenths

[491] The plaintiff relies on various transactions in which Tenths were alienated or exchanged which, he says, resulted in a diminution of the Tenths estate.

[492] My findings in relation to each alleged breach involving the Allocated Tenths are set out in Appendix 2, and in Appendix 1 insofar as they relate to Te Maatū. I have found breach of trust proved in relation to the following transactions:

(a) The 1844 exchanges resulting in the loss of 400 acres of Tenths from the Tenths estate.[247] The failure to replace these Tenths was a breach of the fiduciary duty to reserve 15,100 acres of Tenths.

(b) The withdrawal of 47 town Tenths during the remodelling of the Nelson settlement in 1847.[248] This was a breach of trust and a breach of fiduciary duty.

(c) The Whakarewa grant to the Bishop in 1853.[249] This was a breach of trust but there is insufficient evidence that it was also a breach of fiduciary duty. The failure to prove it was also a breach of fiduciary duty means this breach does not escape the statutory bar in the Limitation Act.

[493] As with the Unallocated Tenths, I require further submissions on how land returned to Wakatū and others is to be accounted for in determining the final acreage the subject of the plaintiff's claim.

Occupation Lands

[494] My findings in relation to each site claimed to be Occupation Lands are set out in Appendix 1.

[495] There was evidence of occupation in relation to many of the claimed sites. However, for some sites (such as Matakinokino and Wakapaetuarā) there was insufficient evidence of occupation in 1845 when the Crown's duties crystallised. For other sites there was insufficient evidence about the scale or nature of occupation to conclude that they fell within the definitions of "pā, urupā and cultivations".

[496] There was some evidence which suggested that some Tenths had been redesignated for occupation purposes. For example, in 1862, James Mackay arranged for certain Tenth sections falling within three of the claimed Occupation Lands sites

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247 See Appendix 1 at [78]–[99].
248 See Appendix 2 at [3]–[13].
249 See Appendix 2 at [17]–[29].

(Te Kūmera, Puketūtū and Mārahau) to be "allotted" to certain hapū and whānau. However, despite the obvious intention to vest this land in those Customary Owners (which would have remedied the breach of the Crown's fiduciary duty), the land remained recorded as a Tenth. In the absence of the return of land to customary ownership, I have treated the Crown's breach as unremedied.

[497] Determining the boundaries of the Occupation Lands sites was extremely difficult. I found the best evidence of boundaries was the Tenths allocated in the claimed area. These Tenths had often (but not always) been allocated in the area precisely because it was an area of occupation. Accordingly, where there was evidence of pā, urupā and cultivations in an area, and Tenths had also been located within that claimed site, I concluded that the Tenths defined the boundaries of the Occupation Lands site.

[498] Those sites which I found to be Occupation Lands falling within the scope of the Crown's fiduciary duty are as follows:

(a) Mātangi Āwhio: to the extent of Tenths sections 62–66.

(b) Puketūtū: to the extent of Tenths sections 144, 145, 146 and 147.

(c) Pounamu: to the extent of Tenths section 157.

(d) Te Āwhina: to the extent of Tenths section 183.

(e) Te Kūmera and Raumānuka: to the extent of Tenths sections 126, 127, 129 and 132.

(f) Mārahau: to the extent of Tenths sections 111, 113, 117 and 118.

(g) Te Maatū: Tenths sections 157, 159, 160, 161, 183, 187 (potato cultivations); 162, 163, 164, 182, 188, 212, 219 and 220 (received in 1844 exchanges).

[499] Much of the land within these boundaries has already been returned to Wakatū or other entities associated with the Customary Owners. As explained in the Land Remedies part of this judgment, the plaintiff's proprietary remedy is limited to the net balance of land falling within the boundaries of these Tenths.

Occupation Reserves

[500] Insofar as the claims in relation to the Occupation Reserves allege that more Occupation Land should have been set aside, then they are addressed in Appendix 1. I have not found any of these claims established on the evidence.

[501] The claims which relate to dealings with the Occupation Reserves are addressed in Appendix 2. Even if the duty owed in relation to these Occupation Reserves fell within the scope of this proceeding, breach is not established on the evidence.

Occupied Tenths

[502] My approach to defining the sites of the Occupation Lands means the Occupation Lands sites are also to be regarded as Occupied Tenths. In addition, the Tenths received in the 1849 exchange are to be categorised as Occupied Tenths (post), that is, Tenths which were properly reserved from the land obtained by the Crown, but which the Crown allowed to be occupied after reservation.

[503] This means that the following Tenths sections are to be regarded as Occupied Tenths:

(a) Mātangi Āwhio: Tenths sections 62–66.

(b) Puketūtū: Tenths sections 144, 145, 146 and 147.

(c) Pounamu: Tenths section 157.

(d) Te Āwhina: Tenths section 183.

(e) Te Kūmera and Raumānuka: Tenths sections 126, 127, 129 and 132.

(f) Mārahau: Tenths sections 111, 113, 117 and 118.

(g) Te Maatū: Tenths sections 157, 159, 160, 161, 183, 187 (potato cultivations); 162, 163, 164, 182, 188, 212, 219, 220 (received in 1844 exchanges); 181, 184, 210, 211, 218 and 243 (Tenths received in 1849 exchange which are categorised as Occupied Tenths (post)).

[504] As discussed above, the Crown's fiduciary duties required it to resurvey the Occupied Tenths allocated in 1842 and 1843.[250] The Occupation Lands were to be excluded and returned to the Customary Owners, and the Tenths were to be reserved from the land obtained by the Crown. This did not happen. The failure to do so was a breach of both fiduciary duties found by the Supreme Court.

[505] The occupation of the Occupied Tenths (post) was a breach of the Crown's duties as trustee in relation to the Tenths. The Tenths were not to be used for occupation purposes. Allowing the Tenths to be occupied meant that only some of the Customary Owners benefited from the land and the remainder were denied the opportunity to do so. While this was a breach of trust, I am not persuaded there is sufficient evidence to establish it was also a breach of fiduciary duty. There was considerable confusion regarding the terms of trust at this time which were not written down. The different capacities of the Customary Owners (as proprietors of the Occupation Lands, and beneficiaries of the Tenths) does not appear to have been appreciated. There is no evidence of disloyalty, bad faith, or any advantage accruing to the Crown as a result of the breach. This has implications for the Limitation Act analysis in relation to this breach, as is discussed later in this judgment.[251]

Summary of findings regarding breach

[506] In relation to the **Unallocated Tenths**, I have found that the failure to reserve 10,000 acres of rural Tenths was a breach of the fiduciary duty to reserve 15,100 acres.

[507] As for the **Allocated Tenths**, I have found a breach of trust and breach of fiduciary duty in relation to the 1844 exchanges, and the withdrawal of 47 Tenths as

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250 See above at [417]–[425].
251 See below at [852]–[854].

part of the 1847 Town remodelling. The 1853 Whakarewa grant was a breach of trust but there is insufficient evidence to show it was also a breach of fiduciary duty.

[508] The **Occupation Lands** which should have been excluded are set out at [498] above. The boundaries of these sites are limited to the Tenths allocated in the claimed area. The plaintiff's proprietary claim is limited to the net area of the Tenths. The Crown breached its fiduciary duty to exclude the Occupation Lands to this extent.

[509] Breach of the fiduciary duty to exclude Occupation Lands is not established in relation to the **Occupation Reserves**.

[510] My findings in relation to the **Occupied Tenths** (including Occupied Tenths (post)) are summarised at [502]–[505] above. The Crown breached both fiduciary duties found by the Supreme Court in relation to the Occupied Tenths. The occupation of the Occupied Tenths (post) was a breach of trust but not a breach of fiduciary duty.

PART V—LOSS

[511] The plaintiff claims that the Customary Owners have suffered loss as a result of the Crown's breach of fiduciary duties. These losses comprise the loss of land and the loss of the benefits which were to be derived from those lands (sometimes referred to as usage losses). Cultural loss from being alienated from the land is claimed in addition.

[512] The following parts of this judgment address the remedies sought for these different heads of loss. This section simply focuses on whether the plaintiff has established his claim for loss of land, and loss of benefits which were to be derived from the land.

[513] As to the loss of land, the exact acreage lost as a result of the Crown's breaches is yet to be determined. This is because land returned to the Customary Owners needs to be taken into account in the final calculations. The acreage figures mentioned below must be read and understood in that context.

Unallocated Tenths

[514] The losses associated with the Unallocated Tenths category of land are probably the most straightforward to conceptualise. The failure to reserve 10,000 acres of land meant that the Tenths estate was short by 10,000 acres. The loss is those 10,000 acres.

[515] The failure to reserve that land meant that the Customary Owners did not enjoy the intended benefits of those 10,000 acres of Tenths. As Arnold and O'Regan JJ noted, this was an important part of the promised consideration for the land:[252]

> The promised consideration had two dimensions – the initial allocation of the Tenths reserves and their subsequent administration for the benefit of local Maori. The Crown took it upon itself to provide the promised consideration in both dimensions.

[516] This can be conceptualised either as a consequential loss which flows from the failure to reserve, or as part of the value of the Trust asset. For present purposes it is sufficient to find that the Customary Owners suffered this head of loss as a result of the Crown's breach of fiduciary duty to reserve the Unallocated Tenths.

Allocated Tenths

[517] I have found breach established in relation to three transactions involving the alienation of the Allocated Tenths. The plaintiff claims all heads of loss in relation to the Allocated Tenths.

[518] For the reasons set out in Appendix 1, I have found that the 1844 exchanges at Te Maatū resulted in the loss of 400 acres of Tenths.[253] Because that loss occurred prior to the fiduciary duty to reserve 15,100 acres, the Crown's obligation extended to the reservation of these 400 acres. The failure to reserve those 400 acres occasioned the loss of land and the loss of the intended benefits from that land. This transaction is to be treated in the same way as the Unallocated Tenths.

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252 Supreme Court judgment, above n 8, at [785] per Arnold and O'Regan JJ.
253 See Appendix 1 at [78]–[99].

[519] The withdrawal of 47 acres of town Tenths during the 1847 remodelling of the Nelson township resulted in a diminution of the Tenths estate by 47 acres. These Tenths were not replaced. The Customary Owners also lost the opportunity to benefit from these 47 acres. Both heads of loss are established in relation to this transaction.

[520] The Whakarewa grant in 1853 also resulted in a diminution of the Tenths estate and the related opportunity to benefit from those Tenths.[254] However, I am not persuaded that there is an extant loss in relation to this transaction. Under the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993, all Tenths that were the subject of the grant were returned to the Ngāti Rārua-Ātiawa Iwi Trust. Other assets of the Whakarewa School Trust Board were also vested in the Ngāti Rārua-Ātiawa Iwi Trust.[255] The beneficiaries of the trust are said to be the descendants of Ngāti Rārua and Te Ātiawa mana whenua ki Motueka iwi who were named in the 1892 and 1893 lists of the Native Land Court.[256]

[521] This suggests that the Tenths alienated pursuant to this grant have been restored to the Customary Owners, thus remedying any land loss. Moreover, the transfer of the assets of the Whakarewa School Trust Board may have also compensated the Customary Owners for the lost opportunity to benefit from the land. In the face of that evidence, I am not satisfied that the plaintiff can prove loss. Even if I am wrong about that, however, the claim is not proved. That is because, for the reasons set out later in this judgment, I have concluded that the claim does not survive the statutory time bar in the Limitation Act.[257]

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254 Although it was intended that a school be built on the Tenths land for use of the Customary Owners and others, the preamble to the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993 records that the school was never built. Accordingly, the Customary Owners did not obtain even limited use of the Tenths granted to the Bishop.

255 Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993, long title: reads that it is "An Act to give effect to a resolution by the Nelson Diocesan Synod of the Anglican Church to vest the assets of the Whakarewa School Trust Board in a trust for the descendants of the original Maori owners from whom the said assets were acquired and to make consequential provisions to enable the dissolution of the Whakarewa School Trust Board".

256 Schedules 2–3.

257 See below at [838]–[842].

Occupation Lands

[522] The failure to exclude pā, urupā and cultivations resulted in the loss of those Occupation Lands. Rather than ensuring those lands remained in customary ownership, the Crown took title to these lands. The Occupation Lands were used to meet the Crown's obligations in relation to the Tenths. In that sense, the Crown expropriated these lands. Those of the Customary Owners who had a proprietary interest in the Occupation Lands were deprived of that proprietary interest.

[523] Much of the Occupation Land has already been returned (either to Wakatū or other groups of Customary Owners) and the proprietary remedy sought by the plaintiff only extends to the net balance of this land. For the reasons explained below, I consider this land is held by the Crown pursuant to a constructive trust.[258]

[524] As for lost beneficial use of this land, I am not satisfied that this has been established in relation to these Occupation Lands. These lands were occupied and used by the Customary Owners.[259] There was no evidence that occupation or use was limited in any way, and that was not the basis upon which the plaintiff put his case. Based on the evidence adduced at trial, I am not satisfied that lost benefits are established in relation to the Occupation Lands.

[525] Accordingly, the plaintiff's loss in relation to the Occupation Lands is limited to the loss of land.

Occupation Reserves

[526] As breach is not established in relation to the Occupation Reserves, no loss is sustained in relation to this category of land.

Occupied Tenths

[527] The hybrid nature of the Occupied Tenths requires loss to be assessed from two different perspectives: the Occupation Lands and the Allocated Tenths.

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258 See below at [625]–[634].

259 Mr Parker gave evidence that, in addition to being occupied, some of the lands at Puketūtū and at Mārahau were also leased, with rentals collected for the benefit of those in occupation.

[528] As I have found, the failure to exclude the Occupation Lands, and the failure to allocate the Tenths from the land obtained by the Crown, constituted a breach of both fiduciary duties found by the Supreme Court.

[529] The breach of the duty to exclude the Occupation Lands has already been addressed above.[260] As for the Tenth component of the Occupied Tenths, I consider allocation of the Tenths section from Occupation Lands instead of the land obtained by the Crown caused a loss to the Tenths estate. While the land may have been reserved as a Tenth, it was, in substance, Occupation Land. In other words, it was not a Tenth at all.

[530] I accept that the actual loss of those Tenths only crystallised when the Occupation Lands were returned or vested in the Customary Owners. Nevertheless, it was the Crown's failure to ensure the Tenths were separated from the Occupation Lands which set up the conditions for that loss to occur. I consider the Crown's breach of fiduciary duties resulted in a loss of land from the Tenths estate.

[531] The breach also meant that the Customary Owners lost the beneficial use of the Occupied Tenths. Occupation of the Tenths by certain members of the Customary Owners meant that the Tenths could not be used for *all* Customary Owners. This was a consequence of not separating out the Tenths from the Occupation Lands as the Crown was required to do. The Crown's breach of fiduciary duties occasioned both a loss of land and a loss of the beneficial use of that land.

[532] As for the Occupied Tenths (post), there was no loss of land arising out of the occupation of this category of Tenths. These Tenths were reserved and held as required. However, the occupation of these Tenths meant they could not be used for the benefit of all Customary Owners. The loss from the breach of trust (but not breach of fiduciary duty) was the lost opportunity to benefit from these Tenths.

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260 See above at [522]–[525].

PART VI—LAND REMEDIES

[533] The primary relief sought by the plaintiff is the return of land. The stated aim of the Customary Owners is to restore the Tenths estate and secure the return of the Occupation Lands.

[534] The return of land assumes greater significance in this case than in other fiduciary duty cases given the unique and special relationship between Māori and land. Dr Jones describes land as being central to Māori identity. He refers to Tā Taihakurei Durie's view that the "cultural, social and spiritual life of the community was built around land" and that the land was posited as a living being from which the community was derived.[261] Mr Taylor confirmed in his evidence that the return of land would be transformative for the Customary Owners.

[535] There are four issues canvassed in this part:

(a) First, a short summary of relevant principles relating to constructive trusts.

(b) Second, consideration of whether there is sufficient certainty of subject matter for either an express or constructive trust.

(c) Third, consideration of whether the plaintiff's proprietary remedy attaches to land held by Crown entities.

(d) Fourth, consideration of whether the land must be held in continuous Crown title for a remedy to attach.

[536] The application of these principles to each category of land then follows.

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[261] E T Durie *Custom Law* (Treaty of Waitangi Research Unit, January 1994) at 61–62.

Constructive trust principles

[537] The law relating to constructive trusts has been described as "complex and, oftentimes, elusive".[262] The constructive trust label embraces different distinct categories, such as the institutional constructive trust, the remedial constructive trust, and constructive trusts which effect a direct proprietary claim.

[538] In *Fortex Group Ltd (in rec and liq) v MacIntosh*, Tipping J described the differences between express trusts, institutional constructive trusts, and remedial constructive trusts as follows:[263]

> … An express trust is one which is deliberately established and which the trustee deliberately accepts. An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.
>
> The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory. This description should not be regarded as definitive or as precluding further developments in this area of the law when greater refinement may be necessary. It is used to reflect the submissions in this case and is sufficient for present purposes.

[539] In *Paragon Finance,* Millett LJ drew a distinction between two types of constructive trusts for the purposes of statutory limitation periods:[264]

> Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

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262 Jessica Palmer "Constructive Trusts" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 335 at 355.

263 *Fortex Group Ltd (in rec and liq) v Mainzeal* [1998] 3 NZLR 171 (CA) at 172–173 per Gault, Keith and Tipping JJ.

264 *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 408–409 per Millett LJ.

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. ... In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.
>
> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungoed-Thomas J.

[540] Millett LJ confirmed that the same analysis applies in relation to those who have a fiduciary duty. The distinction is between those whose fiduciary obligations preceded the acts complained of and those whose liability in equity was occasioned by the acts of which complaint was made.[265]

[541] As the above passages make clear, institutional constructive trusts have an independent life. A court simply declares their existence. Institutional constructive trusts can arise in disparate circumstances. Professor Jessica Palmer suggests that the unconscionability of a defendant denying the plaintiff an equitable interest in the relevant property is a common factor underpinning all these situations.[266]

[542] The second category of constructive trust described by Millett LJ is the remedial constructive trust. This trust is dependent on a Court order for its existence.

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265 At 414 per Millett LJ.

266 Jessica Palmer "Constructive Trusts" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 335 at 338.

Professor Palmer describes the remedial constructive trust as "a controversial concept in the common law world", and, in her opinion, "an illegitimate use of equity to disrupt proprietary rights and obligations without first developing a sound, reasoned basis upon which such intervention is justified".[267] The remedial constructive trust appears to have been received with varying degrees of enthusiasm in different common law jurisdictions around the world.[268]

[543] It is unnecessary to grapple with the legitimacy and limits of the remedial constructive trust in this case. That is because only claims based on an institutional constructive trust, or a pre-existing trust, will meet the Limitation Act exception. Accordingly, the focus in this case is squarely on whether an institutional constructive trust or pre-existing trust arises.

[544] Finally, there is another form of constructive trust which has relevance here. This form of constructive trust can be used as a means of enforcing pre-existing property rights. It is the mode by which equity recognises a direct proprietary claim.[269] This type of constructive trust does not depend on the constructive intention of the parties as it is the subsisting equitable property right that forms the basis of the claim.[270] As discussed further in this part, I consider this type of constructive trust is relevant to the proprietary claim to the Occupation Lands.[271]

Certainty of subject matter

[545] For there to be an express trust or an institutional constructive trust there must be certainty as to what constitutes the trust property.[272] Certainty as to what constitutes the trust property is essential so that the trustees know what their obligations relate to, and so the Court may supervise and execute the trust if required.[273] The requirement of certainty of subject matter is relevant to all claims by the plaintiff for a proprietary

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267 At 350.
268 At 351–357.
269 At 364–365.
270 At 364.
271 See below at [625]–[634].
272 Andrew S Butler "Creation of an Express Trust" in *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 69 at 73–74. The other certainties are of intention and objects.
273 At 74.

remedy. However, the focus of the Supreme Court judgment, and the submissions in this case, was on the Unallocated Tenths. The discussion below adopts that same focus.

[546] Both Elias CJ and Glazebrook J considered there was sufficient certainty of subject matter to constitute a trust (either an express trust or a close analogy to an express trust) in relation to the rural Tenths.[274]

[547] Arnold and O'Regan JJ did "not determine whether there was an express or other form of trust" and did not make any explicit findings regarding certainty of subject matter.[275] Nevertheless, the plaintiff says that that both Judges must have been satisfied that there was sufficient certainty of subject matter to make the Limitation Act findings that formed part of the majority decision. After discussing the distinctions drawn by Millett LJ in *Paragon Finance*, the Judges said:[276]

> On our analysis, the Crown is in the former category, that is, a fiduciary whose fiduciary obligations preceded the impugned acts. This leads us to the same result as that reached by the Chief Justice and Glazebrook J: to the extent the appellants claim recovery of land that came into the hands of the Crown that should have been part of the Tenths reserves as envisaged by the Spain award but was not included in those reserves, no limitation defence is available to the Crown. This includes the land that became vested in the Crown as a result of the failure to set aside the rural reserves. The same can be said in relation to any claim for the proceeds derived by the Crown from the disposal of any such land.

[548] The plaintiff says this constitutes a finding that an institutional constructive trust arose in relation to the rural Tenths. Certainty of subject matter is as much a requirement for an institutional constructive trust as it is for an express trust.[277] Accordingly, the plaintiff says that certainty of subject matter has already been determined in his favour by the Supreme Court.

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274 Supreme Court judgment, above n 8, at [408] per Elias CJ and [578]–[579] per Glazebrook J.

275 At [726] per Arnold and O'Regan JJ.

276 At [815] per Arnold and O'Regan JJ citing *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 408–409 per Millett LJ.

277 Andrew S Butler "Creation of an Express Trust" in *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 69 at 77–78; and Jessica Palmer "Constructive Trusts" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 335 at 337.

[549] I am not as confident as the plaintiff that this issue has been finally settled in the Supreme Court. Arnold and O'Regan JJ explicitly said that they did not determine whether there was an express "or other form of trust" and they did not make any findings regarding certainty of subject matter. I do not consider there to be a binding judgment on this issue in those circumstances. However, the judgments of the majority obviously carry significant weight and the analysis below follows the approach adopted by Elias CJ and Glazebrook J.

[550] Three main cases were considered by the Supreme Court. The first in time is *Re London Wine Co (Shippers) Ltd* which was decided in 1975.[278] In that case the wine dealer company had acquired stocks of wine which were deposited in various warehouses in England. Quantities were then sold to customers, but the wine remained in the warehouse. Once payment for the wine was made, the customer received a certificate of title which described the customer as the sole and beneficial owner of a certain type of wine and vintage. Specific bottles of wine were not segregated nor identified.

[551] Oliver J rejected the claim that a trust had arisen on the basis that it was not possible to ascertain the property of the trust with any certainty:[279]

> I appreciate the point taken that the subject-matter is part of a homogeneous mass so that specific identity is of as little importance as it is, for instance, in the case of money. Nevertheless, as it seems to me, to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach.
>
> I cannot see how, for instance, a farmer who declares himself to be a trustee of two sheep (without identifying them) can be said to have created a perfect and complete trust whatever rights he may confer by such declaration as a matter of contract. And it would seem to me to be immaterial that at the time he has a flock of sheep out of which he could satisfy the interest. Of course, he could by appropriate words, declare himself to be a trustee of a specified proportion of his whole flock and thus create an equitable tenancy in common between himself and the named beneficiary, so that a proprietary interest would arise in the beneficiary in an undivided share of all the flock and its produce. But the *mere* declaration that a given number of animals would be held upon trust could not, I should have thought, without very clear words pointing to such an intention, result in the creation of an interest in common

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278 *Re London Wine Company (Shippers) Ltd* [1986] PCC 121 (Ch).

279 At 137–138 (emphasis in original). The sheep example in this passage was relied on in the Court of Appeal to find insufficient certainty of subject matter: see Court of Appeal judgment, above n 64, at [159] per Ellen France J.

> in the proportion which that number bears to the number of the whole at the time of the declaration. And where the mass from which the numerical interest is to take effect is not itself ascertainable at the date of the declaration such a conclusion becomes impossible.
>
> In the instant case, even if I were satisfied on the evidence that the mass was itself identifiable at the date of the various letters of confirmation I should find the very greatest difficulty in construing the assertion that "you are the *sole* and beneficial owner of" 10 cases of such and such a wine as meaning or being intended to mean "you are the owner of such proportion of the total stock of such and such a wine now held by me as 10 bears to the total number of cases comprised in such stock".

[552] In *Hunter v Moss* the English Court of Appeal considered there was sufficient certainty of subject matter to form a trust where the defendant had declared a trust of five per cent in the shareholding of the company.[280] Central to the Court's reasoning was the fact that all shares were of one class in one company. The decision of *Re London Wine Co (Shippers) Ltd* was distinguished on the basis that it was concerned with the appropriation of chattels and the time at which property in chattels passes.[281] *Hunter*, however, was concerned with a declaration of trust, where legal title remained with Mr Moss and was not intended to pass immediately to Mr Hunter.[282]

[553] The decision in *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* arose out of the receivership of Goldcorp Exchange Ltd.[283] Customers of the company brought proprietary claims to the stock of gold, silver and platinum bullion in its possession. These claims included those by customers who had purchased "non-allocated metal" at the prevailing rate for the bullion. Rather than receiving physical delivery of the bullion, the customers received a certificate of ownership, and they were told that the bullion would be stored on their behalf. The bullion was stored as part of a larger bulk and would require ingoting before delivery of the customer's specific entitlement could take place.

[554] The Board drew a distinction between sales for "generic goods" and "goods sold ex-bulk":[284]

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280 *Hunter v Moss* [1994] 3 All ER 215 (CA).
281 At 458.
282 At 458.
283 *Re Goldcorp Exchange Ltd (In Receivership): Kensington v Liggett* [1994] 3 NZLR 385 (PC).
284 At 392–393.

> For present purposes, two species of unascertained goods may be distinguished. First, there are "generic goods". These are sold on terms which preserve the seller's freedom to decide for himself how and from what source he will obtain goods answering the contractual description. Secondly, there are "goods sold ex-bulk". By this expression Their Lordships denote goods which are by express stipulation to be supplied from a fixed and a predetermined source, from within which the seller may make his own choice (unless the contract requires it to be made in some other way) but outside which he may not go. For example, "I sell you 60 of the 100 sheep now on my farm".

[555] The *Re Goldcorp* sale did not involve a sale of goods ex-bulk. Their Lordships found that the contracts of sale were for unascertained bullion which the company could purchase from any source.[285] As the bullion was unascertained at the time of the contract, any trust which arose would have failed as there was no bullion to which the trust could relate.[286] Similarly, Goldcorp was not a trustee in relation to bullion acquired after the contract but before delivery since the bulk was not the only source of supply under the sale contracts.[287]

[556] Turning to the present case, Elias CJ expressed difficulty in understanding how these cases might assist.[288] Glazebrook J did not consider the cases to be applicable either.[289] I respectfully agree with these conclusions. *Re London Wine* and *Re Goldcorp* arise out of situations of receivership. They concern questions of title to goods under the Sale of Goods Act 1908 and an intention to create a trust. Most notably, as Elias CJ held, these two cases do not stand for a rigid rule that a trust can never exist in non-segregated property.[290]

[557] Even if the principles in these cases do have application, then this case is closer to a sale of goods ex-bulk than a sale of generic goods. Insofar as the Tenths are concerned, the land the subject of the trust was a defined proportion (one tenth) and the rural Tenths comprised 10,000 acres of the 15,100 acres to be reserved. The size of the rural Tenths (150 acres) was also specified.

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285 At 386.
286 At 386.
287 At 386–387.
288 Supreme Court judgment, above n 8, at [432] per Elias CJ.
289 At [579] per Glazebrook J.
290 At [423] per Elias CJ.

[558] Moreover, there was no intention to keep the Tenths unidentified and any undifferentiation was only intended to be temporary. The surveying of these sections, and the selection by ballot, provided a system by which the Tenths were to be identified. The balloting system by which the Tenths were to be selected effectively created homogeneity in the land from which they were to be reserved. There was also no need to differentiate between the Tenths. This is not a case where some of the Tenths were to be held for one person, and others were to be held for someone else. All Tenths were to be held on trust for the same beneficiaries, the Customary Owners.

[559] In those circumstances, the Crown's submissions that land is not a fungible asset, and that the land within the Spain award area is heterogeneous, carry little weight. As counsel for the plaintiff submits, there is no magic in the word "fungible" and whether an item is fungible depends on context. Given the features of the Tenths scheme, and the operation of the ballot system, any differences between each parcel of land did not matter in this case, and there was sufficient certainty by which the Tenths were to be identified.

[560] The Crown submits that the boundaries of the "whole" from which the selection was to be made were not sufficiently certain. That is because there was insufficient land from which to select all 1,000 rural sections, and the Spain award area was "in reality" fluid and unsettled. The Crown says that it is artificial to treat Spain's decision as creating a fixed geographical boundary so that the land within it is analogous to a defined bulk.

[561] To the extent there was uncertainty in 1840 as to the boundaries of the whole, I do not consider it to be the type of uncertainty that creates difficulties in identifying the subject matter of the trust. The area from which the Tenths were to be selected was clear from the Spain award. The witnesses all agreed that there was sufficient land within the Spain award boundary to fulfil the rural Tenths obligations. And, as at today's date, the Spain award boundary has been agreed.

[562] The plaintiff submits that the Crown no longer holds enough land in the suburban or rural areas to meet the Unallocated Tenths shortfall. If that is correct, then present day identification issues essentially fall away. All land in the hands of the

Crown is impressed with a trust in favour of the Customary Owners in relation to the Unallocated Tenths. That provides sufficient certainty for the Crown as trustee to know the assets to which its obligations as trustee attach.

[563] Other areas of trust law add strength to the analysis. Elias CJ drew guidance from cases involving certainty of objects, where the requirement of certainty is not so strictly enforced. The former Chief Justice referred to two cases concerning certainty of objects: *Re Tuck's Settlement Trusts* and *Re Beckbessinger*.[291] In the former case, a distinction was drawn between conceptual uncertainty (where a court cannot understand what was intended in a trust) and evidential uncertainty (where application of what was intended depends on ascertainment of the facts).[292] This distinction was applied by Tipping J in *Re Beckbessinger*, with the Judge holding that there was sufficient certainty if the Court is able "to determine with certainty the limits of the class, ie whether a particular person is or is not within the class".[293]

[564] There seems no reason in principle why that approach should not also apply in this case. There is no question of conceptual uncertainty here. There is no doubt that a trust of the Tenths, including the rural Tenths, was intended. The only issue is one of evidential uncertainty where the application of what was intended—namely, the reservation of the Tenths and the exclusion of the Occupation Lands—depended on the actual survey and reservation of the Tenths. The trust property in this case is ascertainable, and there is sufficient certainty for the Court to supervise, and if necessary, execute the trust. This serves the very purpose of the requirement for certainty of subject matter.

[565] Such an approach aligns with Professor Dame Sarah Worthington KC's views. In an article from 1999, Professor Worthington considers a range of issues arising out of identification of ownership interests in bulk.[294] These include situations where

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291 Supreme Court judgment, above n 8, at [421]–[422] per Elias CJ citing *Re Tucks Settlement Trusts* [1978] Ch 49 (CA); and *Re Beckbessinger* [1993] 2 NZLR 362 (HC).

292 *Re Tucks Settlement Trusts* [1978] Ch 49 (CA) at 59.

293 *Re Beckbessinger* [1993] 2 NZLR 362 (HC) at 370. Elias CJ notes that this approach was also taken by the House of Lords in *McPhail v Doulton* [1971] AC 424 (HL): see Supreme Court judgment, above n 8, at [422].

294 Sarah Worthington "Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts" (1999) JBL 1.

there is a voluntary declaration of trust of part of a bulk. After reviewing relevant legal principles, Professor Worthington concludes:[295]

> In short, there seems to be no practical or theoretical reason to deny the possibility of a trust of part of an identified bulk provided the identity of the bulk and the size of the part (whether designated absolutely or as a proportion) are clear.

[566] Finally, the nature of the fiduciary obligations owed in relation to the Tenths deserve weight in the overall analysis. This is not a case involving the sale of chattels or the sale of gold bullion. This case involves a unique fiduciary duty owed by the Crown to the Customary Owners in circumstances where the Crown assumed obligations of trust in relation to the Tenths. Elias CJ put it this way:[296]

> More importantly, if right in the view that fiduciary and trust obligations were owed by the Crown to Maori in relation to the tenths reserves and occupied lands, I cannot think that equity could countenance the obligation failing for indeterminacy of subject-matter in circumstances where there was clear identification in Spain's award of a fixed proportion of an identified area vested in the Crown on condition that the tenths sections were reserved and the areas of occupation were able to be ascertained.

[567] I respectfully adopt that reasoning.

[568] It follows that I consider there was sufficient certainty of subject matter to constitute a trust (whether an express or institutional constructive trust).

Does the proprietary remedy attach to Crown Entity land?

[569] The plaintiff seeks proprietary relief against the Crown in respect of land that is owned by Crown entities.[297] He does so on the basis that Crown entities constitute the Crown, and land owned by Crown entities is "Crown land" for the purposes of discharging the Crown's fiduciary duties.

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295 At 23.

296 Supreme Court judgment, above n 8, at [435] per Elias CJ.

297 The plaintiff's submissions also refer to land held by New Zealand Post, a state-owned enterprise (SOE) under the State-Owned Enterprise Act 1986. However, there were no submissions directed towards the separate status of SOEs and the plaintiff treated Crown entity and SOE land as the same. New Zealand Post did not appear at the hearing or make submissions.

[570] Nine separate factors are advanced by counsel for the plaintiff in support of this position. These factors include: equitable principles; ministerial control pursuant to the common law control test;[298] the rule of law; analogies with the law relating to State-Owned Enterprises;[299] te Tiriti obligations and the nature of that compact; the Māori perspective on what constitutes the Crown; the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);[300] and the Supreme Court's decision.

[571] In response, the Crown says there is no basis upon which Crown entities can be required to surrender property in fulfilment of obligations owed by the Crown. Counsel for the Crown emphasises the separate legal personality of Crown entities, as confirmed in s 15 of the Crown Entities Act 2004. Counsel submits that the plaintiff's proposed approach would cut across the scheme of the Crown Entities Act, the broader statutory regime governing liability of the Crown, and the law of real property. The Crown contends that the issues raised by the plaintiff have already been considered and rejected by the Court of Appeal in related proceedings (referred to as the ACC caveats case and the Review proceeding, respectively).[301]

[572] Accident Compensation Corporation (ACC), Te Whatu Ora | Health New Zealand, NMIT | Te Pūkenga, and Fire and Emergency New Zealand (FENZ) were joined as defendants and made submissions at the hearing on this issue.[302] While there are some differences in their individual positions, they maintained that their land was not Crown land and was not available for relief in this proceeding. Their positions may be summarised as follows:

(a) ACC says it is not the Crown for the purposes of its investment function and land owned by ACC as part of its investment portfolio is not Crown

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298 The common law control test involves considering whether the degree to which Ministers exercise control over an entity means it is to be accorded Crown status. The test asks "is the nature and degree of the control which Ministers and other central government agencies exercise over the body such that the body is an agent of the Crown?" See *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 327.

299 This submission draws on the Supreme Court's decision in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

300 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

301 ACC Caveats case, above n 16; and *Stafford v Attorney-General* [2022] NZCA 165 [Review proceeding].

302 Kāinga Ora | Homes and Communities and Housing New Zealand Ltd initially intervened in the proceeding but opted not to be joined as a defendant and did not take part in the hearing.

land. It is a separate legal entity and the plaintiff's claim against the Crown cannot be asserted against ACC.

(b) Te Whatu Ora | Health New Zealand is a Crown entity and Crown agent. It accepts there is a level of ministerial control over its operations but says any direction of the type sought in this proceeding would conflict with objectives mandated under the Crown Entities Act.

(c) NMIT | Te Pūkenga is a tertiary education institute under the Crown Entities Act. It is not a Crown agent and ss 103 and 107 of that Act do not apply. NMIT | Te Pūkenga does not actively oppose Mr Stafford's claim as there is no cause of action pleaded against it. It stresses that it acts in compliance with te Tiriti. It submits that it is essential to maintain current operations of its Nelson and Richmond campuses from the land it owns with the Spain award boundary.

(d) FENZ says its legal structure is separate from the Crown and its property is not Crown land. Furthermore, FENZ's organisational history and the history of the 11 properties it owns in the Spain award area demonstrate that FENZ is not the "Crown", nor has it ever been.

(e) Kāinga Ora | Homes and Communities and Housing New Zealand Ltd initially intervened in the proceeding but opted not to be joined as a defendant and did not take part in the hearing.

[573] As already noted, whether Crown land includes that owned by Crown entities has already been considered by the Court of Appeal in the ACC caveats case and Review proceedings. The Crown and Crown entities contend that the ACC caveats case has determined the issues in their favour, and those determinations are binding on this Court. It is therefore necessary to say something about both cases.

ACC caveats case

[574] In 2018, the plaintiff lodged a caveat against land owned by the ACC within the Spain award boundary. The caveat was lodged on the basis that the ACC is an

instrument of the Crown, its land is Crown land, and that land is subject to a trust in favour of the Customary Owners (referring to the Supreme Court judgment in this proceeding).

[575] ACC applied for an order removing the caveat. That application was granted by Collins J who found that the plaintiff did not have a reasonably arguable interest in the land.[303] However, the Judge considered it reasonably arguable that ACC land could be used to settle Crown liability if established by the plaintiff's claim.[304] That was because Collins J considered that responsible Ministers could give directions to ACC under ss 103 and 107 of the Crown Entities Act, and that these directions would not offend the restrictions in s 113(1)(b) of that Act.[305]

[576] Whilst finding the Ministers could give these directions, Collins J nevertheless held that they did not give rise to a caveatable interest because a beneficial interest in the land could not be established unless the Ministers asserted their control.[306] Accordingly, the application to remove the order was granted, but Collins J exercised his discretion to maintain the caveat for one month to provide an opportunity for the Ministers to decide whether to give the direction.[307]

[577] The plaintiff appealed Collins J's decision to the Court of Appeal. The majority (Gilbert and Courtney JJ) dismissed the appeal on the basis that it was not reasonably arguable that the plaintiff had a beneficial interest in the ACC property.[308] That was because ACC was a separate legal entity that did not owe fiduciary obligations of the kind recognised by the Supreme Court. Any judgment in the plaintiff's favour would not be enforceable against ACC.[309]

[578] As the reasoning of the Court of Appeal is relevant to this case, it is necessary to explain the approach taken by each of the Judges. Gilbert J considered the appeal could be determined without expressing any views about whether a direction under

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303 *Accident Compensation Corporation v Stafford* [2018] NZHC 218, [2018] 2 NZLR 861 at [5].
304 At [88].
305 At [81]–[82].
306 At [94].
307 At [97].
308 ACC Caveats case, above n 16, at [152] per Courtney J.
309 At [33] per Gilbert J and at [150] per Courtney J.

ss 103 or 107 of the Crown Entities Act could be made.[310] The Judge accepted that it was arguable there was a beneficial interest in the Crown land, however, he did not consider that this interest was derived from ACC.[311] The Judge said:[312]

> [33] Mr Stafford's substantive claim is not against ACC, rather it is against the Crown for its alleged breaches of fiduciary obligations dating from the time of its acceptance of the Spain award in 1845. ACC did not come into existence until 1998, over 150 years later. ACC is a legal entity separate from the Crown. It is not suggested that ACC assumed fiduciary obligations to the customary owners and it cannot be said to have breached, in the period up to 1882, the obligations found to have been owed by the Crown. Any judgment Mr Stafford may obtain in the substantive proceedings currently before the High Court will not be enforceable against ACC, which is not even a party to that proceeding. The defendant is the Attorney-General who is being sued on behalf of the Sovereign, in right of her Government in New Zealand. The Attorney-General, sued in this capacity, is the correct defendant. Mr Stafford could not choose to sue ACC, which cannot be held liable for the Crown's breaches of fiduciary obligation in this context.

[579] Courtney J also did not consider it necessary to determine whether a direction could be made under ss 103 or 107 of the Crown Entities Act, but nevertheless set out her views on this issue for the assistance of the parties.[313]

[580] Addressing the scope of the power under s 103 of the Crown Entities Act, Courtney J considered it was not as broad as Collins J had found, and that a direction under that section would cut across, rather than relate to, ACC's functions and objectives.[314] Moreover, the Judge considered that a direction under s 107 could not be given in this case, as it would be contrary to s 113(1)(b) of the Crown Entities Act on the basis that it would be difficult to view the descendants of Wakatū as anything other than "particular persons".[315]

[581] Next, Courtney J considered whether ACC was an instrument of the Crown in terms of the common law control test.[316] The plaintiff argued that the reference to ACC's separate legal personality in s 15(b) of the Crown Entities Act did not preclude

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310 At [23] per Gilbert J.
311 At [34] per Gilbert J.
312 Footnote omitted.
313 ACC Caveats case, above n 16, at [42] per Courtney J.
314 At [92] per Courtney J.
315 At [105] per Courtney J.
316 At [106]–[133] per Courtney J.

a finding that property registered in the ACC's name was Crown land.[317] The arguments before the Court of Appeal included those drawing on the Treaty; constitutional aspects of the case which, in the plaintiff's submission, required a broader view of what constitutes the Crown; and analogies with the Supreme Court's decision in *Ririnui v Landcorp Farming Ltd*.[318]

[582] Courtney J concluded that ACC was properly regarded as being under the control of the Crown to the extent that ministerial control exists under the relevant legislative provision.[319] However, her Honour considered that the Minister did not control ACC's operational aspects, including its investment function.[320] Accordingly, even taking an expansive view of whether a Crown entity might constitute the Crown, Courtney J did not consider it arguable that ACC was part of the Crown in relation to one of its core operational functions over which there was ministerial control.[321]

[583] On whether it was reasonably arguable that the plaintiff derived his beneficial interest from ACC, Courtney J said:

> [150] The ACC was a bona fide purchaser for value without notice of the Crown's fiduciary obligations. It is not an instrument of the Crown for purposes beyond those functions over which the Minister has control. Those functions do not include its investment function, which is operational and not subject to ministerial oversight. It does not owe any fiduciary obligations of the kind found in *Wakatū*. It has no obligation to make good a Crown liability that is unrelated to its statutory functions. In these circumstances it is not arguable that Mr Stafford has a proprietary interest in the ACC property arising from the Crown's fiduciary obligations.

[584] Accordingly, in concurrence with Gilbert J, the appeal was dismissed.

[585] Williams J wrote a dissenting judgment. He identified the overarching question as to whether the plaintiff had a caveatable interest in the ACC land as coming down "to whether it is reasonably arguable that ACC is the Crown, or sufficiently

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317 At [106] per Courtney J.
318 At [107]–[111] per Courtney J citing *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.
319 At [130] per Courtney J.
320 At [130] per Courtney J.
321 At [130]–[133] per Courtney J.

Crown-like, to be burdened by the fiduciary obligation found to exist in the [Supreme Court] decision".[322]

[586] His Honour identified six questions to be addressed in determining this issue.[323] The first three concerned the scope of the Minister's powers to issue directions under ss 103 and 107 of the Crown Entities Act, subject to the limits in s 113 of that Act. The fourth issue was whether it was reasonably arguable that ACC is the Crown or fixed with the Crown's fiduciary obligation for the purposes of the caveat. The fifth question was whether it was reasonably arguable that the Crown owed a fiduciary obligation in relation to the ACC property. The sixth question is not relevant to this proceeding.

[587] On the first three questions, Williams J concluded that it was reasonably arguable that a Minister could make a direction to ACC under s 103 of the Crown Entities Act.[324] The Judge also found it reasonably arguable that the Minister could make the direction sought in this case under s 107.[325] Contrary to Courtney J's findings, Williams J did not consider a s 107 direction to be precluded by s 113(1)(b).[326] That is because the Customary Owners were not "particular persons" within the meaning of s 113(1)(b), but were a collection of tribal communities akin to a broad class.[327]

[588] Williams J further concluded that it was reasonably arguable that ACC was an express agent of the Crown in carrying out its investment function, and that it held its property as if it were the Crown, and subject to the Crown's obligations.[328] Reinforcing that conclusion was William J's view that the relationship between the Crown and ACC satisfied the common law control test. His Honour concluded that it was reasonably arguable "that the express intention of Parliament on this question and

322 At [201] per Williams J dissenting.
323 At [204] per Williams J dissenting.
324 At [268] per Williams J dissenting.
325 At [279] per Williams J dissenting.
326 At [279] and [295] per Williams J dissenting.
327 At [291]–[294] per Williams J dissenting.
328 At [327] per Williams J dissenting.

the wider context are both consistent with ACC's status as a Crown agent in relation to [ACC property]".[329]

Review proceeding

[589] The Review proceeding arose out of efforts made by the plaintiff to ensure that the remaining land in the Crown's possession, which could form part of his relief in this proceeding, could be protected from disposal.

[590] The plaintiff sought a moratorium preventing sale of land held by the core Crown, Crown entities and agents, and State-Owned Enterprises. The relevant Ministers declined to grant a moratorium. That decision was challenged in the Review proceeding.

[591] The Review proceeding initially came before Ellis J in the High Court.[330] Relevantly for this proceeding, Ellis J concluded that the respondent Crown entities were separate legal entities from the Crown, and so land owned by them was not directly available as relief.[331] Moreover, Ellis J considered the power of Ministerial direction contained in s 107 of the Crown Entities Act was inapt and could not be used to order a moratorium on the sale by Crown entities of land within the Spain award boundary.[332] Even if the power conferred by s 107 was available, the Judge considered the Ministers were not wrong to refuse to exercise it.[333]

[592] The plaintiff appealed. The grounds of appeal included claims based on the Treaty; the Māori view of the Crown; the decision in *Ririnui* ; the considerable controls exercised by Ministers over Crown entities; and submissions based on UNDRIP.[334]

[593] The Court of Appeal prefaced its decision with the observation that there was a tension between the plaintiff's formulation of its case in this proceeding which was

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329 At [367] per Williams J dissenting.
330 *Stafford v Attorney-General* [2021] NZHC 335.
331 At [185(a)].
332 At [185(b)].
333 At [185(c)].
334 Review proceeding, above n 301, at [8] and [58].

based on principles of private law, and the public law principles employed to seek relief in the judicial review proceedings.[335]

[594] On the substantive issue on appeal, the Court concluded that the plaintiff's position and his interests were sufficiently protected in terms of interim relief by undertakings given by the Attorney-General and other arrangements made with Crown entities.[336]

[595] As to the issues relevant to this proceeding, the Court did not consider it necessary to determine whether the Crown had a power to issue a direction to the Ministers.[337] That is because, if there was such a power, the Court did not consider there was a duty to exercise it.[338] The Court said it was not persuaded that the Crown had a specific and enforceable duty owed to the plaintiff to establish the moratorium he sought.[339] The appeal was accordingly dismissed.

[596] Leave to appeal to the Supreme Court was declined.[340] The Supreme Court accepted that matters such as the scope of Crown land and the nature and extent of the Crown's fiduciary duties may raise questions of general or public importance.[341] However, the Supreme Court said that these matters would ultimately be addressed in this proceeding. It was also preferable that issues arising in the interim be dealt with if and when there was a proposed sale or other disposition of land within the Spain award boundary.[342]

Is the ACC caveats decision binding in this proceeding?

[597] The High Court is bound by decisions of a superior court pursuant to the doctrine of precedent. The policy reasons underpinning that doctrine include stability, consistency, orderly development and certainty in the law.[343]

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335 At [77].
336 At [91] and [95].
337 At [79]–[80].
338 At [80].
339 At [85].
340 *Stafford v Attorney-General* [2022] NZSC 108.
341 At [9].
342 At [9].
343 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [209] per McGrath J.

[598] A question arises as to whether the Court of Appeal has already determined whether the plaintiff's proprietary remedy extends to Crown entity land in the ACC caveats case, and whether this Court is bound by that decision. The Court of Appeal's consideration of these issues in the Review proceeding is also relevant here.

[599] The plaintiff says that the ACC caveats case does not prevent this Court from finding that Crown entity land qualifies as Crown land for the purposes of the Crown's outstanding fiduciary duties. Counsel for the plaintiff submits that the ratio of the Court of Appeal's decision turned on the statutory test for maintaining a caveat, with the consequence that Courtney and Williams JJ's judgments on the broader issues are, strictly speaking, obiter.

[600] It is true that both decisions of the Court of Appeal concern different applications. The ACC caveats case concerned the lapse of a caveat over ACC land, and the Review proceeding involved a decision by the responsible Ministers declining to issue a moratorium over the sale of Crown land (including Crown entity land) within the Spain award boundary.

[601] It is also true that the majority did not make a binding finding on the scope of ss 103, 107 and 113 and the common law control test. Gilbert J declined to express a view on those aspects of the case, and Courtney J's observations were not determinative of the appeal. And, while the same issues were canvassed in the Review proceeding, the Court of Appeal did not make any binding determinations on the issues now before the Court. Indeed, there are statements in the Supreme Court leave judgment which seem to anticipate those issues being finally determined in this proceeding.

[602] Nevertheless, I consider the key issues raised in this proceeding have already been considered and determined by the Court of Appeal. The same submissions made by the plaintiff in this case were before the Court of Appeal in both the ACC caveats case and Review proceedings. In the ACC caveats case, the plaintiff argued that ACC land should be treated as Crown land, and that ACC was a Crown agent subject to ministerial control. Te Tiriti and constitutional arguments were also called in aid of

the plaintiff's case.[344] The fact that the plaintiff modelled substantial parts of its argument on Williams J's dissent in that case underscores the point.

[603] Moreover, the plaintiff made submissions in the Review proceeding which mirror those made in this proceeding. Indeed, the six factors identified by the Court of Appeal are identical to those raised before me.[345]

[604] I accept that factual context may have some bearing on what is meant by the Crown and the scope of Crown land. However, I do not consider my factual findings in this case add anything new to the analysis. In the ACC caveats case, Gilbert J's decision proceeded on the basis that it was arguable that the Crown could be called to account for the Tenths shortfall and the land that it acquired was impressed with a trust.[346] Similarly, Courtney J accepted that if the ACC property had been reacquired by the Crown directly, it was arguable that the plaintiff could assert a constructive trust.[347] Accordingly, both Judges of the majority in the ACC caveats case proceeded on an assumption which I have subsequently found to be proved. My factual findings regarding the existence of an institutional constructive trust do not alter the basis upon which the majority of the Court of Appeal reached their decision.

[605] I consider the Court of Appeal has already determined that ACC is a legal entity separate from the Crown and cannot be held liable for the Crown's breaches of fiduciary obligations. Issues relating to the control of Crown entities and the scope of the powers under ss 103, 107 and 113 of the Crown Entities Act have been determined against the plaintiff in Courtney J's decision in the ACC caveats case. The application of those principles to the individual positions of the Crown entity defendants in this proceeding lead to the same conclusions.

[606] In these circumstances, I consider the doctrine of precedent is engaged. Even if not formally engaged, then the policy reasons underpinning it militate against this Court departing from the reasoning of the superior Court. It is not the role of the High Court to review and consider the opinions of the Court of Appeal. Departure

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344 Review proceeding, above n 301, at [8] and [58].
345 At [58]; and see above at [570].
346 ACC Caveats case, above n 16, at [31] per Gilbert J.
347 At [149] per Courtney J.

from a superior Court's decision introduces uncertainty in the law in an area already bedevilled by uncertainty.[348] It seems inevitable that this case will go further, and in those circumstances, it is preferable that the Court of Appeal decide whether to affirm or depart from its own decisions. This means I cannot (or, at the very least, should not) depart from the Court of Appeal's conclusions on the scope of the Crown.

[607] Accordingly, on application of the Court of Appeal's decision in the ACC caveats case, I find that the plaintiff's proprietary remedies do not extend to Crown entity land and are limited to the core Crown land held within the Spain award boundaries.

Continuous Crown title

[608] The plaintiff says that its proprietary remedy attaches to Crown land whether that land has been held in continuous Crown title or not.

[609] I do not understand the Crown to contest that point. However, for the avoidance of doubt, I agree with the plaintiff. Any land reacquired by the Crown which was alienated in breach of fiduciary or trust obligations remains impressed with those obligations. As Glazebrook J noted, it would "be a novel view that, by way of breach, trust obligations can be brought to an end so that a trustee can re-acquire lands freed from trust obligations".[349]

[610] Accordingly, to the extent that the plaintiff's proprietary remedy attaches to Crown land, it is irrelevant that there have been breaks in the Crown title.

Unallocated Tenths

[611] The plaintiff says that any land held by the Crown (including Crown entities) is held subject to a trust in relation to the Unallocated Tenths. A proprietary remedy is sought to enforce the terms of that trust.

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348 The exact nature of the Crown has been described as "somewhat obscure" with the common law in this area as unsettled and confusing: see Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, The Governor-General, The Crown* (Auckland University Press, Auckland, 2017) at 40.

349 Supreme Court judgment, above n 8, at [586] per Glazebrook J.

[612] I have already found that the fiduciary obligations owed by the Crown in relation to the Unallocated Tenths were obligations of trust. The land obtained by the Crown following the 1845 Spain award was charged with an equitable interest in favour of the Customary Owners pending reservation of the Tenths. This had all the hallmarks of an express trust and was analogous to the trustee getting in the trust assets.

[613] Even if it was not an express trust in its purest sense, then an institutional constructive trust arose in relation to the Unallocated Tenths. The Crown's duty to reserve the Tenths attached to the land obtained by the Crown and this duty was not discharged. By failing to reserve the rural Tenths, the Crown obtained land to which it had no beneficial entitlement. Land which was intended to be held for the benefit of the Customary Owners has been used as if it was Crown land. It would be unconscionable for the Crown to assert its beneficial interest in the Unallocated Tenths and to deny the interest of the Customary Owners. Equity would not countenance such a result.

[614] I have already found there is sufficient certainty of subject matter for a trust to arise. Accordingly, I find that land held by the Crown within the Spain award boundary is held subject to a trust in favour of the Customary Owners to the extent of the Unallocated Tenths. That extent will need to be finally determined once land subsequently returned to the plaintiff is taken into account.

Allocated Tenths

[615] The plaintiff's proprietary claim in relation to the Allocated Tenths is more complex. There appear to be multiple proprietary claims asserted:

(a) First, a proprietary claim in relation to Allocated Tenths still in the Crown hands.

(b) Second, a proprietary claim in relation to Allocated Tenths which were alienated but have since found their way back into Crown hands.

(c) Third, a constructive trust in relation to the Tenths shortfall arising out of the alienation of the Allocated Tenths.

[616] The plaintiff's claim in relation to the first of these categories is not entirely clear. It appears to be a claim to the Allocated Tenths still held by the Crown pursuant to the express trust which arose in the 1840s and irrespective of any breach of fiduciary duty. However, it is not clear to me that any of those Allocated Tenths are still held by the Crown. As I understand it, they were vested in the Public Trustee in 1882, then the Māori trustee, and were finally vested in Wakatū. However, to the extent that there are still Allocated Tenths held by the Crown, then I cannot see how they are held pursuant to an express trust. The Crown's express trust duties in relation to the Allocated Tenths have long since come to an end. The plaintiff has not satisfied me of the legal basis to the first category of proprietary claim.

[617] Turning to the second category, I accept that the plaintiff has a proprietary claim in relation to Allocated Tenths which were alienated by the Crown in breach of fiduciary duty, but which are now held by the Crown. These Allocated Tenths are held pursuant to an institutional constructive trust. The preceding obligation is the Crown's duty of trust owed in relation to the alienated Allocated Tenth. If the alienation of this Allocated Tenth was a breach of trust and a breach of fiduciary duty, then an institutional constructive trust will arise over any land which subsequently found its way back into the Crown's hands. It would be unconscionable for the Crown to claim a beneficial interest in relation to these Allocated Tenths and to deny the equitable interest of the Customary Owners. To do so would allow the Crown to profit from its own breach of trust—a position antithetical to equitable principles.

[618] However, this form of institutional constructive trust only arises where there has been a breach of fiduciary duty. I have found that the withdrawal of 47 town Tenths was in breach of trust and breach of fiduciary duty. Accordingly, an institutional constructive trust arises in relation to the withdrawn Tenths that are now in the hands of the Crown.

[619] This does not, however, apply to the Whakarewa grant to the Bishop in 1853. Even if the plaintiff could prove loss in relation to that claim (contrary to what I have

found), the plaintiff cannot show that there was a breach of a preceding equitable duty which would give rise to an institutional constructive trust. The claim to a proprietary remedy would fail on this ground.[350]

[620] The third category of the plaintiff's proprietary claims requires careful assessment. The plaintiff claims a constructive trust over land held in the Crown's hands within the Spain award boundary in relation to the Tenths shortfall. This includes the Tenths shortfall arising from the alienation of the Tenths. In other words, the plaintiff claims a replacement Tenth from the land held by the Crown and says that this replacement Tenth is to be treated in the same way as the Unallocated Tenths and is subject to an institutional constructive trust.

[621] I agree with the plaintiff insofar as the claim relates to the 400 acres of Tenths which were diminished by virtue of the 1844 exchanges in Te Maatū. This transaction is to be treated in the same way as the Unallocated Tenths. That is because the exchange which led to the loss of 400 acres occurred prior to the date that the fiduciary duty to reserve 15,100 acres of Tenths arose. The Crown could not rely on these 400 acres in meeting the threshold of 15,100 acres. Accordingly, when the Crown obtained the land in 1845 it was required to reserve Tenths to make up the 400-acre shortfall caused by the 1844 exchanges.

[622] However, I do not consider an institutional constructive trust in relation to replacement Tenths otherwise arises. The Crown does not owe any duties to replace alienated Allocated Tenths from the land it obtained following the 1845 Spain award. As earlier explained, the Crown's fiduciary duties in relation to the land obtained by the Crown were discharged once the Allocated Tenth was reserved. Thereafter, the Crown's duty attached to the Allocated Tenth. The Customary Owners' equitable interest vested in the specific Allocated Tenth, and not the land from which it had been reserved.

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350 It seems unlikely that the Crown still holds these alienated Tenths as I understand all Tenths the subject of the grant still in the hands of the Crown were returned to Ngāti Rārua-Ātiawa Iwi Trust under the Ngāti Rārua-Ātiawa Iwi Trust Empowering Act 1993.

[623] Breach of the duty in relation to the Allocated Tenth did not revive the equitable interest which had existed in the land obtained by the Crown, and nor did it revive the Crown's fiduciary duties in relation to those lands. There was no pre-existing duty owed in relation to the land obtained by the Crown which would give rise to an institutional constructive trust. Accordingly, any land ordered to be restored to the trust in replacement of the alienated Tenth would not be declaratory of a pre-existing trust in respect of that land. Rather, it would be remedial only. It is unnecessary to consider whether a remedial trust from the land obtained by the Crown should be ordered in this case, as even if that remedy was established, such a claim would not survive the Limitation Act analysis.[351]

[624] To sum up, the plaintiff's proprietary claim in relation to the Allocated Tenths is limited to land which is held by the Crown pursuant to institutional constructive trusts in relation to:

(a) the loss of 400 acres as a result of the 1844 exchanges in Te Maatū; and

(b) those Allocated Tenths which were withdrawn in the 1847 remodelling, and which have subsequently found their way back into the Crown's hands.

Occupation Lands

[625] The plaintiff seeks the return of Occupation Lands which were not excluded from the land obtained by the Crown.

[626] For the reasons set out above, I do not consider an express trust arose in relation to the Occupation Lands.[352] Accordingly, the question is whether the Occupation Lands are held pursuant to an institutional constructive trust or whether a different form of constructive trust arises to vindicate that proprietary interest.

[627] The Crown says that an institutional constructive trust did not arise after the 1845 Spain award because the Occupation Lands remained in customary ownership at

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351 See below at [836]–[837].
352 See above at [399]–[409].

that time. However, Crown counsel submits that the 1848 Crown grant to the Company, being the grant of an inconsistent legal interest, would have extinguished customary title in these lands. On this basis, counsel accepts that a trust could have arisen over the land which came back into the Crown's hands in 1850 following the Company's collapse.

[628] I do not consider the extinguishment of customary title is relevant to the question of whether an institutional constructive trust arose in relation to the Occupation Lands. The point at which customary title was extinguished establishes when the lands became Crown lands available for grant to the Company and others. While that may be relevant to whether an express trust was formed, it is not relevant to whether an institutional constructive trust arose in relation to the Occupation Lands.

[629] For an institutional constructive trust to arise, I consider it sufficient that there was a pre-existing fiduciary duty to exclude the Occupation Lands from the land obtained by the Crown following the 1845 Spain award. This is consistent with Millett LJ's decision in *Paragon Finance*.[353] It is also consistent with the reasoning of Elias CJ, Arnold and O'Regan JJ in the Supreme Court.[354] Indeed, it is the basis upon which Arnold and O'Regan JJ were able to conclude that the Limitation Act did not bar the claim to the extent it fell within s 21(1)(b).[355]

[630] The failure to exclude the Occupation Lands from the lands obtained by the Crown meant the Crown effectively treated those lands as if they were domain lands of the Crown. Instead of excluding the Occupation Lands from the land it obtained, the Crown used them to meet the Crown's obligations in relation to the Tenths.

[631] That may not seem significant at first glance given the Tenths were to be held for the benefit of the Customary Owners anyway. However, I consider the distinction

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353 See above at [539]–[542]. See also *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 408–409.

354 Supreme Court judgment, above n 8, at [450] per Elias CJ and [815] per Arnold and O'Regan JJ. The former Chief Justice observed that the first category of constructive trust described by Millett LJ in *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) includes "those who put themselves in the position of a trustee and other fiduciaries who, although not strictly speaking trustees, owe equitable duties to the beneficiaries which are 'independent of and preceded' the wrong which gives rise to the liability in the particular case".

355 Supreme Court judgment, above n 8, at [815] per Arnold and O'Regan JJ.

to be important. The Occupation Lands were to remain in customary ownership. When the Crown allocated Tenths over these lands, it took title to the Occupation Lands. The Crown was the legal owner of those lands. I consider that to be an appropriation of the Occupation Lands.

[632] In those circumstances, it would be unconscionable for the Crown to continue to assert ownership in the Occupation Lands, and to deny the proprietary interests of the Customary Owners. Equity recognises the pre-existing fiduciary obligation by imposing a constructive trust in relation to lands obtained in breach of that fiduciary duty. Any Occupation Lands which are now in the hands of the Crown are held pursuant to an institutional constructive trust.

[633] There is another analytical route to get to the same result. This route simply relies on a constructive trust to enforce the Customary Owners' proprietary interest in the Occupation Lands. It is the Customary Owners' subsisting equitable property interest in the Occupation Lands which are now in the hands of the Crown which forms the basis of the claim. The common law analogies for such a claim are actions in conversion, trespass, and money had and received. However, equity allows the direct enforcement of proprietary rights through the means of a constructive trust.[356]

[634] Whether the proprietary claim to the Occupation Lands is conceptualised as an institutional constructive trust, or a constructive trust which directly vindicates the plaintiff's property rights, I consider the net balance of the Occupation Lands are held pursuant to a constructive trust. I find accordingly.

Occupation Reserves

[635] The plaintiff's claim in relation to the Occupation Reserves failed at the duty and breach stages, so no question of proprietary remedies arises.

Occupied Tenths

[636] The plaintiff's proprietary claim in relation to the Occupied Tenths is two-fold. First, the plaintiff says the failure to exclude pā, urupā and cultivations resulted in the

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356 See above at [544].

loss of Occupation Lands. As outlined above, a proprietary claim is sought in relation to the Occupation Lands. Second, the plaintiff says that this failure also resulted in a loss to the Tenths estate. An institutional constructive trust over the land obtained by the Crown following the 1845 Spain award is sought in relation to the replacement Tenths.

[637] The first claim for return of Occupation Lands is addressed in the Occupation Lands section above. An institutional constructive trust arises in relation to those Occupation Lands in the hands of the Crown. The primary question to consider under this section is whether an institutional constructive trust arises in relation to any replacement Tenths to make up the Tenths shortfall. I consider it does for the reasons which now follow.

[638] The fiduciary duties found by the Supreme Court required the Crown to reserve the Tenths from the land obtained by the Crown, and to exclude the Occupation Lands from that same land. Reserving a Tenth over Occupation Land did not discharge either of the duties to reserve and exclude. The Crown's duties in relation to the land it obtained following the Spain award endured.

[639] The failure to reserve the Tenths from the land obtained by the Crown meant the Crown obtained the land from which the re-surveyed Tenth would have been allocated for itself. That land became Crown land and was used by the Crown as if it was free of any equitable interest.

[640] I consider the equitable interest of the Customary Owners endured in that land pending fulfilment of the Crown's fiduciary duty. This means that, like the Unallocated Tenths, the Crown continues to hold the land it obtained following the 1845 Spain award pending fulfilment of its fiduciary duty to reserve 15,100 acres of Tenths from that land. This obligation preceded the Crown's breach. I consider an institutional constructive trust arises over the replacement Tenths. In this sense, the replacement Tenths are to be treated in the same way as the Unallocated Tenths.

[641] Accordingly, replacement Tenths for the Occupied Tenths are held pursuant to an institutional constructive trust for the Customary Owners.

Summary of findings regarding land remedies

[642] In summary, I have concluded that the **Unallocated Tenths** are held pursuant to an express or institutional constructive trust. There is sufficient certainty of subject matter for such a trust to arise.

[643] The claim to a proprietary remedy in relation to the **Allocated Tenths** is limited to the loss of 400 acres as a result of the 1844 exchanges in Te Maatū; and those Tenths which were withdrawn in the 1847 remodelling and which have subsequently found their way back into the Crown's hands.

[644] A constructive trust arises over the **Occupation Lands** held in the hands of the Crown.

[645] No remedies issues arise in relation to the **Occupation Reserves** as the plaintiff's claims in relation to that category of land do not survive the duty and breach analyses.

[646] As for the **Occupied Tenths,** the Occupation Lands underpinning the Occupied Tenths are held pursuant to a constructive trust as set out above. The replacement Tenths are also held pursuant to an institutional constructive trust.

[647] Finally, as noted earlier, further submissions are required as to the exact acreage the subject of proprietary remedies. That is because some land has already been returned to the plaintiff and those he represents, and this needs to be taken into account in framing the final form of relief.

PART VII—EQUITABLE COMPENSATION

[648] In addition to the return of land, the plaintiff seeks an award of equitable compensation. Equitable compensation is a monetary award for breaches of equitable obligations which seek to "make good" any loss resulting from those breaches.[357]

[649] There are two categories of equitable compensation sought in this case:

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[357] *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [32] per Elias CJ.

(a) **Value of the land**. To the extent there remains a shortfall after the return of land, the plaintiff seeks compensation based on the current market value of that shortfall.

(b) **Value of lost opportunity to benefit from the land**. The plaintiff claims equitable compensation for the lost opportunity to benefit from the Tenths and the Occupation Lands.[358]

[650] My findings on loss mean that the claim for equitable compensation in relation to the Occupation Lands is limited to the first of these two categories, the value of the land.

[651] A key issue of dispute between the plaintiff and the Crown concerns the measure by which the second category, value of the lost opportunity to benefit from the land, is assessed.

[652] The plaintiff's expert, Dr Meade, used a measure which focused on compensating the beneficiaries.[359] That is, his assessment was based on "the economic position … that the Customary Owners would have enjoyed as at July 2022 had the Crown's Fiduciary Duties in relation to the Tenths Shortfall and the Occupation Lands been properly discharged". The steps in the counterfactual assumed by Dr Meade to measure loss on that basis are summarised in the diagram below:

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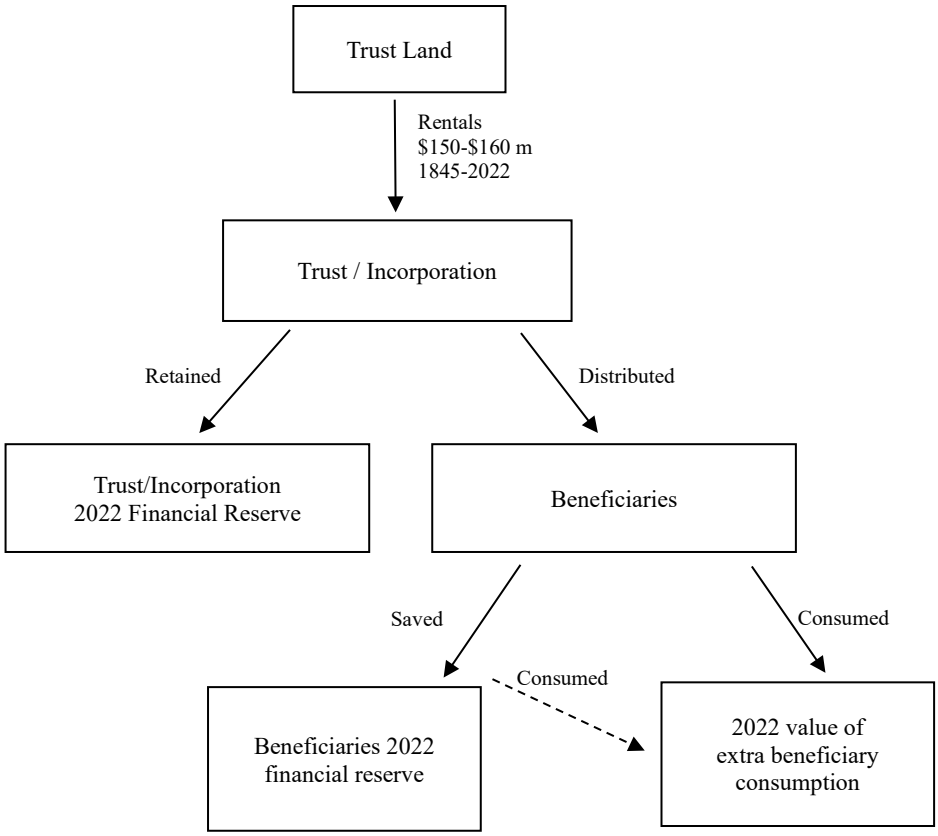
358 These were called "usage losses" by counsel for the plaintiff.

359 Dr Meade's assessment also included an "ex gratia" payment, a sum for cultural loss, and a deduction for the Treaty settlement reached with the Crown. These aspects of his assessment are addressed elsewhere in this judgment.



[653] To explain each of these steps:

(a) First, rentals on the additional land which would have been held in trust had the Crown discharged its duty are calculated.

(b) Second, trust operation and administration costs/commissions and land/income taxes are deducted to determine a net rental income figure.

(c) Third, some of the net rental income is saved, and some is distributed to beneficiaries. The saved rental income and any interest earned and saved on that balance is reported as the Trust/Incorporation 2021 Financial Reserve.

(d) Fourth, the distributions to the beneficiaries are either saved or consumed. Those that are saved are reported as the Beneficiaries 2022 Financial Reserve. Those that are consumed are reported as the 2022 value of extra beneficiary consumption.

[654] Dr Meade applied simple interest on an annual basis to the saved funds (at both the trust and beneficiary levels). That process was repeated year after year up to 2022. For example, at the trust level, simple interest was applied to the net rentals saved each year, with the accumulated trust financial balance carried forward into the following year. As Dr Meade explained, the effect is to compound the (partially) reinvested portion of the earlier period interest over time. In other words, Dr Meade's calculations include income derived from the income earned from the rentals. This process was repeated for the beneficiaries' consumption losses.

[655] The Crown says that equitable compensation should be assessed on the basis that the trust is restored, rather than the beneficiaries compensated. Accordingly, the Crown says that equitable compensation should be assessed by calculating a rental figure and applying simple, rather than compounding, interest.

[656] At the heart of this contest is a question about the appropriate measure of equitable compensation—is it restoration of the trust fund or compensation of the beneficiaries? Related issues are raised about the recovery of consequential loss, and the application of common law concepts of causation, remoteness and foreseeability in the assessment of equitable compensation.

[657] Determining the correct measure of equitable compensation goes some way to answering whether simple or compounding interest should be applied in this case. However, this is a discrete issue of law which requires determination whether a restorative or compensatory measure is adopted. Accordingly, it is discussed separately in this part.

[658] Finally, to round out these issues, the correct counterfactual for the assessment of equitable compensation is determined. This includes deciding between the alternative counterfactuals presented by Dr Meade: the positive and normative counterfactuals. The positive counterfactual is based on what actually happened. The normative counterfactual uses assumptions based on what Dr Meade considered should happen if the Crown had been acting in compliance with its fiduciary duties. The differences between the two counterfactuals account for the range of $4.4 billion

to $6 billion sought by the plaintiff, the lesser figure being derived from the positive counterfactual.

[659] After considering the correct counterfactual, I then turn to consider the measure of equitable compensation for each category of land.

[660] The measure by which equitable compensation is to be assessed, and the recovery for consequential losses, are significant topics which are the subject of debate in case law and commentary in various jurisdictions. This judgment is not the occasion to undertake a deep dive into all aspects of that debate. Nevertheless, it is necessary to canvass some of the key principles in detail to set the relevant framework for the assessment of equitable compensation in relation to each category of land. The consideration of those principles follows below.

Restoring the trust or compensating the beneficiaries?

Relevant legal principles

[661] The measure of equitable damages is often described as restoring the plaintiff to the position that the plaintiff would have been in but for the breach.[360] However, as I explain below, the actual measure will depend on the scope of the equitable duty, the nature of the breach, the type of harm suffered, and the policy factors engaged in the case.

[662] In *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, Tipping J identified three types of cases which invite different remedial responses:[361]

(a) **Breach of trust**. Breaches of duty leading directly to loss of trust property. The remedy requires the defaulting trustee to restore the trust either in specie or value. Questions of foreseeability and remoteness do not apply.[362]

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360 Geoff McLay "Equitable Damages" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 911 at 916.

361 *Bank of New Zealand Ltd v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

362 At 687. This is the basic rule set out in *Re Dawson (deceased)* [1966] NSWLR 211 (SC).

(b) **Breach of fiduciary duty**. Breaches involving an element of infidelity or disloyalty engaging the conscience of the fiduciary ("true" breaches of fiduciary duty). The plaintiff is able to recover its losses unless the defendant fiduciary shows that the loss or damage would have occurred in any event. Questions of foreseeability and remoteness do not arise.[363]

(c) **Breach of duty of skill and care**. Breaches involving a lack of appropriate skill and care. In these cases, the law may require "a sufficient causal nexus and foreseeability or reasonable contemplation of loss or damage" as it would if the cause of action was in contract or in tort.[364]

[663] Taking the first of these three categories, the obligation of a defaulting trustee is to restore the trust assets either in specie or by value. As Street J explained in *Re Dawson (deceased)*, the obligation to restore the trust assets is "of a more absolute nature than the common law obligation to pay damages for tort or breach of contract".[365] Policy reasons dictate that stringent approach. The policy of the law is "to deter breaches of trust and confidence by those in a position to take advantage of the vulnerable by using powers to be exercised solely for their benefit".[366]

[664] The strict approach to causation means that where monetary compensation is to be paid in lieu of restoring assets, it is to be assessed by reference to the value of the assets at the date of restoration and not at the date of breach. That is not disputed in this case where both parties' valuers have approached the valuation exercise according to current market values.

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363 At 687 per Tipping J dissenting, citing *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA). This represents a relaxation of the rule in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC), espoused by Lord Thankerston at 469, in which fiduciary defendants were precluded from arguing that even if a plaintiff had been correctly or independently advised the plaintiff would have pursued the same course and the loss would have arisen anyway. That claim is not pursued in this case and so the law is not canvassed in any detail. The rule does, however, reflect the traditionally strict approach taken to causation in fiduciary duty cases. For more on this rule and its relaxation see Geoff McLay "Equitable Damages" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 911 at 933–941.

364 At 688 per Tipping J dissenting.

365 *Re Dawson (deceased)* [1966] NSWLR 211 (SC) at 216.

366 *Bank of New Zealand Ltd v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 681 per Richardson P, Gault, Henry and Blanchard JJ.

[665] The assessment of compensation on a restorative basis mirrors the remedy of account for breach of trust. Compensation is measured by reference to what the trust has lost. That is so even when the trust is no longer subsisting, and payment is made directly to the beneficiaries. Accordingly, while equitable compensation for breach of trust is sometimes expressed as compensating the loss sustained by the beneficiaries or the plaintiff, the measure of restoring the trust remains the same.[367] In *AIB Group (UK) plc v Mark Redler & Co Solicitors*, Lord Reed SCJ explained it in these terms:[368]

> A breach of trust involving the misapplication of trust property can be remedied by means of proceedings designed to secure the performance of the trust. Such proceedings can include the drawing up of an account as a preliminary to the distribution of the trust fund. If property has been misapplied, the relevant entry in the account will be disallowed and the property must be restored by the trustee. If the property cannot be restored in specie, the trustee must restore the trust fund to the position it would have been in but for the breach, by paying into the fund sufficient pecuniary compensation to meet that objective. The compensation then forms part of the trust fund and is held on the same terms as the remainder of the fund. Alternatively, and more commonly in practice, proceedings may be brought directly for such a monetary remedy.
>
> As I shall explain, another remedy can be sought where the trust is no longer subsisting, namely the payment of compensation directly to the beneficiary absolutely entitled to the trust fund. The liability, in that situation, is to compensate the beneficiary for the diminution in the value of the trust fund which was caused by the breach of trust, to the extent of the beneficiary's interest. The measure of compensation is therefore the same as would be payable on an accounting, although the procedure is different.

[666] A requirement that the defaulting trustee restore the trust ensures there is a complete trust fund from which distributions may be made. In *Target Holdings v Redferns*, Lord Browne-Wilkinson explained that the obligation to reconstitute the trust fund typically reflects the fact that no one beneficiary is entitled to the trust property and there is a need to compensate all beneficiaries for the breach.[369] In this

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367 Paul S Davies "Compensatory Remedies for Breach of Trust" (2016) 2 CJCCL 65 at 89, Paul Davies suggests that the plaintiff/beneficiary focused language in cases such as *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA); *Target Holdings v Redferns* [1996] 1 AC 421 (HL); and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 could lead to a focus on a particular beneficiary's loss, including consequential losses in the assessment of compensation for breach of trust. However, he suggests that the view expressed by Lord Reed SCJ in *AIB Group (UK) plc v Mark Redler & Co Solicitors* tends to indicate that the focus should still be a loss suffered by the trust fund. I agree.

368 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 at [90]-[91] per Lord Reed SCJ.

369 *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) at 436 per Lord Browne-Wilkinson.

sense, restoring the trust restores to the beneficiaries that which they have lost due to the breach.

[667] The rationale for a restorative approach may also be explained by reference to the nature of the trustee's duties. Professor Worthington explains that "[t]he trustee's obligations relate exclusively to custody and management of the pot of trust assets".[370] Accordingly, "[p]erformance of trustee obligations, or remedies for failure to perform, *never* look to the personal circumstances of the beneficiary or to making the beneficiary 'whole'".[371] Rather they are "directed solely to ensuring that the trust pot is kept in the state it ought to be in, or returned to that state if there has been any slippage".[372] Reviewing articles by Len Sealy in the 1960s, Professor Worthington put it this way:[373]

> Even at this early stage, Sealy described [equitable compensation] as compensation for loss, but loss assessed against the counterfactual of proper performance, where the detail of the particular prescriptive performance duty required of the fiduciary is therefore crucial, and the remedy is then directed at repairing the loss to the *assets* under the fiduciary's control; it is not common law damages directed at repairing any harm to the *claimant* herself and any consequential loss she may have suffered.

[668] On the application of these principles, if the plaintiff's case is characterised as a breach of trust case, then the appropriate measure of compensation should be based on restoration of the trust rather than compensation of the beneficiaries. However, a restorative measure does not provide guidance on whether consequential losses will also be recovered for breach of trust. It has been suggested that under the accounting mechanism, equitable compensation for breach of trust cannot extend to consequential losses.[374]

[669] Consequential losses may be more readily recovered in breach of fiduciary duty cases (the second of the three categories identified by Tipping J).[375] Recovery is either justified by applying common law concepts of causation such as foreseeability

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370 Sarah Worthington "Four Questions on Fiduciaries" (2016) 2 CJCCL 723 at 761.
371 At 761 (emphasis in original).
372 At 761.
373 Sarah Worthington "Fiduciaries Then and Now" (2021) 80 CLJ 154 at 176 (emphasis in original and footnote omitted).
374 Jamie Glister "Breach of trust and consequential loss" (2014) 8 J Eq 235 at 238.
375 See above at [662]; and *Bank of New Zealand Ltd v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 687 per Tipping J dissenting.

and remoteness, or by reference to the principles of equity. The former was adopted by La Forest J in *Canson Enterprises Ltd v Boughton & Co*.[376] The latter was followed by McLachlin J in the same case. McLachlin J summarised her approach as follows:[377]

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.

[670] McLachlin J's approach has been cited with approval in various commonwealth jurisdictions, including New Zealand.[378] Her Honour's approach emphasises the restorative and restitutionary nature of equitable compensation, and the strict approach to causation. However, even on this strict approach, liability is not unlimited. Only those losses which, on a "commonsense" view of causation, were caused by the breach, are recoverable by way of equitable compensation.

[671] Just what constitutes a "commonsense view of causation" is difficult to discern in cases involving breach of equitable obligations.[379] Steven Elliott KC draws a distinction between "substitutive" and "reparative" compensation.[380] Substitutive

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376 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534.

377 At 556.

378 See review in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 at [122]–[133]. See also *Bank of New Zealand Ltd v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 680 per Richardson P, Gault, Henry and Blanchard JJ.

379 Lord Reed SCJ commented on a "commonsense view" of causation in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 at [95], noting that, in context, the statement served to emphasise that principles of causation developed in other contexts cannot be applied automatically in an equitable setting. He went on to observe: "[d]ifficult questions of causation do not however always have an intuitively obvious answer. Legal analysis is as important in equity as in the common law".

380 See Steven Elliott "Compensation Claims Against Trustees" (DPhil Thesis, University of Oxford, 2002). See also James Edelman "Equitable Damages" in Ben McFarlane and Steven Elliott *Equity Today: 150 years after the Judicature Reforms* (Hart Publishing, Oxford, 2023) 147 at 161.

compensation seeks to replace what is lost; reparative compensation seeks to compensate for harm done.[381] Mr Elliot suggests that reparative compensation should follow common law principles relating to consequential loss, so that foreseeability and remoteness will be relevant in that context.

[672] New Zealand courts have tended to approach questions of causation and consequential loss by focusing on the fusion of law and equity, and a single law of remedies. Indeed, La Forest J's approach in *Canson* drew on decisions of Cooke P in a series of New Zealand cases in which he observed that the restorative measure used in equity, and the compensatory measure used in the common law, was, in many cases, a "difference without a distinction".[382]

[673] More recent cases of the Supreme Court have focused on relevant policy objectives in determining the correct measure of damages. In *Premium Real Estate v Stevens*, Tipping J said that whether a real estate agent's commission should be refunded as restorative damages in addition to compensatory damages did not involve a question of election:[383]

> To the extent the court allows both forms of damages the remedies are cumulative, not alternative. Whether the court should allow both remedies depends to a significant extent on the policy which lies behind the granting of each. The policy which lies behind compensatory damages is simple. It is to compensate for loss caused by civil wrongs. The policy behind restorative damages is more complex. In present circumstances it includes the importance, in appropriate cases, of reinforcing fiduciary obligations by removing from the defaulting fiduciary a sum paid pursuant to a contract which has not been faithfully performed. The primary purpose, in the present context, of restorative damages, when awarded in addition to compensatory damages, is to deter fiduciary breaches and to express the court's disapproval, by requiring the defaulting fiduciary to restore the value transferred but not earned, as well as compensating for the loss caused.

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381 *Agricultural Management Ltd v Jackson (No 2)* [2014] WASC 102, (2014) 48 WAR 1 at [349]. See also Steven Ballantyne Elliott "Compensation Claims Against Trustees" (DPhil Thesis, University of Oxford, 2002) at 53–54.

382 *Canson Enterprises Ltd v Boughton* & Co [1991] 3 SCR 534 at 577–584 citing *Day v Mead* [1987] 2 NZLR 443 (CA) at 450–451. See also *Aquaculture Corp v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) at 301.

383 *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [107] per Tipping J.

Application to this case

[674] Applying those principles to this case, I consider the appropriate measure is essentially restorative or restitutionary in nature. An award of compensation is measured according to the sum required to restore the trust to the position it would have been in but for the breach. The measure is not what is required to compensate the beneficiaries for their personal losses.

[675] A focus on the loss to the trust fund, rather than the loss to the beneficiaries, reflects the nature of the duties at issue in this case. Those duties relate to trust property—the failure to get in the trust assets by reserving and excluding them and the failure to preserve those trust assets once reserved. The claim does not concern the Crown's administration of the trust, obligations relating to distributions, or the personal interests of the beneficiaries.

[676] A restorative measure which focuses on the trust assets captures the essence of the loss suffered by the beneficiaries when trust assets are dissipated. The position can be best explained by reference to a discretionary trust. Beneficiaries of such a trust do not have an absolute entitlement to the trust property. All they have is a mere expectation that the trustees will exercise their discretion to make a distribution to the beneficiaries. Dissipation of trust property does not alter that expectation or give the beneficiaries rights to the trust property that those beneficiaries did not have prior to the breach. The beneficiaries cannot say that "but for" the breach of trust, they would have received a distribution. Dissipation of trust assets does not cause a loss to the beneficiaries; it only causes a loss to the trust estate.

[677] This does not afford the Crown an escape route from the strict approach to causation. Requiring the Crown to restore the trust is already a stringent application of causation principles. Where the trust asset cannot be restored in specie, then the value of that asset must be paid in monetary form. Value is determined at the date of restoration (effectively the date of trial) rather than the date of breach. No adjustment is made for contingencies which may have affected the Crown's duties or the value of the lost asset over time. The duty to restore that which was lost as a result of the Crown's breach is strictly enforced.

[678] Requiring the Crown to compensate the beneficiaries in addition goes further than is required to vindicate the breach in this case, and risks penalising the Crown. In *Canson*, McLachlin J said that "it is essential that the losses made good are only those which, on a commonsense view of causation were caused by the breach".[384] Similarly, in *Premium Real Estate Ltd*, Elias CJ confirmed that equitable compensation must be causally connected with the breach "and no more than is necessary to make good the loss, or its effect will be as penalty rather than compensation".[385] These cases suggest that causation in the context of equitable compensation may be a long lane, but it is necessary to stay in it, and it is not never-ending.

[679] As I have already observed, I consider the duties in this case relate to trust property as opposed to the administration of the Trust or the distribution to beneficiaries. Accordingly, I do not consider the losses sustained by the beneficiaries are causally connected (or at least, sufficiently causally connected) to the breach of the fiduciary duties engaged in this case. To use common law concepts to analyse the loss, I consider the beneficiaries' lost opportunities to consume, invest, and save are too remote from the breach of fiduciary duties to reserve trust assets and to preserve them once reserved.

[680] That does not mean that all consequential losses are irrecoverable. A blanket rule which prohibits recovery of consequential losses for breach of trust cases would not serve equity's purpose. Moreover, there is no reason in principle for allowing claims for consequential losses in breach of fiduciary cases but disallowing them for breach of trust—particularly when the breach of trust involves a breach of fiduciary duty as in this case. Whether consequential losses will be recoverable will turn on the application of causation principles (whether expressed as a commonsense view of

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384 *Canson Enterprises Ltd v Boughton* & Co [1991] 3 SCR 534 at 556.
385 *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [32] per Elias CJ.

causation or by reference to common law concepts), coupled with relevant policy objectives.[386]

[681] I consider the rental calculation is best conceptualised as the benefit-generating value of the trust assets that were lost. As noted earlier both Arnold and O'Regan JJ considered there were two dimensions to the promised consideration: the initial allocation of the Tenths; and their subsequent administration for the benefit of the Customary Owners.[387]

[682] But even if the rentals are conceptualised as a consequential loss, then they would still be recoverable in this case. That is because the lost rentals are a loss suffered by the trust, rather than a personal loss suffered by the beneficiaries. An award which compensates for this head of loss is accordingly consistent with the restorative measure for breach of trust. This head of loss is also causally linked with the loss of trust assets as those trust assets were to be used to generate an income or other benefits for the Customary Owners. In this sense, it cannot be said that the losses are too remote from the failure to get in the trust assets or to preserve them. Subject to considerations particular to each category of land, I consider this head of loss is recoverable.

[683] As to policy objectives, I have carefully considered whether the special relationship between the Crown and Māori requires a measure which compensates the beneficiaries in this case. The special relationship between the State and indigenous peoples is a feature of the Canadian jurisprudence on the assessment of equitable compensation for breaches in relation to indigenous property rights. In *Southwind v Canada*, the Supreme Court of Canada undertook a comprehensive review of relevant principles and summarised the approach as follows:[388]

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386 I am not sure that there is a clear difference between a "commonsense" view of causation and foreseeability and remoteness concepts. Professor Geoff McLay notes that judges have begun to prefer the view of commentators such as Hart and Honore that the role of causation is less one of scientific determination and one more properly speaking of judicial policy which determines the kinds of loss that a defendant can be held to be responsible for: see Geoff McLay "Equitable Damages" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 911 at 928. It seems to me that this is a more accurate reflection of what is going on when judges speak of causation and causal links.

387 See above at [515]. See also Supreme Court judgment, above n 8, at [785] per Arnold and O'Regan JJ.

388 *Southwind v Canada* 2021 SCC 28, [2021] 2 SCR 450.

> [83] In summary, equitable compensation deters wrongful conduct by fiduciaries in order to enforce the relationship at the heart of the fiduciary duty. It restores the opportunity that the plaintiff lost as a result of the fiduciary's breach. The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations undertaken by the fiduciary. The loss must be caused in fact by the fiduciary's breach, but the causation analysis will not import foreseeability into breaches of the Crown's fiduciary duty towards Indigenous Peoples. Equitable presumptions—including most favourable use—apply to the assessment of the loss. The most favourable use must be realistic. The trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial and the importance of the relationship between the Crown and Indigenous Peoples.

[684] I do not interpret the above passage to suggest that a different measure (compensating the beneficiaries rather than restoring the trust) will apply in cases involving indigenous peoples. The basic measure remains the same—restoration of the opportunity lost as a result of the fiduciary's breach. The decision in *Southwind* concerned breach of obligations in relation to reserve land which was flooded when water levels were raised as part of a hydroelectricity project. The measure of equitable compensation in that case was the value of the flooded reserve land. That was determined on the basis of a hypothetical negotiated surrender of land by the Stoney Indian Band which would have included the value of the land as part of the hydroelectricity project. The measure was not the lost opportunities of the Stoney Indian Band to benefit from that higher value.

[685] Moreover, as stated at the outset of this judgment, the parameters of this case must be kept firmly in mind. This is not a case for breach of the Crown's political duties or breach of the Treaty of Waitangi. Rather, the duties at issue in this proceeding are akin to private law fiduciary duties and it is that relationship which is the focus when considering relevant policy objectives. Care must be taken to ensure this essentially private law claim does not morph into a public law claim. That is not the claim the Supreme Court referred back to this Court to determine. To adopt a measure of loss which compensates the beneficiaries rather than restores the trust risks just that.

[686] Finally, a measure of loss which focuses on the land and the value of the land appears to be consistent with the plaintiff's submission that tikanga requires priority to be placed on returning land to the Customary Owners due to the centrality of land to Māori identity. This case is not about money and lost funds. It is about land and

the restoration of that land to the Customary Owners. In this instance, equitable principles and tikanga appear to be aligned.

[687] It follows that I consider the correct measure of equitable compensation in this case is that which is required to restore the trust rather than compensate the beneficiaries.

Simple or compound interest?

[688] As noted above, the counterfactual adopted by Dr Meade included, in effect, compounding interest. Much of the dispute between the respective experts concerned whether it was appropriate to apply compound interest to the beneficiaries' lost opportunities to consume. Because I have found that the correct measure is to restore the trust rather than compensate the beneficiaries, it is unnecessary to engage with that debate. Nevertheless, it is still necessary to consider whether compound interest should be applied to the assessed rental sum.

[689] Turning to the relevant legal principles, there is no dispute that there is jurisdiction in equity to award compound interest. Circumstances in which an award has been made include claims:

(a) involving a breach of trust to accumulate income;[389]

(b) to recoup an improper profit whether presumed or actual;[390]

(c) where a trustee has used trust funds in their own business or trade;[391] and

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389 Pauline Ridge "Pre-judgment compound interest" (2010) 126 LQR 279 at 297; Lynton Tucker Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet and Maxwell, London, 2020) at 692–693; and Paul Matthews and others *Underhill and Hayton: Law of Trusts and Trustees* (20th ed, LexisNexis, London, 2022) at 1180.

390 Pauline Ridge "Pre-judgment compound interest" (2010) 126 LQR 279 at 297–298.

391 *National Bank of New Zealand Ltd v Development Finance Corporation of New Zealand* [1990] 3 NZLR 257 (CA) at 263 cited with approval in *General Communications Ltd v Development Finance Corporation of New Zealand Ltd* [1990] 3 NZLR 406 (HC) at 436.

(d) involving fraud or misconduct. However, fraud or misconduct may not be enough to justify an award of compounding interest, and the Courts are clear that compound interest is not awarded to punish a miscreant fiduciary.[392]

[690] The basis for the Court's jurisdiction to award compound interest has been described as ensuring that a fiduciary does not benefit from wrongdoing. As the English Court of Appeal has recently confirmed:[393]

> … the purpose of the restitutionary equitable jurisdiction to award compound interest is to ensure that a fiduciary (or a fraudulent wrongdoer) does not benefit from his wrongdoing. Compound interest is intended to restore to the claimant not only the property which has been misapplied, but also the profits which have been, ought to have been, or can fairly be presumed to have been, earned from the wrongdoer's use of the claimant's property during the period in which it was taken from him. Compound interest is not awarded just because the defendant has behaved badly, or even fraudulently.

[691] In *Whitefish Lake Band of Indians v Canada (Attorney-General)*, the Court of Appeal for Ontario held that an award of compound interest did not require the fiduciary (the Crown in that case) to have profited from the breach or intentionally conducted itself wrongfully.[394] The Court said that an award of equitable compensation may include compound interest if that is what is required to restore the claimant to the position it would have been in had the Crown fulfilled its duty.[395]

[692] In *Prudential Assurance Co Ltd v Revenue and Customs Commissioners*, the United Kingdom Supreme Court considered a claim for unjust enrichment for money paid under a mistake.[396] The Supreme Court overturned an earlier House of Lords decision which had allowed a claim for compound interest in similar circumstances.[397] The Supreme Court found that there had not been a transfer of value comprising the

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392 *Equiticorp Industries Group Ltd (in stat man) v The Crown (no 3) (Judgment no 51)* [1996] 3 NZLR 690 (HC) at 696. See also *Everett-Hincks v Bracken* [2018] NZHC 3258 at [24] for the principle that compound interest is not imposed for the purposes of punishment but where justice so demands.

393 *Granville Technology Group Ltd (in liq) v LG Display Co Ltd* [2023] EWCA Civ 980, [2024] 2 All ER 819 at [56].

394 *Whitefish Lake Band of Indians v Canada (Attorney-General)* (2007) 87 OR (3d) 321 (ONCA).

395 At [48].

396 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2019] AC 929.

397 At [79] citing *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561.

opportunity to use money which should be reversed by the payment of compound interest. Simple interest was awarded in that case.[398] However, the decision of the House of Lords confirming that a claim of compound interest was available as damages or compensation where it was the measure of loss foreseeably suffered by the claimant from the loss of use of funds was affirmed.[399]

[693] The United Kingdom Supreme Court considered the United Kingdom Law Commission's Report on pre-judgment interest on debts and damages, observing that policy reasons made it unwise to introduce an absolute right to compound interest in restitution.[400] Those policy reasons included the fact that compound interest "increased in an exponential rather than linear way, especially during periods of high inflation" and is capable of causing considerable disruption to public finance.[401] The Court noted that this was particularly so when a limitation period could mean that claims for restitution can go back in principle for a period of several decades, with resultant claims "potentially enormous".[402] The Crown submits that the same policy considerations are engaged here.

[694] The survey of these cases confirm that awards of compound interest may be made as part of an award of equitable compensation. Compound interest is not awarded mechanistically but is part of the overall assessment of what is required to restore the trust to the position it would have been in but for the breach. This accords with the approach taken by New Zealand Courts to the assessment of equitable compensation as outlined above. Therefore, whether compound interest should be awarded will turn on the same principles which apply to the assessment of equitable compensation generally.

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398 At [68]–[73], [77] and [79].

399 At [44] citing *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561. See also *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590, [2008] 3 NZLR 31 at [49] in which the Court of Appeal confirmed that compound interest could be awarded for a breach of contract provided the plaintiff satisfied the normal remoteness test in *Hadley v Baxendale* (1854) 9 Exch 341, (1854) 156 ER 145. That loss needed to be pleaded and proved.

400 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2019] AC 929 at [53] referring to United Kingdom Law Commission *Pre-judgment Interest on Debts and Damages* (UKLC 287, 2004).

401 At [53] and [65].

402 At [65].

[695] There is a note of caution in relation to an award of equitable compensation which includes compound interest in addition to other equitable remedies. Care must be taken to ensure that the application of compound interest does not result in double counting. That is because equitable remedies are already fashioned according to strict concepts of causation reflecting relevant policy objectives (such as deterrence). An additional equitable remedy which includes compound interest risks overcompensating the beneficiary and penalising the trustee or fiduciary.[403]

[696] Turning to this case, I am not persuaded that compound interest is required to restore to the trust that which was lost as a result of the Crown's breach. This case is *not* about the Crown's duty as trustee to manage trust assets in the best interests of the beneficiaries. Nor is it about the Crown's duty to accumulate trust income, or to engage in a proper investment strategy. This is *not* a case where the Crown has had the use of rental proceeds or even where it is presumed to have had use of those rental proceeds. This is *not* a case about the misapplication of trust funds.

[697] This case is about land, and the opportunity to benefit from that land. The Tenths are the trust assets which are the subject of this claim. Other forms of trust assets, such as the income that may have been earned on the rental income, are not part of this claim. A claim for compound interest is too remote from the loss caused by the Crown's breach. To include compound interest in a counterfactual to assess loss risks expanding the claim well beyond the four corners of this proceeding and goes further than what is required to restore the loss.

[698] As a matter of principle, I do not consider an award of simple interest in this case to be at odds with the Canadian approach to compound interest in similar claims by indigenous peoples. Each case turns on its own facts, and the nature of the duty,

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403 See Jamie Glister "Breach of trust and consequential loss" (2014) 8 J Eq 235 at 242. This article suggests it would not be appropriate to "surcharge an account by reference to the proper value at judgment while also awarding compound interest since breach". That is because both compound interest and the surcharge would be directed to remedying the same loss. The Crown did not contend that the combination of current market value of the land and compound interest in an award of equitable compensation for the lost benefits of that land would result in double counting in this case. I do not consider it necessary to consider this issue further given my view that an award of compound interest is not required.

breach and loss consequently suffered are all relevant to the assessment of equitable compensation and whether compound interest should be awarded.

[699] To that end, it is relevant to bear in mind that the legal landscape in Canada is not identical to our own. While it is true that the duties owed in *Guerin* informed the Supreme Court's conclusions around the duties owed in this case, the fiduciary duties owed by Canada to indigenous peoples are not the same as the fiduciary duties owed in this case.[404]

[700] Moreover, there is a difference in the nature of the claims which affects the assessment of loss. For example, the claim in *Whitefish* was concerned with sale proceeds from the timber rights which were sold for $316, instead of $31,600.[405] The loss to the Indian Band included the lost opportunity to benefit from the additional sale proceeds.[406] By comparison, this case does not include the lost opportunity to benefit from sale proceeds or even the rental income. It concerns the lost opportunity to benefit from the land. Rental proceeds are a proxy for the value of that lost benefit. The claimed compound interest in this case is one step removed again from the claim assessed in *Whitefish*.

[701] To sum up, I am not persuaded that compound interest is required to restore the trust in this case. The Crown concedes that simple interest must be paid. However, I was not directed to the evidence regarding the interest rates and periods that should apply, and there were no submissions on the quantum of simple interest claimed. I require further submissions on the application and calculation of simple interest and my decision on this issue is reserved pending receipt of those submissions.

Relevant counterfactual

[702] My findings that the correct measure is restoration of the trust, and that compound interest should not be applied, fixes the key parameters of the relevant counterfactual for assessing equitable compensation.

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404 See *Guerin v The Queen* [1984] 2 SCR 335. See also Supreme Court judgment, above n 8, at [344] per Elias CJ.

405 See *Whitefish Lake Band of Indians v Canada (Attorney-General)* (2007) 87 OR (3d) 321 (ONCA) at [2]–[4].

406 At [52].

[703] For the sake of clarity, I confirm that a counterfactual based on how rentals from the land would have been administered by the trust (including the deduction of administration fees and tax and applicable savings rates) goes further than required to assess compensation in this case. The focus is on the value of the trust asset, rather than the operation of a hypothetical trust.

[704] Moreover, to the extent that it remains relevant, I confirm that figures derived from Dr Meade's positive counterfactual rather than his normative counterfactual are to be adopted. That is because the positive counterfactual most closely follows what actually occurred, whereas the normative counterfactual adopts assumptions based on Dr Meade's opinion of how a fiduciary should act.

[705] Accordingly, equitable compensation will comprise the current market value of the land, plus the rentals from that land with the question of simple interest reserved. The application of that measure to each category of land is considered next.

Unallocated Tenths

[706] I have found that the failure to reserve the Unallocated Tenths was a breach of the fiduciary duty to reserve 15,100 acres of Tenths. I have also found an institutional constructive trust arose over 10,000 acres (or less) of land held by the Crown within the Spain award boundary.

[707] To the extent there is a shortfall in the 10,000 acres held on trust, then the plaintiff is entitled to the current market value of that land. Such an award compensates for land that can no longer be returned. The real issue is whether restoration of the trust fund requires an award of equitable compensation to compensate for the lost opportunity to benefit from the Unallocated Tenths.

[708] There are arguments against making such an award. For example, it may be argued that the return of land (or the value of the land) restores the trust in full for losses sustained due to the failure to reserve. Strictly construed, the loss which flows from the failure to reserve (as opposed to the duty to manage) is the loss of land. Restoring the land to the trust could be seen as remedying the breach in full.

[709] Relatedly, it may be argued that the proprietary remedy is sufficient to unwind the advantage obtained by the Crown by virtue of its breach. The effect of the proprietary remedy is that the Crown is unable to continue to treat the land it obtained following the 1845 Spain award as if it was its own. The position having been restored, equity no longer has any work to do, and an additional award of equitable compensation is not required.

[710] I am not swayed by these arguments. I consider a proprietary remedy, without more, does not fully restore to the trust that which was lost from the breach. The value of the Tenths was not just in the land, but in the intended beneficial use of that land. This beneficial use comprised the consideration for the purchase of the Customary Owners' land. The failure to reserve the Tenths meant that the Customary Owners were deprived of both the land and its intended benefits. The proprietary remedy restores the former, but an award of equitable compensation is required to restore the latter.

[711] Moreover, an unduly narrow approach to the duty and assessment of breach risks undermining the policy objectives of the law in this area. While a return of land reverses the Crown's advantage in obtaining the land, it does not reverse the advantages in using that land as if it was its own, or the value of that benefit which was converted by the Crown. In this sense, a proprietary award does not fulfil the objective of deterrence. Equitable compensation is required in addition to the proprietary remedy to properly vindicate the breach.

[712] For these reasons, I allow the plaintiff's claim for the value of any shortfall in the 10,000 acres held on trust for the Customary Owners. I also allow the claim for lost rentals to compensate for the lost opportunity to benefit from the 10,000 acres of rural Tenths.

Allocated Tenths

[713] The plaintiff's claim for equitable compensation also extends to the lost benefit associated with the alienated Tenths. I have found breach of fiduciary duty resulting in the loss of land in relation to two transactions: the 1844 exchange resulting in a loss of 400 acres; and the withdrawal of 47 town Tenths sections in 1847.

[714] The same considerations which apply to the Unallocated Tenths apply to the 1844 exchanges and the withdrawal of 47 town Tenths sections in 1847. Restoring the trust involves restoring the land lost to the Trust (or the value of that land), and an award of equitable compensation to restore the lost opportunity to benefit from this land.

[715] While I found a breach of trust established in relation to the Whakarewa grant in 1853, there was insufficient evidence to prove breach of fiduciary duty. Loss was not proved in relation to this transaction either. Therefore, questions of equitable compensation in respect of this transaction do not arise.

Occupation Lands

[716] I have found that the plaintiff has a proprietary remedy in relation to the net balance of the Occupation Lands. However, because I have found that those Occupation Lands were occupied at the relevant time, the plaintiff has not established its claim for the lost opportunity to benefit from those lands. The claim for lost rental does not arise. However, to the extent the Crown no longer owns the net balance of the Occupation Lands, then the claim for the current market value of this land is allowed.

Occupation Reserves

[717] The plaintiff's claim in relation to the Occupation Reserves is not established at the duty and breach stage so equitable compensation issues do not arise.

Occupied Tenths

[718] As set out above, I have found that a constructive trust exists in relation to the Occupation Lands which underpin the Occupied Tenths. I have also found that an institutional constructive trust exists in relation to the replacement Tenths for the breach in relation to the Occupied Tenths.

[719] To the extent there is a shortfall in the return of land, then the current market value of the replacement Tenths is recoverable by way of equitable compensation. Moreover, I consider equitable compensation for the loss of the opportunity to benefit

from those Tenths for all Customary Owners is also recoverable. Lost rentals is recoverable in relation to this land.

[720] The plaintiff's claim for compensation in relation to the lost opportunity to benefit from the Occupied Tenths (post) is not determined on equitable principles. That is because the breach was not of a fiduciary duty. For the reasons set out in the Limitation Act part of this judgment, I consider such a claim to be time-barred and so it is unnecessary to consider the appropriate measure of loss for this breach.[407]

Summary of findings regarding equitable compensation

[721] The measure of equitable compensation in this case is that which is required to restore the trust, rather than compensate the beneficiaries. Compounding interest shall not be applied, but my decision on the application of simple interest is reserved pending the receipt of further submissions.

[722] Equitable compensation for breach of the duties owed in relation to the **Unallocated Tenths** is to be assessed according to the current market value of the shortfall in the 10,000 acres (or less) not reserved and no longer in Crown hands, and rental incomes generated on those lands.

[723] The same measure applies to the two transactions involving the **Allocated Tenths**.

[724] Because loss of use is not proved in relation to the **Occupation Lands**, equitable compensation is limited to the current market value of the land no longer in the Crown's hands.

[725] No questions of equitable compensation arise in relation to the **Occupation Reserves** as the claim does not survive the duty and breach analysis.

[726] Equitable compensation for the breach of duties owed in relation to the **Occupied Tenths** is to be assessed on the same basis as the Unallocated Tenths. A

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[407] See below at [852]–[854].

different measure may have applied in relation to the Occupied Tenths (post), however, as this claim is statute barred, it has not been considered any further.

PART VIII—CULTURAL LOSS

[727] The plaintiff claims compensation for cultural loss which he says the Customary Owners have suffered due to losing their land. The claim ranges between $150 million and $252 million depending on which of the two methodologies put forward by the plaintiff are adopted.

[728] Mr Taylor and Mr Paora Te Poa Mokena (also known as Paul Morgan) gave evidence directed to this head of loss. Mr Taylor described this loss as follows:

> … the land we whakapapa to is the foundation of our mana as whānau, hapū and iwi. It follows that if we lose control of that land, there is a whole range of impacts that stem from that lack of control: impacts on our mana, our identity, and our well-being. The loss of our land has put pressure on us in terms of our ability to act as kaitiaki and regulate what others do on our land. It impacts on our spiritual and physical wellbeing, particularly when we can no longer properly provide for our whānau, and our people have to leave their tūrangawaewae to survive. It impacts on our ability to provide manaakitanga (hospitality) through provision of the revered traditional foods at our hui and tangihanga.
>
> The cultural impact of our loss of association and connection with our wāhi tapu and urupā undermines our collective and individual identity as the people of these lands.
>
> …
>
> Things that happened in the past are having a direct consequence on the type of life that we live today. That is why we continue to wear the inter-generational trauma that stems from our alienation from our ancestral lands. The impact on our people has been profound, I believe it is directly linked to the high rates of Māori incarceration in prisons, poor health, unemployment, and all other negative social statistics. That is a result of having our economic base ripped out from underneath us.

[729] Mr Taylor's brief of evidence in reply also contained a description of the impact of losing land:

> The impact of the loss of land suffered by my people resulted in abject poverty and destitution, forcing most of my people to leave. Without enough land to grow crops and live upon, many migrated away — returning whenever they could, but becoming harder and harder with each generation. This is like death from a thousand cuts, a slow but steady attrition of identity and connection. It resulted in generations of poor health and short life expectancy.

…

> Like all my relatives, I carry a fire in the pit of my stomach, a smouldering outrage for what occurred to my people. As descendants we feel the burden and duty to uphold the legacy of our tupuna because they are us and we are them. Our connection together is cyclical and so the injustice of what transpired, the wrongness of it all demands that we their mokopuna must do everything possible to rectify this. For our tūpuna, for us and for those that will follow after we have gone. That is utu, bringing back the balance through doing the right thing.

[730] This evidence describes wide-ranging loss with intergenerational impacts arising from the alienation of ancestral lands.

[731] The cultural loss experienced from the loss of land was also the subject of expert evidence by Dr Jones. Dr Jones explained the importance of land to the identity of hapū and iwi. He referred to the writing of Tā Taihakurei Durie, who stated that the "cultural, social and spiritual life of the community was built around land" and that "land was posited as a living being from which the community derived".[408]

[732] Dr Jones explained the loss of land as having an intergenerational impact. This is because of the ongoing spiritual presence of the tūpuna, and the responsibility of past and present generations to protect the land for future generations. This impact was described in terms of identity, mana (authority), kaitiakitanga (stewardship) and manaakitanga (nurturing), in addition to the physical losses associated with being separated from the land.[409]

[733] It is not contested that cultural loss was experienced in this case. The Crown acknowledges that cultural losses are real and worthy of redress. The issues for determination are whether that cultural loss can, or should, be compensated at common law. And, if so, how to quantify that loss. To provide context for the analysis of these issues, I first canvass the evidence adduced by the plaintiff on the methodologies for assessing this loss.

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408 E T Durie *Custom Law* (Treaty of Waitangi Research Unit, January 1994) at 61–62.

409 As defined by Dr Jones.

Methodologies for quantifying cultural loss

[734] The plaintiff put forward two alternative methodologies for assessing compensation for cultural loss. Both are considered below.

Dr Meade's approach

[735] Dr Meade started by categorising land into wāhi tapu and non-wāhi tapu land.

[736] For the non-wāhi tapu land, he estimated cultural loss at 12.5 per cent of the rental income that could have been earned from that land. He used a framework used in the valuation of environmental resources (the Total Economic Value (TEV) framework) and a paper on passive values of New Zealand's land based eco-systems to fix the 12.5 per cent rate.[410]

[737] For wāhi tapu land, Dr Meade estimated cultural loss as being equivalent to the pain and suffering of individuals. This estimate of loss was based on the number of people who would have experienced that pain and suffering. He applied values benchmarked against the value of a statistical life for people's willingness to pay to avoid pain and suffering from different types of car accidents, and the willingness to pay to enjoy improved access to natural biodiversity.

[738] Dr Meade incorporated an assumption that 25 per cent of Customary Owners "forget" about lost cultural sites every 25 years to ensure a conservative assessment of the resulting loss (and despite his own reservations about such an approach).

[739] The assessment included compensation for the deceased Customary Owners because Dr Meade considered the collective as an indefinite body with tūpuna being part of the present. This reflected the circular concept of time in Te Ao Māori. These losses were compounded over time.

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410 Peter Tait and others *Assessing New Zealand public preferences for native biodiversity outcomes across habitat types: A choice experiment approach incorporating habitat engagement* (Lincoln University Agriculture and Economics Research Unit, Research Report No 345, December 2017).

[740] By way of cross-check, Dr Meade used compensation awarded by the Human Rights Review Tribunal, and compensation awarded under the 2020 Compensation Guidelines for Wrongful Conviction and Detention issued by the Ministry of Justice.

Alternative approach

[741] While still maintaining support for Dr Meade's assessment, counsel for the plaintiff suggested an alternative in closing submissions. This alternative conceptualised the award as a form of general damages by analogy with awards for mental harm, pain, and suffering.

[742] Counsel for the plaintiff submits that awards made in two Australian cases provide a basis upon which an appropriate award may be quantified.

[743] In the first of those cases, *Napaluma v Baker*, the South Australian Supreme Court awarded the plaintiff $10,000 as part of a general award of $35,000 arising out of a car accident for "loss of position in the aboriginal community".[411] The injuries suffered by the plaintiff meant that he would no longer be entrusted with secret knowledge, would be left out of some ceremonies or have a minor role, and would not grow into community or leadership roles. The Judge considered a monetary award for the special loss of amenity position within the tribe was justified. The $10,000 figure was reached by way of assessment, rather than according to a prescribed formula.

[744] In the second case, *Dixon v Davies*, the Northern Territory Supreme Court awarded $20,000 for injuries suffered during a car accident which resulted in a loss of standing for the victim within his aboriginal community.[412] His injuries meant he would unlikely achieve full adult status by participating in ceremonies such as initiation. The sum awarded for loss of cultural fulfilment was part of a general damages award of $45,000 for pain and suffering and loss of amenities. The sum was not referenced to any formula or awards made in other cases.

[745] Counsel for the plaintiff assesses the present-day value of these awards as being $40,000 and $80,000 respectively. Reference is also made to general damages

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411 *Napaluma v Baker* (1982) 29 SASR 192 (SASC) at 194–195.
412 *Dixon v Davies* (1982) 17 NTR 31 (NTSC).

awards for mental harm, pain, and suffering made in proceedings involving residential properties. These include:

(a) $25,000 to a family trust plaintiff for negligence relating to a residential property.[413]

(b) $25,000 to a single plaintiff for breach of contract and Fair Trading Act 1986 relating to residential property.[414]

(c) $25,000 to a single resident owner, $35,000 to joint resident owners, $15,000 to single non-resident owners and $25,000 to joint non-resident owners for negligence relating to properties.[415]

(d) $15,000 general damages to each of two plaintiffs resulting from a breach of contract and negligence claim.[416]

[746] On the basis of these cases, the plaintiff suggests that an award of $25,000 per person could easily be justified. Multiplying that sum by an estimated 6,000 Customary Owners produces damages of approximately $150 million. This is suggested to be the "lower bound" of any award given these general damages awards have not been informed by indigenous peoples' connections to their lands.

Is cultural loss compensable?

[747] While a claim for cultural loss is recognised in Treaty settlements, it has not been recognised in New Zealand Courts as a separate head of loss, whether for an equitable claim, or at all. The first question then is whether cultural loss is compensable as a matter of law.

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413 *Buchanan v Tasman District Council* [2023] NZHC 53, [2023] 2 NZLR 287 at [123]–[124].
414 *Perry v O'Neills Building Removals Ltd (in liq)* [2018] NZHC 503 at [71]–[77] and [112].
415 *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511 at [104]–[127].
416 *Steffensen v BGW Investments Ltd* [2014] NZHC 1828 at [89]–[94].

[748] The plaintiff points to overseas examples of cultural loss damages awards. These include non-pecuniary compensatory awards made by the Inter-America Court of Human Rights,[417] and the two Australian cases discussed above.[418]

[749] Reliance is also placed on *Northern Territory v Griffiths* in which the High Court of Australia awarded $1.3 million as compensation for cultural losses pursuant to s 51(1) of the Native Title Act 1993 (Cth).[419] The issue in that case was the quantum of compensation payable by the Northern Territory of Australia to the Ngaliwurru and Nungali People (Claim Group) pursuant to pt 2 of the Native Title Act. That statute specifically recognises native title and provides for compensation if native title is extinguished. An issue in the case was how the Claim Group's sense of loss of traditional attachment to the land was to be reflected in the award of compensation. That assessment was to be made in accordance with one of the inquiries required by the definition of native title.[420]

[750] The High Court of Australia referred to the complexity in quantifying this loss which resonates with aspects of the exercise in this case, quoting with approval its earlier decision:[421]

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the [Native Title Act]. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.

[751] The different legal contexts in which these cases arise mean they provide little direct assistance in determining whether cultural loss should be compensated in this case. This proceeding is different in kind to claims before the Inter-American Court

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417 See for example *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, Reparations and Costs)* (2001) IACHR (series C) No 79 at [167]. The Court ordered that Nicaragua invest, in the course of 12 months, $50,000 in works and services of collective interest for the benefit of the Awas Tingni Community by common agreement with the Community and under the supervision of the Inter-American Commission.

418 *Napaluma v Baker* (1982) 29 SASR 192 (SASC); and *Dixon v Davies* (1982) 17 NTR 31 (NTSC).

419 *Northern Territory v Griffiths* [2019] HCA 7, (2019) 269 CLR 1.

420 At [152] and [217].

421 At [153] quoting *Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1 at [14].

of Human Rights, and personal injury claims for car accidents. It is also different to the statutory enquiry at issue in *Griffiths*. It is notable that the decision in *Griffiths* has not been applied by Australian courts to other statutory compensation schemes for land acquisition, and it has not been applied in the common law.[422]

[752] However, what these cases confirm is the willingness of the law to recognise cultural loss through an award of damages. Moreover, despite the evident difficulties in assessment, these cases demonstrate the capability of the law to tackle these difficulties. As counsel for the plaintiff submits, these cases show that the law can reduce to a monetary sum difficult to value cultural losses that are deserving of special compensation.

[753] While this head of damages may be recognised in some circumstances, the question is whether compensation for this head of loss may be accommodated by the common law.

[754] The Crown submits that conceptually, the claim for cultural loss is difficult to reconcile with the nature of the common law. Counsel submits that all within the community should be able to sue for any recoverable damages available at common law, so long as the cause of action is made out. However, counsel says, cultural loss is a distinct head of novel damages, only available for one section of the community. In that sense, recognising cultural loss would be inconsistent with the foundations of the common law. I do not accept that submission for three reasons.

[755] First, care must be taken not to conflate cultural loss as a separate head of loss, with the nature of the cultural loss advanced in this case. An award of cultural loss in this case would set a precedent for other claims of cultural loss in equitable claims and more broadly. That head of loss would not be limited to the cultural harm experienced in this case, but could encompass all forms of cultural loss experienced irrespective of the culture of the person or people who suffered the loss.

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422 See *Anderson v Commissioner of Highways* [2019] SASCFC 119, (2019) 134 SASR 543. In this case, a Full Court of the Supreme Court of South Australia declined to apply *Northern Territory v Griffiths* [2019] HCA 7, (2019) 269 CLR 1 and found that non-economic loss is not compensable under the Land Acquisition Act 1969.

[756] Second, and most importantly, I consider the common law is broad enough to recognise that loss and harm may be experienced differently by different sectors of the community. Recognition of that difference does not involve excluding or disadvantaging others. Indeed, the opposite is true. Accommodating difference within the legal system is integral to the legitimacy and strength of the rule of law.

[757] Third, the common law already offers compensation for other categories of non-pecuniary loss. For example, monetary relief is available for harm to reputation and breach of privacy; and damages for mental harm, pain and suffering are also available in contract and tort claims. The cases relied on by the plaintiff (and referred to above) demonstrate a willingness to recognise pain and suffering in residential building cases. I consider the experience of cultural loss as described in the evidence comes closest to mental harm, pain and suffering.

[758] It follows that I consider that, as a matter of broad principle, the common law can accommodate this head of loss. The crux of the issue, therefore, is whether the law should be extended in this direction, whether for this case or breach of fiduciary claims more generally. That is considered next.

Should the law be extended to compensate for cultural loss?

[759] Extending the common law to recognise this head of loss appears, at least on the surface, to be consistent with the incremental development of the common law.[423] However, I consider it necessary to have sufficient information to be able to assess whether a new development in the law is incremental in nature, and whether stability in the law will be maintained if the law is taken in a new direction. What appears at first glance to be a short jump, may in fact be quite a distance, and there is always the prospect of unintended consequences lurking below the surface. A close look is called for in the circumstances.

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[423] Dame Helen Winkelmann, Chief Justice of New Zealand "Picking up the Threads: The Story of the Common Law in Aotearoa New Zealand" (Robin Cooke Lecture, Te Herenga Waka—Victoria University of Wellington, 2 December 2020). See also *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [116] per Glazebook J.

[760] Part of the "close look" includes considering the policy implications of extending the law in a novel direction. The plaintiff says there are "overwhelming" public policy reasons for awarding such damages. They include the special connection between indigenous peoples and their traditional lands. Counsel for the plaintiff submits that these land rights encompass cultural, spiritual, political, economic, environmental, and social elements, which are essential for the existence and survival of indigenous peoples.

[761] This special relationship is embraced in the United Nations Declaration of the Rights of Indigenous People (defined above as UNDRIP). New Zealand announced its support for UNDRIP in April 2010. UNDRIP affirms the rights of indigenous people to practice and revitalise their cultural traditions and customs, and to retain and strengthen their traditional lands or territories, waters, and other resources, including culturally significant sites.[424] I accept that the special relationship between Māori and land gives rise to strong policy reasons in favour of recognising cultural loss as a compensable head of damages.

[762] However, these are not the only policy issues engaged. The Crown suggests that cultural loss is not suitable to be addressed by the Courts, and is a matter best left for the other branches of government to address through Treaty settlement legislation. Treaty settlements can, and often do, provide for cultural redress of the type sought here. The Tainui-Taranaki iwi Treaty settlement included a cultural redress package.[425] These packages are an acknowledgement of the lost connection or demise of a cultural base suffered through landlessness.

[763] There is merit in the Crown's submission that compensation for these losses may be best addressed outside the courtroom doors. That submission is at its strongest in relation to some of the harm described by Mr Taylor such as starvation, poverty, and intergenerational trauma.

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424 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), arts 8, 10–13 and 25–26.

425 Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, pt 2.

[764] Other information required before recognising a novel claim includes an assessment of how this head of loss might fit within the existing legal rubric of equitable remedies. For example, should the loss be conceptualised as a loss sustained by the beneficiaries, a loss sustained by the trust, or neither? If it is conceptualised as a loss to the beneficiaries, then should it be disallowed on the basis that equity seeks to restore the trust and not compensate the beneficiaries?[426] If it is conceptualised as a loss to the trust, then how is that to be reconciled with the personal (albeit collective) nature of the loss claimed?

[765] Similar questions arise in relation to the Limitation Act. Do cultural losses attach to the trust asset, or, as the plaintiff asserts, should this head of loss be treated as a standalone category falling outside the scope of the Limitation Act?[427] If the latter approach is adopted, then how is that to be reconciled with the policies underlying limitation periods and the statutory exceptions which would otherwise apply?

[766] In addition, there are questions to be raised about the quantification of the loss. The scale and range of the compensation sought in this case underscores the need for caution. The claim for cultural loss ranges between $150 million and $252 million. By any measure, these are significant sums of money. An $100 million difference between the two approaches gives reason to pause on the methodology used to quantify the claim.

[767] Another area critical to the analysis concerns questions of tikanga. As described earlier, I received evidence on behalf of the Customary Owners which described the cultural harm suffered due to the alienation of land. Dr Jones gave expert evidence which described that loss through a tikanga lens.

[768] What I do not have, however, is evidence which connects the description of the loss on the one hand, with the specific claims at issue in this case on the other. For example, there is no discussion in the evidence about whether the experience of cultural loss in relation to the Tenths is different to that experienced in relation to the

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426 See above at [674]–[687].

427 Counsel submits that cultural losses should be treated as sui generis losses analogous to claims for public law damages for breaches of rights affirmed in the New Zealand Bill of Rights Act 1990.

Occupation Lands. Nor is there any discussion about whether the Customary Owners' relationship to the land which they continued to occupy (the Occupied Tenths) was different to the land which was permanently alienated.

[769] There are other gaps too. For example, it is not apparent how Dr Meade's assessment reflects Dr Jones's evidence that the ancestral relationship that Māori have with their land cannot be severed by alienation, since "Māori cannot sever part of themselves. The whakapapa to the land endures".

[770] Similarly, whether the return of land compensates for past cultural losses is also relevant here. Mr Taylor gave evidence at trial that the return of land would be "transformative" and would resolve "the intergenerational trauma that has been eating away at us". However, there is no evidence before the Court about how the return of land might be reflected in an award for cultural loss.

[771] Most importantly, I do not have any evidence validating or sanctioning the values which the plaintiff seeks to assign to cultural loss as a matter of tikanga. There do not appear to have been wānanga on this issue as there was in *Ellis*.[428] The plaintiff's own expert, Dr Jones, did not comment or give evidence on the methodologies used to assess this loss. There is no evidence before the Court which validates the assignment of an economic value (whether Dr Meade's or the plaintiff's alternative measure) as a matter of tikanga.

[772] This is significant in my view. What is being valued has implications for Māori which go beyond the four corners of this case. Given the significance of the Māori relationship with land, I consider this Court should be cautious about fixing a value as a matter of law when the measures used to determine that value do not appear to have been considered as a matter of tikanga.

[773] I have considered whether this aspect of the proceeding should be adjourned to allow further opportunity to be made to address the gaps I have identified. However, unlike the issue in *Ellis*, the question of whether the common law should recognise

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[428] See the description of the wānanga held at [11]–[18] of the statement of tikanga appended to *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 114.

cultural loss is not an issue raised by the Court. Rather, this head of loss forms part of the plaintiff's claim for breach of fiduciary duty and breach of trust. That claim is pursued in an adversarial forum where expert evidence has been called by both sides. It is for the plaintiff to prove his claim at trial and to call the necessary evidence to do so. I consider further opportunities to call evidence to fill gaps identified by the Court would undermine those key principles of trial process.

[774] The final reason weighing against an award of compensation for cultural loss in this case concerns the Treaty settlement received by the Customary Owners. As noted earlier, that Treaty settlement included a cultural redress package. While it is not possible to determine the exact extent of the overlap, some of that cultural redress will relate to the claims at issue in this case. This means that declining the claim in the context of this proceeding will not mean that cultural loss will be entirely unrecognised and uncompensated.

[775] It follows from the above that while I consider the common law *can* recognise this head of loss, and while there are very good reasons to do so, I have not been armed with sufficient information, nor persuaded, that the law should be developed in this novel direction at this stage. Further assessment of the relevant policy issues, the interrelationship with existing equitable principles, and tikanga implications, is required. Accordingly, the claim for cultural loss is dismissed.

PART IX—LIMITATION ACT 1950

[776] The Crown raises a defence to the plaintiff's claim based on the Limitation Act 1950. That statute was repealed in 2010, but was in force at the time the proceedings were commenced and so therefore applies.

[777] The Crown says that the plaintiff's claim is barred by s 21(2) of the Limitation Act, or alternatively by analogy to other limitation periods in that Act. Under s 21(2), claims to recover trust property or for breach of trust must be brought within six years, unless they fall within one of the exceptions in s 21(1)(a) and (b).

[778] A majority in the Supreme Court held that Mr Stafford's claims were not barred by the Act "to the extent that they are within the terms of s 21(1)(b) of the Act

because they seek to recover from the Crown trust property either in the possession of the Crown or previously received by the Crown and converted to its use".[429] Other issues relating to limitation, including the availability of a limitation defence to any claim for equitable compensation, were remitted to this Court.[430]

[779] The plaintiff says his claim falls within the exception provided in s 21(1)(b) of the Act. Alternatively, he says it falls within the exception in s 21(1)(a). That subsection preserves a claim for fraud or fraudulent breach of trust to which the trustee was a party or privy. To the extent the claim is couched as a breach of fiduciary duty claim, then the plaintiff says no limitation period applies.

Statutory scheme

[780] The scheme of the Limitation Act is to prescribe limitation periods for certain claims. Statutory limitation periods serve several purposes. They protect defendants from stale claims and they serve the public interest in ensuring disputes are finally resolved.[431] Limitation periods also reflect the increasing difficulties in determining a claim as time marches on. These difficulties include evidentiary problems, and the assessment of conduct which took place at a time when standards may have been very different.[432]

[781] The Act does not contain an express limitation period for breach of fiduciary duty claims. However, an equitable claim may be time barred if a statutory provision applies by analogy. This flows from s 4(9) which provides that the limitation periods set out in that section (which are generally six years) do not apply to claims for equitable relief (which would include equitable compensation) unless a statutory period of limitation applies by analogy.

[782] The Court of Appeal explained in *Johns v Johns* that there will only be a bar by analogy where the fiduciary claim parallels the statute-barred claim so closely that it would be "inequitable to allow the statutory bar to be outflanked by the fiduciary

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429 Supreme Court judgment, above n 8, at [4].
430 At [4].
431 See *W v Attorney-General* [1999] 2 NZLR 709 (CA) at [79] per Thomas J.
432 See Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1998) at [103].

claim".[433] The underlying facts, the nature of the relationship between the parties, and the policy and purpose of the different causes of action need to be analysed to determine how close the parallel is to any statutory barred claim.[434]

[783] In this case, the Crown says that s 21(2) applies directly as the plaintiff's claim is for breach of trust and recovery of property, meaning the claim is time-barred. The Crown also submits that neither of the s 21(1) exceptions to this statutory bar apply. However, if characterised as a breach of fiduciary duty claim, then the Crown says that s 21(2) applies by analogy. Either way, the six-year limitation period in s 21(2) applies to bar the plaintiff's claims. The scope of s 21 is central to this case and is considered further below.

Section 21—actions in respect of trust property

[784] Section 21 of the Limitation Act prescribes limitation periods in respect of trust property. It provides:

> **21 Limitation of actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; 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.
>
> (2) Subject as aforesaid, 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 limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

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433 *Johns v Johns* [2004] 3 NZLR 202 (CA) at [78] and [80].
434 At [78] and [80].

[785] Pursuant to s 21(2), a six-year limitation period for any action by a beneficiary to recover trust property or in respect of breach of trust will apply unless one of the exceptions in s 21(1) applies. As already noted, the exceptions in both s 21(1)(a) and (b) are relied on in this case.

[786] Section 21 has equivalents in s 21 of the Limitation Act 1980 (UK) and s 21 of the Limitation of Actions Act 1958 (Vic). In *Burnden Holdings (UK) Ltd v Fielding*,[435] the Supreme Court of the United Kingdom held that the purpose of s 21(1) was as stated by Kekewich J in *Re Timmis, Nixon v Smith*:[436]

> The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, i.e., money of the trust received by him and converted to his own use.

[787] The terms "trust" and "trustee" are defined in the Limitation Act to include implied and constructive trusts.[437] However, that does not mean that all forms of constructive trust fall within s 21(1)(b). In *Paragon Finance*, Millett LJ drew a distinction between those who are already a trustee in relation to the property, and those upon whom an obligation to account as a trustee is imposed as a result of wrongful conduct.[438]

[788] This distinction captures the difference between an institutional constructive trust and a remedial constructive trust. However, in *Du v Georgiadis*, the Victorian Court of Appeal explained that applying s 21 is not a matter of drawing a distinction between these two forms of trust.[439] Rather, it is a matter of timing. The section only covers claims by those who were beneficiaries under a trust before the claim is made, rather than a claim which, if successful, will result in a claimant being recognised as a beneficiary.

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435 *Burnden Holdings (UK) Ltd v Fielding* [2018] UKSC 14, [2018] AC 857 at [17].
436 *Re Timmis, Nixon v Smith* [1902] 1 Ch 176 at 186.
437 The definition in s 2 of the Limitation Act 1950 applied the definitions in s 2 of the Trustee Act 1956.
438 *Paragon Finance plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 408–409.
439 *Du v Georgiadis* [2020] VSCA 306 at [59].

[789] Section 21(1) will therefore capture pre-existing trusts which remain in place at the time the claim is filed. I consider it will also capture past trust relationships. That is, it will cover claims for breach of trust where the trust no longer exists. That is consistent with the policy of the section which is to exempt claims of trustee wrongdoing from the statutory time bar, irrespective of whether the wrongdoing is in relation to past or present trust relationships.

Section 21(1)(a)—the fraud exception

[790] Section 21(1)(a) provides an exception from the six-year time limit "in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy".

[791] Decisions of this Court have interpreted "fraud" in s 21(1)(a) to refer to equitable fraud.[440] Unlike actual fraud, equitable fraud includes conduct that does not involve deceit or dishonesty. It encompasses conduct which falls below the standard demanded by equity.[441]

[792] Construing "fraud" to include equitable fraud aligns with the meaning attributed to "fraud" in s 28 of the Limitation Act. That section provides for the postponement of the limitation period where the action is based upon fraud, or it is concealed by the fraud of any person.

[793] In *Official Assignee of Collier v Creighton*, the Court of Appeal confirmed that "fraud" in s 28 included an action based on equitable fraud, including breach of fiduciary duty.[442] This was affirmed by the Privy Council on appeal.[443] Under s 28, time will not start running until the plaintiff has discovered the fraud, or with reasonable diligence could have done so.

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440 *Investacorp Holdings Ltd v Quinn* [2014] NZHC 2389 at [66]; *Staite v Kusabs* [2017] NZHC 416 at [187]–[189]; *Becker v Anderson* [2013] NZHC 2798 at [75]; *Bambury v Jensen* [2015] NZHC 2384 at [99]; and *Woolf v Kaye* [2016] NZHC 1628 at [37]–[38]. See also Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1039 at 1046.

441 *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 171; and Ben McFarlane "Fraud, Undue Influence and Unconscionable Transactions" in John McGhee and Stephen Elliott *Snell's Equity* (34th edition, Thomson Reuters, 2020) 211 at 212.

442 *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534 (CA) at 538. It is of note that it was common ground between the parties to the appeal that a six-year limitation period applied to the breach of fiduciary duty claim.

443 *Collier v Creighton* [1996] 2 NZLR 257 (PC) at 262.

[794] The authors of *Equity and Trusts in New Zealand* describe "fraudulent breach of trust" as a more complex concept than "fraud".[444] It is suggested that the concept embraces breaches of trust by a trustee which are intentional or reckless and "probably embraces simple breaches of the fiduciary standards applicable to trustees, simple breaches of fiduciary duty being a species of 'equitable fraud'".[445]

[795] The High Court cases which construe fraud in s 21(1)(a) to include equitable fraud are contrary to a line of English cases on the equivalent provision in the United Kingdom. Those cases confirm that dishonesty will be required for a claim to fall within the exception in s 21(1)(a). In *Armitage v Nurse*, Millett LJ described dishonesty in this context as connoting:[446]

> … at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.

[796] There are good reasons to favour an interpretation of s 21(1)(a) as requiring proof of dishonesty. Such an interpretation is consistent with the general scheme of s 21(1) which sets a threshold of wrongdoing for the exceptions to the six-year time limit. It also makes sense of s 28 which provides for the postponement of a limitation period in cases of equitable fraud. Time does not start to run until the point in time that the fraud could have been discovered. Postponement is redundant if a limitation period does not apply to cases of equitable fraud.

[797] However, I accept that there is nothing on the face of the statute which suggests that "fraud" as used in s 28 should be construed differently to "fraud" as used in s 21. Parliament must have intended "fraud" to bear the same meaning. On the basis of the Court of Appeal's decision in *Collier*, I therefore accept that "fraud" in s 21(1)(a) should be interpreted to mean equitable fraud, including breaches of fiduciary duty.

[798] Nevertheless, I consider the exception only applies to claims relating to breach of "true" fiduciary duties and would not include simple breaches of trust. That is, it

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444 Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1039 at 1046.

445 At 1046–1047.

446 *Armitage v Nurse* [1998] Ch 241 (CA) at 251 per Millett LJ.

would not capture a claim for breach of reasonable skill and care by a fiduciary. To interpret s 21(1)(a) otherwise would deprive s 21(2), and the imposition of a six-year time limit for breach of trust, of any meaning and effect.

Section 21(1)(b)—the trust property exception

[799] Section 21(1)(b) provides an exception to the limitation period for actions "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 [the trustee's] use".

[800] There are two limbs to the subsection:

(a) The first applies to the recovery of trust property or the proceeds thereof in the "possession of the trustee".

(b) The second relates to recovery of trust property or the proceeds thereof "previously received by the trustee and converted to [the trustee's] use".

[801] In *Du v Georgiadis* the Victorian Court of Appeal considered the purpose of s 21(1)(b) was to exempt claims for breach of trust involving wrongdoing. The Court said:[447]

> [69] This brings us to the purpose of s 21(1)(b). By its terms, the exception addresses two classes of case, both involving wrongful conduct of a trustee which extends beyond breach of trust alone. The first class, described by s 21(1)(a), involves fraudulent conduct to which the trustee was a party or privy. The second, described by s 21(1)(b), involves a trustee who either wrongfully retains trust property or has previously received it, or its proceeds, and converted it or them to the trustee's own use. The common theme reveals that it is the purpose of s 21(1) to permit an action outside the ordinary limitation period in respect of breaches of trust involving wrongful conduct on the part of the trustee.

[802] Turning to the text of s 21(1)(b), the Court found that the first limb primarily dealt with property in the possession of the trustee and extended to the recovery of proceeds of trust property in the possession of the trustee.[448] That included any trust

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447 *Du v Georgiadis* [2020] VSCA 306.
448 At [70].

property or proceeds held by a trustee in breach of trust, including where the property or proceeds had been converted to the trustee's own use.[449]

[803] The Court then turned to consider what was added by the second limb in terms of property or proceeds previously received by the trustee and converted to the trustee's use.[450] The Court concluded that the second limb of s 21(1)(b) should be read as extending to claims to recover equitable compensation for the loss of trust property or its proceeds.[451] The Court reasoned as follows:[452]

> [72] Again, if the proceeds addressed by the second limb were in the possession of the trustee, then the second limb of s 21(1)(b) would add nothing to the first. The second limb therefore must contemplate an action to recover from a trustee the proceeds of trust property previously received by the trustee and converted to the trustee's use but which are not in the trustee's possession. Significantly, this indicates that an action "to recover … proceeds" from the trustee has a meaning beyond literal recovery of specified proceeds, because such proceeds would be in the trustee's possession and therefore within the first limb. This suggests that the second limb might be read broadly, as extending to actions to recover equitable compensation in respect of the conversion of trust property by a trustee.
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> [73] Such a reading of s 21(1)(b) preserves for beneficiaries the ability to sue not only to recover trust property or its proceeds following conversion by the trustee, but also for compensation in respect of the loss of trust property or its proceeds in those circumstances. Indeed, it is difficult to see, as a matter of policy, why the legislature would have permitted the former but not the latter. Both kinds of action vindicate a beneficiary's entitlement to have trust property dealt with by a trustee in accordance with the terms of the trust and the trustee's fiduciary obligations. This construction therefore gives better effect to the purpose of the subsection identified above.

[804] In *Du v Georgiadis*, there was no issue about whether the trust property and proceeds had been "previously received" and "converted to the [trustee's] use". The meaning of those phrases was not discussed. Indeed, there is little discussion in the cases and commentary on what these phrases mean.

[805] The approach taken in some cases appear to favour a strict and literal interpretation to these phrases, requiring trust property or proceeds to have been

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449 At [70].
450 At [71].
451 At [72]. This approach was supported by English cases such as *Bhullar v Bhullar* [2017] EWHC 407 (Ch) at [127]; and *Mander v Watts* [2017] EWHC 7879 (Ch) 119.
452 *Du v Georgiadis* [2020] VSCA 306.

actually received and converted by the trustee to fall within the subsection.[453] Other cases, however, have adopted a more liberal approach, allowing claims under s 21(1)(b) in the absence of direct evidence that the proceeds of trust property have been received or converted to the trustee's own use. Two of these cases are discussed below.

[806] In *Mackenzie v Mackenzie*, a beneficiary sought to recover under a trust deed in which the principal sum of £2,500 was declared to be held on trust for him.[454] The money had earned interest, and then a lump sum had been invested on a mortgage at an interest rate of seven per cent. No investments could be traced after that date.

[807] The Court held that the beneficiary was entitled to the accumulated interest from the original investment and the mortgage. In the absence of evidence about what happened to the trust property thereafter, the Court treated it as having been converted to the trustee's own use or as having been retained by the trustee. Either way, the limitation period did not apply. The Court said that if the statute did not bar the right to recover the principal converted by the trustee to his own use, it would not operate as a bar in respect of a claim for interest on that principal. The Court applied simple interest at a rate of seven per cent (the rate applied to the mortgage) to derive the additional sum of interest which the plaintiff was entitled to recover.

[808] In *Re Howlett*, the deceased possessed a wharf at the time of her death which devolved to her son, subject to a life interest of her husband in one-half of the rents and profits, defeasible on his remarriage.[455] The husband occupied the wharf and, although he remarried, he continued to occupy it until his death. The deceased's son brought a claim against the estate in respect of rents and profits of the wharf which should have been paid to him during the deceased husband's lifetime.

[809] Counsel for the estate contended that the claim for rents or profits was statute barred under the equivalent of s 21(1) because no rent had been received by the trustee

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453 See *Culling v Duncan* (1906) 8 GLR 668 (SC) at 675–676. Notably however the section at issue in that case differed to s 21(1) in that retention of the trust funds was a separate and discrete requirement for the exceptions to apply.

454 *Mackenzie v Mackenzie* (1894) 12 NZLR 590 (SC) at 591–592.

455 *Re Howlett (deceased)* [1949] 2 All ER (Ch).

and the section did not extend to "notional rents". That argument was rejected by the Judge who held the defendant estate was liable for an occupation rent:[456]

> I think, however, that there is force in the contention which counsel for the plaintiff makes that a trustee who remains in occupation of trust property for his own purposes—and, undoubtedly, the husband did so remain in occupation in the present case—cannot be heard to say that he has not received any rents or profits in respect of the property. Having received, therefore, in theory rents and profits, because he is chargeable with an occupation rent, he cannot discharge himself unless he can show that he has paid moneys away, and, therefore, either discharge himself by proper payments, or indeed, perhaps escape under the Limitation Act, 1939, having made improper payments. But here the husband, it seems, did not make any payments of any kind. He merely used the property for his own purposes, and I think the submission of counsel for the plaintiff is justified, that, having received the occupation rent for which he is chargeable, he must be considered as still having it in his own pocket at the material date, and therefore, cannot escape under the provisions of the Limitation Act, 1939.

[810] These cases suggest a broad approach should be taken to the second limb of s 21(1)(b). If the phrases of the second limb ("trust property", "proceeds", "previously received" and "converted to [the trustee's] use") are construed too restrictively, a trustee who is guilty of wrongdoing in relation to trust property may escape liability contrary to the intent of the legislation. Moreover, the vindication of a beneficiary's right to have the trust property dealt with in accordance with the trust deed could be unjustifiably constrained.

[811] Applying this approach to this case, and as explained more fully in relation to the Unallocated Tenths, I consider that proof of actual receipt of rentals is not required for this claim to fall within s 21(1)(b). It will be enough for the Crown to have received the land and converted it to its own use. That conversion will include the land itself, and the potential of that land to generate benefits for the beneficiaries. Such a construction is necessary to fully vindicate the Customary Owners' interests in relation to the trust property.

[812] With these principles in mind, I turn to consider how they apply to each category of land.

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456 At 494–495.

Unallocated Tenths

[813] The plaintiff seeks to recover land held by the Crown within the Spain award boundary; the value of the land no longer held; and money to compensate for the loss of the beneficial use of that land. The issue is whether any or all of these claims are statute barred.

[814] The first question is whether s 21 applies. That depends on the proper characterisation of the claim. I consider the claim in relation to the Unallocated Tenths is a claim to recover trust property and is analogous to a claim for breach of trust (which also involves a breach of fiduciary duty). Such a claim falls within the scope of s 21(2). Accordingly, a statutory limitation period of six years will apply unless the claim falls within one of the exceptions set out in s 21(1).

[815] Turning to those exceptions, I start with the opening words of s 21(1) "an action by a beneficiary under a trust". As explained by the Victorian Court of Appeal in *Du v Georgiadis*, this section will only apply if the trust was in existence before the claim was made. The trust in relation to the Unallocated Tenths is such a trust. It is an institutional constructive trust which arose on the failure to reserve the rural Tenths from the land obtained by the Crown after 1845. Section 21(1) therefore applies.

Claim to land in the hands of the Crown

[816] Moving to the content of the exceptions, I start with s 21(1)(b). The plaintiff's claim to land which remains in the hands of the Crown and is held pursuant to an institutional constructive trust is a claim to "recover from the trustee trust property … in the possession of the trustee". This claim falls within the first limb of s 21(1)(b) and is not statute barred.

Claim to current market value of land no longer in hands of the Crown

[817] The claim for the value of the Unallocated Tenths no longer in the possession of the Crown falls to be considered under the second limb of s 21(1)(b), being "property or the proceeds … previously received by the trustee and converted to [the trustee's] own use".

[818] There is no doubt that the Unallocated Tenths were previously received by the Crown. That occurred on the acceptance of the Spain award. I consider the land which was received was then converted to the Crown's use. The Crown treated all land it obtained (including the Unallocated Tenths) as if it were domain lands of the Crown, available to be granted to the Company and others. The lands which should have been held in trust for the benefit of the Customary Owners were instead used by the Crown to meet the Crown's objectives and obligations in establishing a new settlement. In the circumstances of this case, I consider the nature of this conversion to be sufficient to meet the requirements in s 21(1)(b).

[819] In allowing a claim for the market value of this land, I respectfully follow and adopt the reasoning of the Victorian Court of Appeal in *Du v Georgiadis*.[457] The only way to give meaning to the second limb of s 21(1)(b) is to interpret it as allowing "recovery" of trust property no longer in the possession of the trustee by way of an award of equitable compensation. An award of equitable compensation, based on the current market value of the converted land compensates for the Customary Owners' loss. Accordingly, I consider the claim for the current market value of the converted property is a claim falling within s 21(1)(b).

Claim to lost rentals

[820] The more difficult issue is whether the claim for lost rentals on land either in the possession of the Crown, or no longer in possession of the Crown, also falls within s 21(1)(b). On a strict interpretation of s21(1)(b), the Crown did not "receive" these rentals, nor convert them to its own use.

[821] However, as previously noted, I consider a broad and purposive construction of s 21(1)(b) should be adopted in this case. The subsection is concerned with "trust property" and its "proceeds". The trust property in this case is not just the bare land or acreage comprising the Unallocated Tenths but includes the value of the benefits that were to be generated from that land (the intended proceeds of the land). Indeed, as Arnold and O'Regan JJ said in the Supreme Court, the promised consideration for the purchase of the Customary Owners' land had two dimensions: the initial allocation

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457 See above at [803]; and *Du v Georgiadis* [2020] VSCA 306 at [72]–[73].

of the Tenths reserves, and their subsequent administration for the benefit of the Customary Owners.[458] "Trust property" in this case includes both dimensions.

[822] When the Crown took land that was intended to be reserved as Tenths, it took "trust property". That is, it took the value of the land, and it took the potential of that land to generate benefits for the Customary Owners. Equitable compensation for the current market value of the land captures the land value dimension of the trust asset, but it does not capture the potential of the land to generate those benefits. The only evidence before this Court which values the beneficial use dimension of the trust asset is the notional land rentals calculation prepared by the plaintiff's expert. That calculation is a proxy for the value of the Unallocated Tenths to generate benefits for the Customary Owners.

[823] Recovery of lost rentals accords with the broad purpose of s 21(1)(b) which is to allow a beneficiary to recover the value of the trust property in circumstances of wrongdoing by a trustee in relation to trust property. To split the value of the trust property into that which is recoverable (current market value of land) and that which is not (lost rentals) would undermine that purpose. The trust would not be fully restored, and a trustee would not be held to account for that which was lost due to the trustee's breach of trust and conversion of trust property. That cannot have been Parliament's purpose in enacting s 21(1)(b).

[824] A broad construction of s 21(1)(b) which allows recovery of lost rentals is also consistent with s 4(9) of the Act which provides that claims for equitable relief (which includes equitable compensation) are not time barred except by analogy. The recovery of lost rentals also accords with the policy of the Act which does not subject claims for breach of fiduciary duty to a limitation period.

[825] It follows that I consider the plaintiff's claims to recover the Unallocated Tenths still in the hands of the Crown; the current market value of the Unallocated Tenths no longer in the Crown's possession; and equitable compensation for lost rentals, all fall within the scope of s 21(1)(b) of the Limitation Act. None of these claims are time-barred.

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458 Supreme Court judgment, above n 8, at [785] per Arnold and O'Regan JJ.

Allocated Tenths

[826] The claims in relation to the Allocated Tenths are limited to the recovery of land and equitable compensation in relation to:

(a) the loss of 400 acres as a result of the 1844 exchanges in Te Maatū; and

(b) those Allocated Tenths which were withdrawn in the 1847 Nelson township remodelling, and which have subsequently found their way back into the Crown's hands.

[827] As indicated earlier in this judgment, I consider the claim for a replacement Tenth in relation to other alienated Allocated Tenths is time-barred.[459] The claim in relation to the Whakarewa grant to the Bishop is also time-barred.[460] My reasons for those conclusions are set out below.

1844 exchanges at Te Maatū

[828] I have found that an institutional constructive trust over the land obtained by the Crown exists in relation to the 400-acre shortfall (or such lesser sum as may be established) which resulted from the 1844 exchanges at Te Maatū. A trust existed over this land before the claim was filed, and the plaintiff's claim in relation to this land is a claim by a beneficiary under a trust for the recovery of trust property and breach of trust. Section 21 applies.

[829] As for the exceptions in s 21(1), the reasoning in relation to the Unallocated Tenths set out above applies equally to this transaction. The claim falls within the scope of s 21(1)(b) either because it relates to a claim to recover trust property or proceeds thereof in the hands of the Crown, or because it seeks to recover trust property previously received by the trustee and converted to its own use. This claim is not time-barred.

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459 See above at [836]–[837].
460 See above at [838]–[842].

Withdrawal of 47 town Tenths

[830] The claim to recover those Tenths which were withdrawn as part of the remodelling of the Nelson township in 1847 but are *now* in the hands of the Crown is a claim by the Customary Owners as beneficiaries of an institutional constructive trust in relation to those specific Tenths.

[831] The trust obligation owed in relation to the specific Tenth preceded the breach of trust which was the withdrawal of that Tenth. The breach of trust was also a breach of fiduciary duty. When the withdrawn Tenth came back into the hands of the Crown it was impressed with a trust in favour of the Customary Owners. The institutional constructive trust in relation to the Tenth in the hands of the Crown existed before the claim was filed. Accordingly, the claim in relation to withdrawn Tenths which are now in the hands of the Crown is a claim in relation to an existing trust over that specific Tenth and falls within s 21(1).

[832] Turning to the exceptions set out in s 21(1)(a) and (b), I consider the claim falls within the first limb of s 21(1)(b). It is a claim to recover from the Crown as trustee, trust property (being the specific Tenth) which is in the possession of the trustee.

[833] The claim in relation to the withdrawn Tenths which are no longer in the hands of the Crown falls within the second limb of s 21(1)(b). These Tenths were previously received by the Crown and held as trustee. I consider these Tenths were converted to the Crown's own use. While little happened with these Tenths in the early days following their withdrawal, they were subsequently returned to the Crown following the collapse of the Company in 1850. Thereafter, they appear to have been used as if they were domain lands of the Crown and were granted to third parties and others. In the context of this case, I consider the use of these lands as if they were Crown lands represents a conversion of trust property to the Crown's own use. This claim falls within s 21(1)(b).

[834] Finally, for the reasons explored above in relation to the Unallocated Tenths, I consider the claim for equitable compensation in relation to the withdrawn Tenths also falls within s 21(1)(b). Equitable compensation comprises the current market value of this land, plus the value of the lost opportunity to benefit from this land as

represented by the lost rentals. This claim falls within s 21(1)(b) and is not statute barred.

[835] It follows that the plaintiff's claims in relation to the withdrawn Tenths are not statute barred.

Replacement tenths from land obtained by the Crown

[836] As previously noted, I consider the plaintiff's claim to a constructive trust in relation to replacement Tenths for alienated Allocated Tenths does not escape the statutory time bar. There was no pre-existing trust or fiduciary duty in relation to this land prior to the plaintiff's claim being filed.

[837] As explained earlier, once the Tenth was allocated, the land obtained by the Crown was no longer held on trust for the Customary Owners.[461] The fiduciary duty to reserve from that land was discharged. This means there was no preceding fiduciary duty in relation to the land obtained by the Crown, and an institutional constructive trust does not arise. This means the claim for loss of use of this land does not survive either. If the Customary Owners do not have a claim in relation to the land itself, they cannot have a claim in relation to the benefits which would have been generated from that land. Both claims fail to escape the statutory bar.

1853 Whakarewa grant

[838] This claim is not proved as loss has not been established on the evidence. Nevertheless, if wrong in that conclusion, I consider the claim would be time-barred. That is because the claim does not fall within one of the exceptions to the limitation period set out in s 21(1)(a) and (b).

[839] The plaintiff's claim to recovery of land in the hands of the Crown does not relate to the specific Tenths alienated as part of the Whakarewa grant. Those Tenths were returned to the Ngāti Rārua-Ātiawa Iwi Trust and so are no longer in Crown

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461 See above at [622].

ownership.[462] And, as explained above, the claim in relation to replacement Tenths for the alienated Tenths is not a claim pursuant to an institutional constructive trust. The Crown does not hold any land within the Spain award boundary on trust for the Customary Owners in relation to this transaction which may be recovered, pursuant to s 21(1).

[840] That just leaves the claim in relation to the current market value of the Allocated Tenths that were held on trust but were alienated as part of the Whakarewa grant. While these Tenths were received by the Crown in its capacity as trustee, I do not consider they were converted to the Crown's own use within the meaning of s 21(1)(b). There is no evidence that the Crown expropriated these Tenths and it did not treat these Tenths as if they were Crown lands. I do not consider this transaction falls within the exception in s 21(1)(b).

[841] Nor do I consider the claim in relation to the Whakarewa grant falls within s 21(1)(a). The grant did not involve actual fraud, or a fraudulent breach of trust. Nor is there sufficient evidence to establish breach of a "true" fiduciary duty, falling with s21(1). That exception does not apply either.

[842] In summary, even if loss could be proved, I do not consider any of the plaintiff's claims in relation to the Whakarewa grant escape the statutory time bar in s 21(2) of the Limitation Act.

Occupation Lands

[843] Turning to consider the plaintiff's claim in relation to the Occupation Lands, I have found that the Crown holds the net balance of the Occupation Lands pursuant to an institutional constructive trust for the Customary Owners. This trust arose prior to the claim being filed. The plaintiff's claim for recovery of those lands and for breach of trust falls within the scope of s 21.

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[462] Even if they were in the hands of the Crown they would not be recoverable pursuant to an institutional constructive trust because the breach of trust was not a breach of a preceding fiduciary duty.

[844] To the extent the claim is for return of Occupation Lands currently in the hands of the Crown, the claim seeks to recover trust property in the possession of the trustee, and the claim falls within the first limb of s 21(1)(b). This claim is not time barred.

[845] Insofar as the claim relates to Occupation Lands no longer in the Crown's possession, the plaintiff's claim falls within the second limb of s 21(1)(b). The Occupation Lands were "previously received" by the Crown. That occurred when the Crown accepted the Spain award and obtained land subject to a fiduciary duty to exclude Occupation Lands. These lands were also converted to the Crown's own use. Instead of being excluded from the Crown lands and remaining in customary ownership, these Occupation Lands were taken by the Crown and used to meet the Crown's obligations to reserve 15,100 acres of Tenths. This was an expropriation of the Occupation Lands, and I consider the lands were converted to the Crown's own use.

[846] The claim for the current market value of the converted Occupation Lands falls within the second limb of s 21(1)(b). But, the loss of use claim does not arise in relation to the Occupation Lands as I have found that the Customary Owners had use of these Occupation Lands.

[847] In summary, the claim for recovery of Occupation Lands in the hands of the Crown, and the claim for the current market value of those lands since alienated, is not barred by the Limitation Act.

Occupation Reserves

[848] No limitation issues arise in relation to the Occupation Reserves as the claim does not survive the duty and breach analysis.

Occupied Tenths

[849] I have found that an institutional constructive trust over the land obtained by the Crown exists in relation to the replacement Tenth for the Occupied Tenths.

[850] To that end, the claim for recovery of this land is a claim by a beneficiary under a trust which was in existence at the time the claim was filed. Section 21 is engaged. To the extent the claim seeks recovery of trust property in the hands of the Crown, then it falls within the first limb of s 21(1)(b).

[851] The claim in relation to land no longer in the hands of the Crown falls within the second limb of s 21(1)(b). The Crown was obliged to reserve the Tenths from the land obtained by the Crown, and not from the Occupation Lands. The land from which the Tenths were to be reserved was impressed with a trust for the replacement Tenth. This land was used by the Crown as if it was domain lands. This was a conversion of trust property. The trust property converted included both the value of the land and the value of the opportunity to benefit from that land. Equitable compensation for both value components is allowed for under the second limb of s 21(1)(b). This claim is not time-barred.

[852] Turning to the Occupied Tenths (post), I consider this claim to be time barred. The claim is for breach of trust and damages are sought in relation to the lost opportunity to benefit from the Occupied Tenths (post) due to the occupation by some of the Customary Owners.

[853] While s 21 is engaged, neither of the exceptions apply. There is no fraud or fraudulent breach of trust alleged, and the claim does not involve a breach of fiduciary duty within the meaning of s 21(1)(a). Nor does the claim involve the recovery of trust property previously received by the Crown within the meaning of s 21(1)(b). Unlike the other Occupied Tenths, the claim for the lost opportunity to benefit from the Occupied Tenths (post) is not related to land previously received and converted by the Crown to its own use. Essentially the claim is a damages claim for breach of reasonable skill and care in relation to trust property. The Crown was not in possession of the land itself and so it cannot be presumed that the Crown converted trust property (including the potential to generate benefits). There is no evidence that the Crown received rentals or converted them to its own use. This claim is statute barred.

[854] This means that the plaintiff's claim for recovery of the Occupied Tenths held by the Crown pursuant to an institutional constructive trust, and for equitable

compensation (current market value and lost rentals) in relation to the replacement Tenths is not time barred. However, the claim in relation to the Occupied Tenths (post) is time barred.

Summary of findings regarding Limitation Act

[855] The claims for land and equitable compensation in relation to the **Unallocated Tenths** are not time barred.

[856] As for the **Allocated Tenths**, the claim in relation to the 1844 exchanges is not time barred. Nor is the claim in relation to those Tenths which were withdrawn during the 1847 remodelling of the Nelson township. The claim in relation to replacement Tenths for the alienated Allocated Tenths is time barred, as is the claim in relation to the 1853 Whakarewa grant.

[857] The claim in relation to the recovery of the **Occupation Lands** and the current market value of those Lands is not time barred.

[858] No limitation issues arise in relation to the **Occupation Reserves** as the claim does not survive the duty and breach analysis.

[859] The claim for replacement Tenths and equitable compensation in relation to the **Occupied Tenths** is not time barred. The claim for lost rentals in relation to the **Occupied Tenths (post)** is time barred.

PART X—TREATY SETTLEMENT

[860] In 2012 and 2013 the Crown and Ngāti Kōata, Ngāti Rārua, Te Ātiawa o Te Waka-a-Māui and Ngāti Tama (Tainui-Taranaki iwi) executed deeds of settlement in relation to claims that the Crown had breached the Treaty in Te Tauihu.

[861] The deeds were part of a much wider settlement of claims advanced by the eight iwi having interests in Te Tauihu. The other iwi were: Ngāti Apa, Ngāti Kuia, and Rangitāne o Wairau (together referred to as the Kurahaupō iwi) and Ngāti Toa Rangatira (Ngāti Toa).

[862] The Tainui-Taranaki iwi settlements were given effect to by the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 (defined above as the Settlement Act). Section 25 of that Act preserves the ability of the plaintiff to obtain relief in this proceeding.

[863] The Supreme Court found that the plaintiff's claims were not barred by the Settlement Act.[463] However, it was acknowledged that the effect of the settlement may have caused prejudice to the Crown which was relevant to the laches defence. In addition, three of the majority Judges (Glazebrook, Arnold and O'Regan JJ) recorded that there should be no "double recovery" under the Settlement Act and this proceeding.[464]

[864] The Crown relies on the process of settlement and the settlement itself as factors relevant to the exercise of the Court's discretion to grant equitable relief and as part of the laches defence. This part of the judgment is concerned with the impact on equitable relief, and specifically, the question of double recovery. The issue of laches is considered in the following part.

Waitangi Tribunal claims and report

[865] The relevant background leading up to settlement starts with the filing of Wai 56 in the Waitangi Tribunal on 22 June 1988. The claim was signed by the plaintiff and Mr Hohepa Solomon on behalf of the descendants of the original owners of the Nelson Tenths estate. The claim alleged that the Crown had breached the Treaty by failing to give effect to undertakings to reserve the Tenths, and failures in relation to the administration of the Tenths.

[866] Wai 56 was not the only claim to be filed with the Tribunal in relation to the Tenths. Claims were also filed by the Tainui-Taranaki iwi alleging breaches in relation to the administration and alienation of the Tenths. The three Kurahaupō iwi and Ngāti Toa also filed claims relating to their exclusion from the Nelson and Motueka Tenths.

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463 Supreme Court judgment, above n 8, at [5].
464 At [716]–[717] per Glazebrook J and [826] per Arnold and O'Regan JJ.

[867] From 2000–2004 the Waitangi Tribunal heard 31 claims filed by Te Tauihu iwi, hapū, and whānau. There were 19 hearings across 89 days at 15 different venues across Te Tauihu and Wellington.[465]

[868] The Tribunal issued two preliminary reports in 2007.[466] The final report was issued on 18 September 2008. The Tribunal's findings relevantly included:[467]

(a) The 1845 Spain award was in breach of the Treaty, as it was based on an inadequate inquiry and wrong on the facts.

(b) The four Tainui-Taranaki iwi had the strongest customary authority in the lands awarded; Kurahaupō had "surviving rights"; and Ngāti Toa had a "latent right".

(c) The Crown breached the Treaty in relation to the Nelson and Motueka Tenths and the imposition of perpetual leases over the land.

(d) Kurahaupō and Ngāti Toa were wrongly denied a share in the Tenths.

[869] The Tribunal said that the settlement of historical grievances was most appropriately a matter between the Crown and Te Tauihu iwi, and that matters affecting shareholders of Wakatū since its establishment in 1977 should be resolved between Wakatū and the Crown.[468]

Settlement negotiations

[870] In 2005, Tainui Taranaki ki Te Tonga was established as the mandated body to represent the Tainui-Taranaki iwi in negotiations for the settlement of historical claims,

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465 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at 8–10.

466 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wai 785, 2007); and Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Preliminary Report on Te Tau Ihu Customary Rights in the Statutory Ngai Tahu Takiwa* (Wai 785, 2007).

467 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 2 at 870 and 921–922; and Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 3 at 1379–1383.

468 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 3 at 1442.

including Wai 56. Two of the 10 directors of this mandated body were representatives of Wakatū, one of whom was the plaintiff. The role of Wakatū was recognised as kaitiaki of Wai 56.

[871] The Crown adopted a regional approach to negotiations. As explained by Ms Jane Fletcher (who worked at the Office of Treaty Settlements at the time), this approach accommodated the overlapping interests of the eight Te Tauihu iwi and afforded opportunities for consensus to be reached between iwi on the allocation of redress. A regional "premium" was incorporated into the settlement packages to reflect the advantages of a region-wide settlement.

[872] Settlements were negotiated over several years. The Crown witnesses involved in the process described the settlement negotiations as extremely complex. Letters containing the financial and commercial redress offers were sent to Tainui-Taranaki and Kurahaupō iwi on 2 May 2008. These letters were accepted by the Kurahaupō and Tainui-Taranaki iwi later that month. However, following a general election in October 2008, the overall settlement packages were reduced with the agreement of each iwi.

[873] In December 2008, counsel for the Wai 56 claimants sought to explore separate and specific redress for Wai 56. The Crown responded that Wai 56 would be settled by the existing letters of offer and there was no room for additional redress. However, the Crown agreed to continue to discuss the settlement of Wai 56 in good faith.

[874] On 11 February 2009, the Crown signed Letters of Agreement with all three iwi collectives in Te Tauihu—being the Tainui-Taranaki iwi, the Kurahaupō iwi and Ngāti Toa. The Letter of Agreement included a statement by the Minister for Treaty of Waitangi Negotiations at the time acknowledging that the historical aspects of Wai 56 would be discussed by the parties in good faith. Negotiations on the detailed aspects of redress continued.

[875] Following the signing of the Letters, Mr Morgan, then Chairperson of Wakatū wrote to the Minister expressing disappointment with the redress in the Letters of Agreement and requesting the Crown to resolve Wai 56 directly. The Minister

responded that while the Crown was willing to continue to discuss the historical aspects of Wai 56 in good faith, the financial value of the offer could not be extended as the financial and commercial packages were significant, and further financial value would not be accepted by Cabinet.

[876] On 4 December 2009, counsel for Wai 56 claimants sought an urgent hearing with the Waitangi Tribunal alleging that the Crown had failed to act upon the findings of the Waitangi Tribunal and that they would suffer significant and irreversible prejudice if they did not receive a separate settlement for the historical claims in Wai 56.

[877] That application was dismissed by the Tribunal in a decision dated 1 March 2010.[469] The Tribunal noted that in the context of settlement negotiations there would always be some groups or alliances that believed they should receive the settlement rather than somebody else.[470] The Tribunal also noted that the Crown's position had been clear from the start, and there was nothing in the Crown's failure to settle Wai 56 separately that would cause significant prejudice to the Wai 56 claimants.[471]

[878] Wakatū then filed this proceeding in May 2010. Due to a concern about the overlapping nature of the proceeding and the Tainui-Taranaki settlement, negotiations were suspended in October 2010. Following suspension of negotiations, three of the Tainui-Taranaki iwi wrote to the Minister asking for the negotiations to continue. Ms Fletcher explains that at this point the Crown was required to balance the risks of continuing suspension of the negotiations with the potential obligations arising from this proceeding. Due to the interconnected nature of the settlement packages, attempting to settle without Tainui-Taranaki would require renegotiation of the other packages, which could lead to further delays.

[879] Accordingly, in March 2011, the Crown agreed to lift the suspension on the basis that the four Tainui-Taranaki iwi would commit to initialling deeds of settlement. The deeds were initialled by the Crown in October 2011.

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469 Waitangi Tribunal *Wai 56 #2.85* (1 March 2010) at [70].
470 At [65]–[66].
471 At [67].

Deeds of settlement and Settlement Act

[880] Clifford J delivered the first High Court judgment in this proceeding in June 2012,[472] with an appeal filed later that year. The Crown and the Tainui-Taranaki iwi subsequently agreed that their settlements would be progressed, subject to a preservation clause in the enabling legislation which allowed this proceeding to continue.

[881] Deeds of settlement were then executed. As explained by witnesses for the Crown, Treaty settlements comprise several components: a Crown acknowledgement and apology; a historical account (setting out the history of the Crown's interaction with the settling group); commercial redress; and cultural and historical redress.

[882] Commercial redress involves the payment of cash and transfer of commercial assets. It only represents a small portion of losses actually incurred. Nevertheless, it is negotiated according to a quantum framework which takes account of the amount of land lost and the way it was lost. Relativity between settlements is also an important factor in determining quantum.

[883] Cultural redress seeks to recognise a range of Māori interests relating to the natural environment and sites of cultural, spiritual, historical and traditional association to the iwi. Settlements may also involve one-off payments which are expressed to be "outside quantum".

[884] The total value transferred to the Tainui-Taranaki iwi was $99.29 million. This comprised $35 million in quantum; $48.90 million in flow-on benefits (including interest on quantum and accumulated rental from Crown Forestry Rental land) and $15.39 million in other financial redress payments and cultural redress gifting. Commercial redress for each iwi also included the right of first refusal over certain Crown and Crown Entity Land. This includes properties over which all iwi had a right of first refusal, and properties over which individual iwi had rights of first refusal.

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472 High Court judgment, above n 18.

[885] As Ms Fletcher explained, the settlement packages negotiated do not link items of redress to specific claims or grievances, but rather "provide a bundle of redress that in total settles all the historical claims of the claimant group". Nevertheless, Ms Fletcher identified that compensation relating to the Tenths and Occupation Lands formed part of the settlements. This was through references to the Tenths in the historical accounts, Crown acknowledgements, and Crown apologies. It was also reflected in the financial and cultural redress payments made.

[886] The settlement with the Kurahaupō iwi also reflected their claim in relation to the Tenths. In particular, the exclusion of the Kurahaupō iwi from the Tenths was a factor in the $4.4 million funding towards iwi capacity building.

[887] Each deed of settlement contained acknowledgements that it was not possible to fully compensate the relevant iwi for all loss and prejudice suffered, and it was intended that the foregoing of full compensation would contribute to New Zealand's development. There was also an acknowledgement that the settlement was intended to enhance relationships between iwi and the Crown, and that it was fair. The acknowledgement in full provides as follows:[473]

> 4.1 Each party acknowledges that:
>
> 4.1.1 the other parties have acted honourably and reasonably in relation to the settlement; but
>
> 4.1.2 it is not possible:
>
> (a) to assess the loss and prejudice suffered by [Ngāti Rārua, Te Ātiawa o Te Waka-a-Māui, Ngāti Tama ki Te Tau Ihu and Ngāti Kōata] as a result of the events on which the historical claims are or could be based; or
>
> (b) to fully compensate [Ngāti Rārua, Te Ātiawa o Te Waka-a-Māui, Ngāti Tama ki Te Tau Ihu and Ngāti Kōata] for all loss and prejudice suffered; and
>
> 4.1.3 [Ngāti Rārua, Te Ātiawa o Te Waka-a-Māui, Ngāti Tama ki Te Tau Ihu and Ngāti Kōata] intend their foregoing of full compensation to contribute to New Zealand's development; and

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[473] The clause in the Ngāti Tama ki Te Tau Ihu deed of settlement is not identical. However, it contains a mirrored language with some additions and the differences are not material.

4.1.4 the settlement is intended to enhance the ongoing relationship between [Ngāti Rārua, Te Ātiawa o Te Waka-a-Māui, Ngāti Tama ki Te Tau Ihu and Ngāti Kōata] and the Crown (in terms of the Treaty of Waitangi, its principles, and otherwise).

4.2 [Ngāti Rārua, Te Ātiawa o Te Waka-a-Māui, Ngāti Tama ki Te Tau Ihu and Ngāti Kōata] acknowledge that, taking all matters into consideration (some of which are specified in clause 4.1), the settlement is fair in the circumstances.

[888] The Settlement Act is the enabling legislation for the settlements. Section 25 of that Act provides:

25 Settlement of historical claims final

(1) The historical claims are settled.

(2) 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.

(3) Subsections (1) and (2) do not limit the acknowledgements expressed in, or the provisions of, the deeds of settlement.

(4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—

(a) the historical claims; or

(b) the deeds of settlement; or

(c) this Act; or

(d) the redress provided under the deeds of settlement or this Act.

(5) Subsection (4) does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deeds of settlement or this Act.

(6) Subsections (1) to (5) do not affect—

(a) the ability of a plaintiff to pursue the appeal filed in the Court of Appeal as CA 436/2012; or

(b) the ability of any person to pursue an appeal from a decision of the Court of Appeal; or

(c) the ability of a plaintiff to obtain any relief claimed in the Wakatū proceedings to which the plaintiff is entitled.

(7) To avoid doubt, subsection (6) does not preserve any claim by or on behalf of a person who is not a plaintiff.

(8) In this section—

plaintiff means a plaintiff named in the Wakatū proceedings

Wakatū proceedings means the proceedings filed in the High Court as CIV–2010–442–181.

[889] As previously noted, the Supreme Court found that s 25(6) (preservation clause) meant that the current proceeding was not barred by the Settlement Act.

Adjusting for the settlements

[890] The plaintiff submits that the Treaty settlements are irrelevant to the claim for relief in this proceeding. Emphasis is placed on s 25(6)(c) of the Settlement Act which provides that s 25(1)–(5) does not affect the ability of the plaintiff to obtain any relief claimed in the Wakatū proceedings to which the plaintiff is entitled. In essence, the plaintiff says that a key purpose of the preservation clause is for the claims to property rights advanced in the proceeding to be unaffected by the Crown's settlement of its moral obligations through Treaty settlements.

[891] I agree that the distinction between the Treaty settlement process on the one hand, and private law claims to vindicate property rights on the other, must be maintained. Treaty settlements sit within the role and function of the other branches of government. The Treaty settlement process is separate from the Court's role in adjudicating a private law claim. The principle which sits behind the preservation clause is that the Treaty settlement process cannot prevent the plaintiff from accessing the Court to vindicate private property rights.

[892] The Customary Owners right to pursue this claim means I cannot accept the Crown's submission that my discretion should be exercised to avoid the grant of relief which would significantly undermine the principles and expectations informing the Treaty process. The Customary Owners are like any other private litigant and their right to relief should not be curtailed simply because the defendant is the Crown. The plaintiff's claim is determined according to the law, unaffected by the political objectives of the other branches of government which sit outside the courtroom doors.

[893] The Crown's concern about the impact on other Treaty settlements is discussed more fully in the following part. For present purposes it is sufficient to note that the impact must be seen in context. That context includes the fact that Treaty settlements often include an explicit clause in which the claimants acknowledge that it is not possible to fully compensate them for all loss and prejudice suffered and they forgo compensation in order to contribute to New Zealand's development.

[894] Moreover, it is far from clear that this decision will have the wide-ranging and significant impact feared by the Crown. The duty found by the Supreme Court is not a fiduciary duty owed by the Crown to Māori generally. Nor does it arise out of the Treaty of Waitangi. It is a bespoke duty arising out of a particular land transaction which took place in the 1840s and which is decided according to principles of equity. The circumstances in which this duty arises is case specific which necessarily limits the extent of this judgment's application.

[895] This does not mean, however, that the Treaty settlements are entirely irrelevant to the current proceeding. There is a factual overlap between the claim before the Waitangi Tribunal which was subsequently settled, and the current claim. As Glazebrook, Arnold and O'Regan JJ said in the Supreme Court, care must be taken to ensure there is no double recovery between that which was received as part of the settlement and the relief ordered in this proceeding.[474]

[896] Ascertaining the extent of the double recovery between the Treaty settlement and this claim is not an easy task. The settlements are not pegged to a particular claim or property. They also cover matters which fall outside the scope of this proceeding, or which do not meet the pre-conditions of a legal claim. A precise calculation is not possible, and I follow Glazebrook J's opinion that a "broad view" of the Treaty settlement should be taken.[475]

[897] The Crown did not call evidence, nor make submissions, suggesting the quantum of any double recovery. The plaintiff submits that the sum to be deducted

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474 Supreme Court judgment, above n 8, at [716]–[717] per Glazebrook J and [826] per Arnold and O'Regan JJ.

475 At [717] per Glazebrook J.

should be limited to $5.98 million, which is the sum calculated by reference to the proportion of the settlement which relates to the Spain award area compared to the total area of interest the subject of the settled claims. Alternatively, the plaintiff says that the maximum sum to be deducted is $48 million, which is the sum calculated by Dr Meade. That sum was calculated by reference to:

(a) the estimated number of Customary Owners in 2013 as a share of the combined 2013 Census populations of the four Tainui Taranaki iwi; and

(b) an indicative assumption that 50 per cent of the redress value in the Treaty settlement package relates to the Tenths shortfall and Occupation Land.

[898] Neither of the sums proposed by the plaintiff include the value of the apology offered by the Crown or the historical account. Nor do the sums reflect the value of the plaintiff's acknowledgement in the deed of settlement, particularly the foregoing of full compensation to contribute to New Zealand's development. The value of the Kurahaupō Treaty settlement does not appear to be reflected in these sums either.

[899] However, in the absence of evidence and submissions regarding the value which should be assigned to these factors, I am not prepared to go beyond the plaintiff's assessments. What these factors do suggest, however, is that the higher of the two sums put forward by the plaintiff should be adopted. Accordingly, I find that the sum of $48 million should be deducted from the monetary award made against the Crown in this case.

PART XI—LACHES AND ACQUIESCENCE

[900] The Crown relies on the equitable defences of laches and acquiescence in defending the claim. Crown counsel submits that "it is simply too late to do justice at this extraordinary remove in time".

[901] While often addressed together, laches and acquiescence are nevertheless distinct concepts protecting different interests.[476] Laches captures those situations where delay, coupled with prejudice to the defendant, makes it inequitable to disturb the status quo.[477] Acquiescence on the other hand captures situations where a plaintiff has participated in the breach, or has stood by without asserting rights, such that the conduct amounts to a waiver or estoppel.[478]

[902] The Supreme Court addressed laches in its judgment. All Judges of the majority agreed that the historical record was relatively intact.[479] Other observations were made on grounds relevant to this defence (most extensively by Elias CJ). Those observations are addressed below.

[903] The Crown marshalled most of its arguments under the laches head. The grounds put forward in support of the acquiescence defence were, by in large, related to individual transactions (for example, the Te Maatū exchanges and the 1853 Whakarewa grant). These arguments are addressed in the factual findings relevant to each of these transactions. Accordingly, the focus of this part is on the laches defence.

[904] Each of the grounds relied on by the Crown are considered first. Other factors relevant to the assessment of the defence then follow. A final balancing of the equities concludes this part.

Relevant legal principles

[905] Elias CJ summarised the principles applicable to the laches defence as follows:[480]

> [456] The general approach is that mere delay does not establish laches, although length of delay and the acts done in the interim are always important "in arriving at a balance of justice or injustice between the parties". The

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476 Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1039 at 1059–1064.

477 At 1059–1064; *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [37]; and JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2015) at 1085 and 1087.

478 Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) Equity and Trusts in New Zealand (2nd ed, Thomson Reuters, Wellington, 2009) 1039 at 1063–1064.

479 Supreme Court judgment, above n 8, [459] per Elias CJ, [690] per Glazebrook J and [817] per Arnold and O'Regan JJ.

480 Footnotes omitted.

doctrine of laches in equity is "not an arbitrary or a technical doctrine", as Lord Selborne LC explained in 1874:

> Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[457] When a claim will be barred in equity because of lapse of time is not capable of any clear rule. It depends on the balance of justice, as Cooke P noted in *Neylon v Dickens*, applying Lord Selborne's approach. If there is a balance of justice to be achieved in any particular case, as the cases suggest, the full circumstances will always need to be considered. In *Eastern Services Ltd v No 68 Ltd*, it was acknowledged that "[e]quity has been most reluctant to accept that an equitable interest in land could be 'lost or destroyed by mere inaction'", at least where the circumstances do not amount to waiver or acquiescence on the part of the plaintiff. When a plaintiff sues in a representative capacity, the courts have been even more reluctant to find that delay is a bar.

[906] Those principles are adopted and applied below.

Forensic prejudice

[907] The Crown submits that it is significantly prejudiced by its inability to call and cross-examine witnesses with first-hand knowledge of what occurred.

[908] In the Supreme Court, Elias CJ and Glazebrook J did not consider there was material evidential prejudice that would justify the claim being barred for delay.[481] Nevertheless, Elias CJ considered there were certain transactions (including the circumstances relating to the loss of Occupation Lands) which needed to be considered

[481] Supreme Court judgment, above n 8, at [459] per Elias CJ; [690] per Glazebrook J.

further before findings of breach could be made. For that reason, her view on evidential prejudice was provisional.[482]

[909] Glazebrook J did not rule out the possibility that there may be aspects of particular transactions where the lack of full documentary records meant that it was impossible to come to a view on what occurred. Her Honour acknowledged that it may be more difficult for the Crown to identify the extent of the Occupation Lands wrongly treated as Crown lands, and a defence of laches may therefore be available with regard to those lands.[483]

[910] Arnold and O'Regan JJ considered that:[484]

> … there was no proper basis to establish the defence of laches based on any prejudice to the Crown from its inability to adduce evidence of what was and what was not promised in the 1840s or about the circumstances giving rise to the fiduciary duties that we have found the Crown owed the original customary owners.

[911] Arnold and O'Regan JJ agreed with Elias CJ and Glazebrook J that it would be necessary to revisit the issue in this proceeding.[485]

[912] As my factual findings make clear, there are several areas where there is insufficient evidence to conclude that the Crown breached its fiduciary duties. As foreshadowed by Elias CJ and Glazebrook J, determining the boundaries of the Occupation Lands is particularly difficult. While it may be possible to determine that certain areas were occupied, it is not possible with the passage of time and the changing landforms in the interim, to determine the extent of the Occupation Lands with certainty. This has led me to use the Tenths to establish boundaries, as I explain earlier in this judgment.[486] I consider this mitigates any prejudice to the Crown arising from the passage of time in defending the claim in relation to the Occupation Lands.

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482 At [461]–[462] per Elias CJ.
483 At [691] per Glazebrook J.
484 At [817] per Arnold and O'Regan JJ.
485 At [818] per Arnold and O'Regan JJ.
486 See above at [391]–[394].

[913] Forensic prejudice has no purchase when it comes to the Unallocated Tenths. The trust or trust-like obligations in relation to the Unallocated Tenths arise out of essentially undisputed facts and legal instruments.

[914] Furthermore, the conclusions regarding the nature and scope of the duty to reserve 15,100 acres of Tenths means evidence relating to Governor Grey's intentions and motivations bears little relevance to the breach inquiry. The Crown has not shown a lawful basis upon which it could retain the land obtained after the 1845 Spain award without reserving 15,100 acres of Tenths. Further evidence, whether documentary or adduced by way of cross-examination of the relevant actors, would make no difference to that calculation. Elias CJ put it this way:[487]

> [460] In relation to the failure to get in the rural reserves and in the dealings with the established reserves before 1856, no lawful basis on which the Crown, as trustee, could have retained the rural sections and disposed of the town and suburban sections has been put forward. In those circumstances, I do not consider that the motivation the Crown may have had at the time is of great significance. The suggestions put to us in argument that the Crown is prejudiced by not being able to explore such motivation with witnesses of the time seems rather to be based on the assumption of political trust, which I do not accept. In any event, there is contemporary or near contemporary evidence that, even at the time, the Crown was seen by some to be acting in breach of trust in these and similar dealings. So I doubt that any forensic prejudice (as opposed to prejudice through change of position) will be shown even after the final findings of fact on breach are made.

[915] The position identified in the above passage remains unaltered and I do not consider forensic prejudice is an aspect of laches that is engaged in relation to the Unallocated Tenths. Similarly, the primary record is substantially intact in relation to those transactions involving Allocated Tenths I have found proved, and in relation to the Occupied Tenths. There is no forensic prejudice in defending these claims.

Change of position and prejudice to third parties

[916] The Crown says it has "reasonably and irreversibly" altered its position in the intervening 180 years. This is through dealings with the land by making grants to private individuals and public entities, and by relying on the Treaty settlement process. As to the latter, the Crown says the circumstances in which the proceedings were

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487 Footnote omitted.

commenced, and the "threat to the stability" of the Treaty settlement process, are all factors relevant to laches.

[917] I accept that the Crown has dealt with the land as if it was unencumbered. This is a prejudice to the Crown arising out of the late filing of proceedings. However, and as Elias CJ noted, any such prejudice must be weighed in the balance of equities between the parties.[488] Those equities include the fact that the Crown held land on trust for the benefit of the Customary Owners and it was aware of its obligation from the outset. Glazebrook J put it this way:[489]

> [692] The Crown argues that it has acted in reliance of its unencumbered title to the land in Nelson. This may have been so but there was no justification for it to have held that view, given the 1840 agreement, the Spain determination and the basis on which the land became desmesne land of the Crown. A trustee cannot justify a breach of trust or escape the consequences by saying it thought the trust property belonged to it.

[918] I follow and adopt those observations.

[919] The impact of the litigation on the Treaty settlement process was a central focus of the Crown's submissions on laches. The Crown says it is prejudiced in terms of the Treaty settlement process it embarked upon before this proceeding was filed. The Crown also says that the possibility of civil claims of the current magnitude risks overshadowing existing and future Treaty settlements.

[920] The former Chief Justice made observations on many of these claims advanced by the Crown which may be briefly summarised as follows:[490]

(a) Any prejudice suffered as a result of altering its position by relying on the Treaty settlement would have to be substantiated and weighed against competing equities.[491]

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488 Supreme Court judgment, above n 8, at [470]–[471] per Elias CJ.
489 Footnote omitted.
490 At [471]–[482] per Elias CJ.
491 At [471] per Elias CJ.

(b) The Treaty of Waitangi Act 1975 provides a system of inquiry into Treaty grievances which was intended to sit alongside, not to oust, common law rights and remedies.[492]

(c) The history of negotiations leading up to the proceedings does not suggest an "end run" around settlement because the terms were disappointing. The proceedings were issued before the settlement negotiations were concluded and after efforts were made to have Wai 56 determined separately. Those efforts included an urgent application to the Waitangi Tribunal which was declined.[493]

(d) A political settlement of a claim to the Waitangi Tribunal should not pre-empt determination of a legal claim before the courts. That consideration weighed with Parliament in enacting the Settlement Act.[494]

(e) The Settlement Act, which explicitly preserves the plaintiff's appeal rights is inconsistent with an assertion that the Crown would be prejudiced to the extent that it should be granted relief in equity by reason of it having entered into the settlement.[495]

[921] The Crown says that there is now a much fuller factual picture of the background to the settlements, the settlement process more generally and the prejudice to the Crown, iwi yet to settle with the Crown, and the public, than was before the Court at the time the former Chief Justice expressed these views.[496] It is therefore necessary to consider the Crown's arguments afresh.

[922] Counsel says that the claimants in Wai 56 delayed filing the claim until the negotiations had reached a point where, because of the interconnected nature of the

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492 At [474] per Elias CJ.
493 At [471]–[472] and [475]–[480] per Elias CJ.
494 At [481] per Elias CJ.
495 At [482] per Elias CJ.
496 Evidence was given by Jane Fletcher, Lilian Anderson and Hon Christopher Finlayson KC.

negotiations, it was not practicable nor fair on the other iwi for the Crown to pull out or change tack.

[923] While I accept that the commencement of this litigation was extremely disruptive to the settlement negotiations, I do not consider that to be a prejudice which engages the laches defence. Rather, it is part and parcel of the negotiation process. There is no suggestion (nor evidence) that the Wai 56 claimants were acting in bad faith by commencing this proceeding, nor that they were attempting to avoid the entire settlement process. The claimants were entitled to adopt a different negotiating position and tactical approach to that adopted by the Crown. That is the fibre of settlement negotiations.

[924] Moreover, the proceeding was commenced before settlements were finally concluded, and only after other avenues for relief (namely an application to the Waitangi Tribunal) had been exhausted. There is nothing in the timing of the filing of this proceeding which speaks of the type of prejudice with which laches is concerned.

[925] The fact that the Settlement Act specifically provides for this proceeding is also relevant here. It was a solution proposed by the Crown and accepted by the claimants, including the plaintiff in this case. A claim that this proceeding prejudices the Crown's settlement process when that very settlement process allows for the proceeding sits uneasily with the defence of laches.

[926] The Crown says it is not contending that the Treaty settlement process has the effect of displacing property rights recognised at law. Nevertheless, and as mentioned in the previous part, care must be taken to ensure that the distinction between the two processes is maintained. The Treaty settlement process is political in nature. Participation in that process cannot operate as a defence to proceedings in which claimants seek to enforce their legal rights in accordance with the law. To allow that conclusion would be to allow the political process to usurp access to justice rights. Indeed, Parliament's very purpose in enacting the preservation clause was to ensure access to justice for the enforcement of property rights.

[927] The second aspect of the Crown's argument concerns alleged prejudice to the integrity and durability of other Treaty settlements and the wider settlement process. The particular concern revolves around the scale of the relief sought by the plaintiff in this proceeding, which is 1.7 times the value of all Treaty settlements achieved to date. Crown witnesses expressed concern that awards at that level would place significant pressure on the Māori-Crown relationship across the country and could raise redress expectations for iwi who are yet to settle.

[928] As noted in the previous part, it is hard to get a precise handle on the true extent of the risk to the Treaty settlement process. This litigation concerns a particular transaction and set of events. As the Supreme Court was careful to say, the duty of care does not arise out of te Tiriti or the Crown's obligations towards Māori more generally.[497] The precedent effect of this judgment is not at all clear. Added to that is the fact that my determination of the claim results in relief being granted at a fraction of the total quantum sought.

[929] In any event, the impact of this proceeding on the Treaty settlement process is a consequence which must have been contemplated by Parliament when the preservation clause was included in the Settlement Act. For reasons already canvassed in the previous part, I consider the Court should be cautious about accepting a defence to a private claim which is based on a political process.

[930] Ultimately, I am not persuaded that this is a prejudice which should receive much weight in the overall balance.

Reasons for the delay

[931] The Crown submits that the plaintiff's delay in bringing this proceeding is not adequately explained, particularly since the facts giving rise to the claim have long been known.

[932] I consider the delay in bringing the claim must be seen in context. Mr Morgan and Mr James Wheeler gave evidence in the first High Court trial in 2011 of the efforts

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497 Supreme Court judgment, above n 8, at [391] per Elias CJ, [590] per Glazebrook J, [784] and [784], n 1012 per Arnold and O'Regan JJ.

made by the Customary Owners to vindicate their rights. These included petitions in 1854 by Tamihana Ngāpiko and Simeon Te Wehi seeking information about the Tenths. Other petitions followed in 1882, 1883, 1886, 1887, 1889 and 1897.

[933] Letters were also sent to James Mackay Junior in 1905 asking for assistance with respect to the lands set aside in Motueka. A meeting between Mr Wheeler's grandmother and the Prime Minister took place in 1936 in which the lands in Motueka were discussed. Requests were also made by Mr Paul Morgan's father in the mid-1940s to find out from the Māori Trustee the details regarding the management of the land. Enquiries were still being made in the 1970s. And, in 1974, Mr Wheeler's grandmother made a submission to the Sheehan Inquiry into the reserved lands. As Ellen France J said in the Court of Appeal, this is not a case of the Customary Owners sitting on their hands.[498]

[934] Furthermore, it is clear that the Crown was aware of the problems with the Tenths for some time, and yet did not take steps to remedy the position. For example, Thomas Brunner pointed out in 1870 that the cultivated lands (being Occupation Lands) should have been excluded, rather than being included within part of the Tenths estate. Similarly, Alexander MacKay identified deficiencies with the administration of the Tenths estate in a comprehensive report tabled after the Court of Appeal's decision in *Regina v Fitzherbert*.[499] Most importantly, the Crown was clearly aware of the obligation to provide the rural Tenths and failed to do so.

[935] Elias CJ identified the hurdles faced by the Customary Owners in bringing claims in the Courts. These included: the impact of the *Fitzherbert* decision; the influence of the political trust theory; and the difficulties in getting information about the legal status of the Tenths. The background of impoverishment of the beneficiaries attributable to deprivation of their lands was also referred to by Elias CJ as being relevant to the delay.[500]

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498 Court of Appeal judgment, above n 64, at [197] per Ellen France J. Approved in Supreme Court judgment, above n 8, at [468] per Elias CJ and [693] per Glazebrook J.

499 *Regina v Fitzherbert* (1872) 2 NZCAR 143.

500 Supreme Court judgment, above n 8, at [466]–[469] per Elias CJ.

[936] The Crown responds to these observations by noting that the Courts were still capable of enforcing the private law trust throughout this time as the law of equity and trusts is not a recent intervention. As to the effect of impoverishment, the Crown submits that it must be assessed with caution as it could result in an examination of 19th century transactions through a 21st century lens with a resulting risk of distortion.[501]

[937] None of these responses alter the import of the factors identified by Elias CJ. I consider laches must be assessed in a realistic way and with an eye to the practical hurdles faced in bringing claims to the Court.[502] These include the legal hurdles (such as those posed by *Fitzherbert*) and socio-economic factors too. As to the latter, I accept that caution must be exercised in making sweeping statements and generalisations as to impoverishment caused by the lack of land. Nevertheless, there is evidence before the Court that the Customary Owners suffered significantly due to the loss of their lands. It is not too much of a stretch to acknowledge that, at least for the period of impoverishment, and during other periods (such as the depression era), the Customary Owners would have been hampered in bringing their claims to Court.

[938] The representative capacity in which this claim is brought is also relevant here. Elias CJ noted that "[w]hen a plaintiff sues in a representative capacity, the courts have been even more reluctant to find that delay is a bar".[503] The Crown's attempt to distinguish the plaintiff's claim from an orthodox representative claim is unpersuasive in this context. The difficulties in launching a representative action such as this one, against the backdrop of complex Treaty settlement negotiations, are not to be underestimated.

[939] Overall, I am not persuaded that the plaintiff or those he represents sat on their hands or are guilty of delay to such an extent that the Crown can call on laches as a defence to the claim.

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501 Quoting *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [309] per William Young J.

502 This is consistent with the majority judgment in *Manitoba Métis Federation v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623 at [149], relied on in Supreme Court judgment, above n 8, at [467] per Elias CJ.

503 Supreme Court judgment, above n 8, at [457] per Elias CJ.

Balancing the equities

[940] Turning to the balancing exercise, I accept that the Crown has suffered prejudice as a result of this litigation. However, it is a limited form of prejudice. There is no forensic prejudice in relation to the Unallocated Tenths. The evidential issues that arose in relation to the Occupation Lands and the transactions concerning the Allocated Tenths and Occupied Tenths are addressed on a site-by-site or transaction-by-transaction basis.

[941] Any prejudice arising out of the Treaty settlement process is not of the type that would ordinarily engage a laches defence. I am unpersuaded that the extent of the prejudice to existing and future settlements will be as catastrophic as predicted by the Crown given the extent and nature of the relief granted, and the specific factual circumstances giving rise to the duty in this case. The Settlement Act preservation clause which allows the plaintiff to obtain relief despite the settlement deserves weight in the overall balancing exercise.

[942] As for delay in bringing this claim, there is a history of the Customary Owners raising issues about the Tenths and others raising issues on their behalf. Despite knowing about these issues, the Crown took no steps to remedy the position. This proceeding was commenced after other avenues were exhausted and before a final settlement deed had been concluded. While this proceeding disrupted and delayed existing settlements, there is no suggestion that those the plaintiff represents acted in bad faith.

[943] The extent of any prejudice to the Crown must be weighed against the nature of the Customary Owners' claim in this case. The claim relates to land which should have been held in trust for the benefit of the Customary Owners. The Tenths were the primary consideration for the Customary Owners' sale of land. Provision of those Tenths was key to Commissioner Spain finding that the sale was just and equitable. And, the exclusion of Occupation Lands was consistent with the Crown's obligations under te Tiriti. The Customary Owners had no other option but to trust that the Crown would deliver on the deal. The Crown's failure to comply with its fiduciary duties

meant the land was treated as if it was Crown land to be granted to the Company and others. This was at the expense of the Customary Owners.

[944] I consider the nature of this claim outweighs any prejudice to the Crown. To adopt the phrase from *Eastern Services Ltd v No 68 Ltd*, this is a case where equity would be "most reluctant to accept that an equitable interest in land could be 'lost or destroyed by mere inaction'".[504] Accordingly, I do not accept that laches operates as a complete defence to the plaintiff's claim.

PART XII—QUANTUM

[945] I have found that equitable compensation comprising: (a) the current market value of the land; and (b) rentals is recoverable by the plaintiff. Quantification of those sums is addressed in this part of the judgment.

[946] The rentals calculation affects all categories of land where loss of the beneficial use of the land has been established. It is addressed as a single topic below. Dr Meade's assessment included a sum calculated on the basis of an ex-gratia payment made in 2002. This was advanced on a standalone basis and so is addressed separately from the rental calculation.

[947] As regards the current market value of the land, Mr Smithies gave expert valuation evidence for the plaintiff, and Mr Schellekens for the Crown. As a result of caucusing, they were able to agree on many points, with the most significant difference between them being valuation of the Unallocated Tenths (that is, the rural Tenths). The valuation of each category of land is considered after the section on rentals.

Rentals

[948] To calculate rentals, Dr Meade plotted a curve using assumed 1845 unimproved land values at one end, and the 2022 values assessed by Mr Smithies at the other. Known values ("knots") were incorporated into this curve where that information was available. Vacancy and rental rates were then applied to derive a

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[504] *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [39] citing *Fitzgerald v Masters* (1956) 95 CLR 420 (HCA) at 433 per Dixon CJ and Fullagar J.

rental income stream. Dr Meade calculated the net rentals lost to the Customary Owners on the plaintiff's claimed Tenths shortfall under the positive counterfactual as approximately $159 million. This figure was extracted from Dr Meade's evidence by Mr Murray, a Crown witness.

[949] The Crown did not produce its own calculation, nor did it contest the methodology used by Dr Meade. However, some of the inputs into the methodology were challenged by the Crown experts, Mr Murray and Mr Henson. Each of the challenged inputs are considered below.

1845 land values

[950] Dr Meade concluded that the unimproved land value in 1845 was an average of £1.50 per acre. This appears to have been assessed from the £300 paid by the settlers for 201 acres of land (made up of a town section of one acre, a suburban section of 50 acres and a rural section of 150 acres).

[951] Mr Murray says the average of £1.50 per acre is too high as the price paid by the settlers included costs other than just land value. This has the result that the chosen values adopted by Dr Meade for the town Tenths (£32.37 per acre), suburban Tenths (£2.29 per acre) and rural Tenths (£1.50 per acre) were also too high. He gave evidence that changes in these values could have a significant impact on quantum.

[952] I accept there is evidence which suggests the 1845 land values adopted by Dr Meade may be on the high side. Sales of town sections from 1849, 1850 and 1851 suggest a rate of around £6.00 per acre, as opposed to the £32.37 adopted by Dr Meade. A comparison with the package offered by the New Zealand Company to settlers in 1840 also suggests an average of £1.00 per acre, compared to the £1.50 acre estimated by Dr Meade, might be more realistic.

[953] However, there is a difficulty in deciding which values should be adopted instead. Mr Murray produced alternative values by using the Company information to scale the 1845 land values. However, Mr Murray did not undertake that exercise to determine alternative values, but rather to demonstrate the sensitivity of Dr Meade's modelling to the chosen 1845 values. There is no reason to suggest that the scaled

values produced by Mr Murray are any more accurate than those adopted by Dr Meade.

[954] In those circumstances, and in the absence of any evidence of alternative values, I consider Dr Meade's 1845 unimproved land values should be adopted. I find accordingly.

Vacancy and rental rates

[955] Dr Meade used a five per cent rate of unimproved land value to calculate rental returns. Dr Meade chose this rental rate in the early periods following the Spain award, and in later periods he justified its use by reference to the perpetual leasing regime and the prescribed rental rate under the Maori Reserved Land Act 1955 (which was five per cent for rural land and four per cent for urban land).

[956] As for vacancy rates, Dr Meade assumed 50 per cent of the land was fully leased in the year it was lost from the trust and that the remaining 50 per cent was fully leased seven years later. That is, Dr Meade assumed that all land could have been fully leased by 1852.[505]

[957] Mr Murray challenged the use of a five per cent rental rate, and the vacancy assumptions used by Dr Meade, in the early period. The main ground of challenge was that the rural land would have needed significant effort to bring it into production in 1845.[506] Once the land was productive, its value would be higher, and the owner/lessor would obtain all the benefit of the lessee's work. Accordingly, Mr Murray said that it would be expected that the benefit of this work would be shared between lessor and lessee by way of a lower rental rate.

[958] Support for this proposition was derived from examples detailed in Dr O'Malley's reply brief. These included 360,524 acres of land in the Nelson region leased for £950. At the land values assumed by Dr Meade, that suggested a rental rate

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505 The exception is for 0.1 per cent for wāhi tapu lands. That exception is not relevant to this assessment.

506 The other ground of challenge related to the impact on vacancy rates of large tracts of land becoming available. That issue was particularly relevant to the rental assessment for the Occupation Lands, and so I do not address it here.

of 1.1 per cent. Mr Murray accepted that the Whakarewa lands were leased at a higher rate, but considered this to be a comparatively small area of high-quality land which was not reflective of rental rates generally.

[959] In Mr Murray's expert opinion, this historical evidence could have been incorporated into the analysis in the same way that Dr Meade had used known values in estimating land values on the curve. Mr Murray reproduced one of the Dr Meade's curves with this historical information included to demonstrate its effect. The result was a $20,000 difference to the raw figures produced by Dr Meade. In reply, Dr Meade produced further examples of vacancies which Mr Murray accepted would have narrowed this difference even further.

[960] Dr Meade responded to the criticism regarding vacancy rates by saying that the rental rate of five per cent was based on historical evidence, was conservative, and that it built in an "assumed vacancy rate". That is, if the true rental rate was 5.5 per cent, then this would allow for an assumed vacancy rate of 11 per cent. Similarly, if the true rental rate was six per cent, then the assumed vacancy rate was 19 per cent.

[961] As a matter of principle, I agree with Mr Murray that the preferable approach would have been to calculate vacancy rates according to the available historical evidence. However, Mr Murray's alternative calculation is not based on all available historical evidence. He accepts that the additional historical evidence might close even further the already narrow gap of $20,000 between the experts' analyses. I also accept that some of the difference between the parties may be accounted for in the five per cent rental rate adopted by Dr Meade, although I am not persuaded that this rental rate is necessarily conservative.

[962] On balance, given the modest difference between the two parties, I consider the best evidence before the Court is the vacancy and rental rates adopted by Dr Meade. I find accordingly.

Ex gratia payment

[963] Dr Meade's calculations include a category described as an "ex gratia payment". The claim is based on the Crown's ex gratia payment of $14.082 million

to Wakatū in 2002. The payment was made to acknowledge the effects of the perpetual leases on land that were transferred to Wakatū in 1977. Dr Meade quantifies the sum relating to this claim as $222 million for both the Tenths and Occupation Lands together.

[964] Counsel for the plaintiff submits this claim is justified since Dr Meade has calculated the plaintiff's claim for lost rent as if the perpetual leasing regime applied. Because of this, the plaintiff submits that Dr Meade's assessment is overly conservative. On the basis that such a regime is discriminatory and unfair, Dr Meade made an adjustment by reference to the ex gratia payment to compensate for that effect.

[965] There is a superficial attraction to Dr Meade's approach, however, on closer analysis I am not convinced that the claim is justified. The underlying premise of the claim introduces factors which are not before the Court. The nature and the effect of the perpetual leasing regime is not part of the plaintiff's case and there is no evidence directed to this issue. To allow this claim would expand the parameters of this case beyond the pleaded grounds.

[966] There is also a conceptual difficulty in assessing a sum based on an ex gratia payment. By its very nature, an ex gratia payment is one which is made voluntarily and without obligation on the Crown. Dr Meade's assumption that the payment would have been larger had more land been subject to the perpetual leasing regime is unsubstantiated.

[967] Moreover, there is no link between the quantum of the ex gratia payment received by Wakatū and the effect of that perpetual leasing regime. The ex gratia payment made in 2002 was part of a settlement of litigation between the owners of Māori reserved land.[507] The $14.082 million received by Wakatū was part of a much bigger settlement sum paid to those owners. The Crown was not responsible for the apportionment which was carried out between the owners. The parties expressly acknowledged that the settlement did not suggest that the Crown had any legal liability

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[507] Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 2 at 929 and 938.

or obligation to an owner in relation to rental losses. In other words, it cannot be assumed that the $14.082 million received is compensation for losses sustained as a result of the perpetual leasing regime.

[968] For these reasons, I do not consider Dr Meade's assessment of damages based on an ex-gratia payment is recoverable in this case. That part of the claim is dismissed.

Summary of conclusions on rentals

[969] It follows from the above that Dr Meade's assessment of the net rentals, excluding the ex-gratia payment, is adopted. The final rental sum will depend on the final acreage of land. And, as set out in the Equitable Compensation part of this judgment, my decision on the application of simple interest is reserved pending further submissions from the parties on this issue.

[970] The next section considers the current market value of each category of land.

Unallocated Tenths

[971] Both valuers agreed that valuing the rural Tenths was a very difficult exercise. Mr Schellekens, an expert for the Crown, considered aspects of the valuation exercise to be "uniquely and inherently vague".

[972] The valuers adopted different methodologies for valuing the rural Tenths, resulting in a significant difference between them. Mr Smithies adopted a sales comparison approach, producing a value of $108 million. Mr Schellekens adopted a rating value indexation approach, producing a value of $60 million. The nature of these two approaches is discussed below.

[973] Mr Smithies started by identifying comparable sales evidence in the area and discarded those sales which lay outside the Spain award boundary. A further filtering exercise was undertaken whereby sales of 50 acres or less were discarded, together with sales of suburban, forestry, and steep (low productive) land. This reduced the sales evidence to 23 sales. Those sales generally came from the Motueka and Ngātīmoti areas. Mr Smithies calculated the mean dollar per acre (plus GST) rate

adjusted for improvements to be $11,300 per acre. This rate was cross-checked against the national average for rural land values. Applying this rate to the 10,000 acres of rural Tenths resulted in a valuation of $113 million. A 4.5 per cent market adjustment was then applied to reach an end figure of $108 million.

[974] Mr Schellekens relied on the evidence of Mr Parker and the map of the locations within which the rural land might have been located. He then identified existing parcels of land broadly comparable to a rural Tenth (150 acres) which had a separately assessed rating valuation. Mr Schellekens categorised those sites by region and calculated an indicative median dollar per hectare rate for each region. He then considered the weightings of each region relative to the location of rural land as identified by Mr Parker. Mr Schellekens adopted the average of the median ($42 million) and mean ($56 million) of these values, being $50 million. Mr Schellekens used a sales comparison approach as a cross-check for his valuations. This produced a wide spectrum of values, ranging from a low of $10 million to a high of $240 million. As a result of this cross-check, Mr Schellekens adjusted his adopted value from $50 million to $60 million.

[975] The key contest between the two valuers concerns the methodology which should apply. Neither methodology is entirely apt. Both have strengths and weaknesses. For the reasons set out below, I consider a combination of the two approaches is likely to provide the best approximation of value in this case.

[976] The starting point is the indexed rating valuation approach. Mr Schellekens explained that this approach is used to accommodate the challenges of valuing large parcels of land in one hit, and in cases where there is a lack of knowledge about the particular features of the land that drive value. These include factors such as shape, contour, access, and most importantly, use. He said that indexing rating values, accounting for time, is a good proxy for market value. That is important in this case where the features of the Unallocated Tenths are unknown.

[977] Another factor favouring Mr Schellekens's approach is the fact that he started with the land within the Spain award area which was available to be selected for the rural Tenths. Such an approach ties the valuation exercise to the historical evidence

and counters the risk that the selection of sales data is driven by present-day subjective assumptions about the likely location of the land.

[978] To expand on this point, it cannot be assumed that the rural Tenths would not have been allocated close to suburban areas, or over forestry or low productivity land. Dr O'Malley gave evidence which showed there were rural sections in districts which were predominantly comprised of suburban sections. In addition, Dr O'Malley's evidence was that rural Tenths could have been allocated over forested areas as they could have been leased for sawmilling purposes until such time as the land was cleared and made available for farming. The evidence also suggests that if the rural Tenths had been allocated, it is likely that many of them would have been allocated over low-quality land, as this was the only land available.

[979] The rating valuation indexed approach removes the influence of these assumptions from the valuation exercise. It is the best measure of the range of values which might be reflected in the selection of the rural Tenths given that the precise location of that land and other variables are unknown.

[980] However, the approach has its drawbacks. Some of the land included in the analysis would never have been selected as rural Tenths. And, the extent of the difference between the valuers suggests the value determined according to the rating valuation indexed approach may be underestimated. I consider an adjustment based on the sales comparison approach is required in this case.

[981] Mr Schellekens used the sales comparison approach as a cross-check but placed little weight on it in fixing an overall value. It resulted in him adjusting his valuation upwards from $50 million to $60 million. I consider more weight should be accorded to the sales comparison approach. Due to transcription errors in the sales comparison table used by Mr Schellekens, the sales comparison undertaken by Mr Smithies provides better evidence from which to make this adjustment.

[982] The adjustment to be made must take account of the weaknesses in the sales evidence relied on by Mr Smithies. Some of the sales Mr Smithies included in his analysis were significantly smaller than the 150 acres of a rural Tenth. Those outlier

sales may have skewed upwards the valuations derived from this evidence. The impact was compounded by Mr Smithies's use of an average rather than the median of the sales data. As Mr Smithies accepted, the use of an average means the outliers were accorded equal weight in the data set. Use of the median would have resulted in a rate of $9,000 per acre, or a total of $90 million for the rural Tenths.

[983] There is no exact nor scientific means to fix an appropriate value. I have had regard to the equitable context of the claim, and the significance of the Customary Owners' relationship with land. Taking account of these factors, the historical evidence before the Court, and the difficulties inherent in valuing unallocated land, I consider a valuation of $8,000 per acre, or a total of $80 million represents the best estimate of value of the rural Tenths in all the circumstances. I find accordingly.

Allocated Tenths

[984] The valuers largely agreed on the values for both the town and suburban Tenths, however, there were some discrepancies.

[985] Those discrepancies affected two Town sections (Tenths sections 253 and 256), and 12 suburban sections (Tenths sections 6, 7, 8, 20, 22, 114, 126, 138, 145, 146, 147 and 262).

[986] The discrepancies arise out of differences in the way in which the sections have been mapped. Dr Moira Jackson, for the plaintiff, used Fred Tuckett's 1842 and 1844 plans and Samuel Stephen's Survey Office Plan 1045 to georeference the relevant sections. The Crown's witness, Mr Parker, relied on numerous survey plans to locate the actual boundaries of relevant Tenths sections.

[987] Dr Jackson was not cross-examined on these discrepancies. Indeed, she was not called to give oral evidence at all on the basis that her evidence was accepted. Accordingly, she has not been given an opportunity to explain the apparent differences and s 92 of the Evidence Act is engaged.

[988] While that situation is unfortunate, this is not a case where oral evidence is critical. The issue in dispute does not turn on the credibility or respective skill sets of either witness. Rather, it turns on the reliability of the documentary sources used to map the boundaries of the sections. On this issue, I accept that the surveying plans used by Mr Parker provides a more accurate record than the sources used by Dr Jackson for georeferencing purposes.

[989] As Mr Schellekens's valuation of these sections was based on Mr Parker's evidence, those valuations should be preferred.

[990] For the sake of clarification these valuations will apply to the 1844 exchanges of suburban Tenths at Te Maatū and the withdrawal of 47 town sections in Nelson.

Occupation Lands

[991] The valuers agreed that that it was impossible to advance a joint recommendation for the Occupation Lands.

[992] However, both agreed that the rating valuation indexing approach was an appropriate methodology to value this land. It is expected that the valuers will be able to resolve and agree on a final value of that land in light of my factual findings set out in this judgment.

Occupation Reserves

[993] No issues of value arise in relation to the Occupation Reserves as the claim does not survive the duty and breach analysis.

Occupied Tenths

[994] The valuation exercise for the Occupied Tenths involves valuing the shortfall in replacement land held on institutional constructive trust. Strictly speaking this land is unascertained and is to be treated in the same way as the Unallocated Tenths.

[995] However, the actual allocation of the Tenth provides a point of reference to determine value and I accept that it may be the best (albeit imperfect) evidence

available from which to determine the value of this land. As already noted, the values of the town Tenths and suburban Tenths were agreed between the valuers, and those agreed values are adopted here.

PART XIII—RELIEF

[996] The plaintiff's statement of claim seeks various declarations to be made by way of relief.[508] These include a declaration that the Crown has a duty to account for any trust property held on behalf of the Customary Owners, including property that it currently holds on trust and any profits received.[509] Further information is required before declarations can be made in terms consistent with this judgment. The further information required is set out later in this part.

[997] Before addressing that issue, I turn to the plaintiff's request for a six-month adjournment to allow an appropriate vehicle to be formed to receive relief ordered in this proceeding, and the Crown's concerns about the capacity in which the plaintiff will receive that relief.

Receipt of relief by the plaintiff

[998] The Crown challenges the capacity of the plaintiff as representative to receive the relief sought in this case. This raises issues about the capacity in which the plaintiff brings this claim.

[999] The Supreme Court confirmed the Court of Appeal's determination that the plaintiff had standing to pursue the claim. Mr Stafford's right to bring the proceeding arose from his right as a beneficiary of the Tenths and his acknowledged kaumātua and rangatira status.[510]

[1000] At the time the Crown filed its statement of defence, it was unclear whether the parties that had previously intervened would oppose the claim on the basis that

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508 Section 17 (1)(b) of the Crown Proceedings Act 1950 limits the relief that may be granted against the Crown in relation to the return of land to declaratory relief.

509 The plaintiff did not seek an order for account at trial and it appears this relief is no longer sought.

510 Supreme Court judgment, above n 8, at [3], [494] and [499] per Elias CJ, [673] per Glazebrook J and [807] per Arnold and O'Regan JJ.

they, and not Mr Stafford, should receive relief on behalf of the Customary Owners. That was the position before the Supreme Court.

[1001] However, the position has developed since the statement of defence was filed. There is now evidence before the Court indicating that all the Tainui-Taranaki post settlement governance entities support Mr Stafford. Similarly, following agreement being reached with the plaintiff, the Ngāti Apa ki te Rā Tō Trust (on behalf of the Kurahaupō iwi) expressly supports Mr Stafford also. Contrary to the Crown's submission, I am satisfied that this is sufficient evidence for Mr Stafford to receive relief on behalf of the Customary Owners.

[1002] Notwithstanding this position, the plaintiff seeks a period of six months from the delivery of the judgment to allow an appropriate structure to be formed to receive the relief ordered by the Court. Counsel for the plaintiff submits that this period is required because the structure needs to be designed in consultation with the Customary Owners and by a process which accords with tikanga. Time is also required to finally identify all members of the beneficiary class. It is intended to seek the Court's approval to the legal structure.

[1003] I am not persuaded that relief in this proceeding should be delayed for this process to be completed. The relief sought is declaratory in nature. Mr Stafford is the named plaintiff to this proceeding and any declarations will be made in *his* favour as representative of the Customary Owners. The mechanics by which the Crown complies with the declaratory relief ordered will no doubt involve discussion and cooperation between the respective parties. That discussion and cooperation will take place outside the courtroom doors.

[1004] The making of final orders in this proceeding will discharge the functions of this Court. It is for the plaintiff and those he represents to decide how any assets received as a result of the relief ordered in this proceeding are to be distributed between themselves. This Court has no role to play in that process. The united front presented throughout trial suggests any disagreements will be readily resolved. If they are not,

then further proceedings may be necessary.[511] Those proceedings will be different to the present one, and, depending on the nature of the dispute, could fall within the jurisdiction of a different Court.

[1005] The fact that the beneficiary class has not yet been finally identified does not present any hurdles to the grant of relief, and nor does it warrant further delay. As Clifford J found in the High Court there is sufficient certainty of objects for a trust to arise and the class of persons said to be beneficiaries of the trust are identifiable.[512] That finding was not challenged on appeal.

[1006] The subsequent agreement between the Customary Owners and Ngāti Apa on behalf of Kurahaupō iwi does not alter that conclusion. Relief will be granted to Mr Stafford as representative of the Customary Owners, being those descendants of the tūpuna identified by the Native Land Court in a list from 1893. A formal order in those terms is necessary because that is the basis upon which Mr Stafford commenced this proceeding and those are the Customary Owners he represents.[513] It is also necessary because the question of who comprises the beneficiaries of the Tenths was determined in 1893 by the Native Land Court. That is a final decision of that Court.

[1007] The effect of the agreement reached with Ngāti Apa is to acknowledge those of the Kurahaupō iwi as Customary Owners, and to allow them to share in any relief awarded in this proceeding. That is a matter between the plaintiff, Kurahaupō iwi, and the rest of the Customary Owners. It is an agreement which sits outside this Court proceeding and does not affect the award of relief to the plaintiff.

[1008] To the extent there was a challenge made to the 1893 list and the decision of the Native Land Court in this proceeding, then such a challenge has been resolved between the plaintiff (and those he represents) and Ngāti Apa (on behalf of Kurahaupō iwi) in accordance with tikanga. It is not a matter which concerns this Court and

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511 This appears to have been what was contemplated by Arnold and O'Regan JJ. They found that Mr Stafford did have standing to pursue the claim as representative of a collective group, being the descendants of the original customary owners, and to obtain declarations in the event that the claim was made out. Their Honours noted that if the making of those declarations led to further proceedings seeking redress there would be an opportunity for the iwi trusts to be involved in those further proceedings: see Supreme Court judgment, above n 8, at [807].

512 High Court judgment, above n 18, at [247]–[248].

513 See Supreme Court judgment, above n 8, at [10] per Elias CJ.

neither a factual finding nor Court ruling is required. Most importantly, it does not impact the award of relief to the plaintiff in this proceeding.

Further information required

[1009] Despite the plaintiff's success in this case (albeit not to the full extent sought), it is not possible to make final orders for relief in this proceeding. That is because further information is required before the final form of relief may be settled.

[1010] The further information required is set out below. The key information sought relates to the net acreage of land the subject of the plaintiff's successful claims. The land which has been returned to the Customary Owners (or entities on their behalf) needs to be taken into account in determining the acreage of Tenths and Occupation Lands held on trust by the Crown.

[1011] Other key information extends to identification of the land which is currently in Crown hands and is impressed with a trust in accordance with this judgment. Together, this information will drive the final assessment of equitable compensation (being the current market value of the shortfall of land held on trust, and compensation for the value of the beneficial use of the Tenths) to be awarded in this case. Submissions on the application of simple interest, including the rates and periods which apply, are also sought before findings on the quantum of compensation to be paid may be finally determined.

[1012] The further information required before the final form of relief may be settled is set out below. Counsel for the parties may identify other information which is not listed here. Accordingly, the list of information required is not closed but includes the following:

(a) The actual acreage of land the subject of the plaintiff's successful claims (taking account of land which has already been returned to the plaintiff, the Customary Owners, or entities representing the Customary Owners).

(b) The land which is currently held by the Crown within the Spain award boundary which is impressed with a trust in accordance with this judgment.

(c) The consequent shortfall in land no longer held on trust and which will attract an award of equitable compensation, being the current market value of that land.

(d) The current market value of the net balance of Occupation Lands (with those values to be adjusted to rating values for March 2023).

(e) The current market values of the disputed town and suburban Tenths determined in accordance with this judgment.

(f) The quantum of rentals calculated in accordance with this judgment.

(g) Submissions on the application and calculation of simple interest on the rentals sum.

Interim judgment

[1013] Subject to receipt of the further information listed above at [1012], I make the interim findings set out below.

[1014] First, I find that the land owned by the Crown (not including land held by Crown entities or State-Owned Enterprises) within the Spain award boundary is impressed with a trust for the benefit of the Customary Owners to the extent set out as follows:

(a) Land to the extent of the Unallocated Tenths (being 10,000 acres or less).

(b) Land to the extent of the 1844 exchange in Te Maatū (being 400 acres or less).

(c) The specific Tenths which were withdrawn during the 1847 remodelling of the Nelson township, and which are now held by the Crown.

(d) The net balance of the Occupation Lands identified in [498] above currently owned by the Crown.

(e) Land to the extent of the Occupied Tenths being the land identified in [503] above less any land returned to the Customary Owners. This does not include those Tenths categorised as Occupied Tenths (post).

[1015] Second, I find that the Crown must pay a monetary sum to the plaintiff comprising current market value of any shortfall in the land referred to in [1014] above which is no longer in Crown ownership. Current market value shall be determined in accordance with [971]–[995] of this judgment.

[1016] Third, I find that the Crown must pay the plaintiff a monetary sum which represents the value of the beneficial use of the land listed in [1014] above which either was or is currently held by the Crown. These rentals shall be calculated in accordance with Dr Meade's positive counterfactual but shall not include an additional ex-gratia payment.

[1017] Fourth, I reserve my decision on the application and calculation of simple interest pending further submissions from the parties on this issue.

[1018] Fifth, a deduction of $48 million shall be made from the monetary sum to be paid to the plaintiff to account for any double recovery between this proceeding and the value of the Treaty settlement received.

[1019] Sixth, relief shall be awarded in favour of the plaintiff as representative of the Customary Owners. I decline the plaintiff's request for an adjournment to allow an entity to be formed which may receive the land and money awarded.

[1020] Seventh, for completeness, I record the agreement reached between the plaintiff and the intervener which means that members of the Kurahaupō iwi will also share in the relief awarded to this plaintiff. However, I make no orders to that effect.

[1021] Eighth, all other claims by the plaintiff are dismissed. This includes the plaintiff's claims for land remedies attaching to Crown Entity and State-Owned Enterprise Land, and for a monetary award to compensate for cultural loss.

Acknowledgement of counsel and parties

[1022] Finally, I wish to acknowledge counsel for the parties in this case. This is a highly complex case involving difficult issues of fact and law. I thank counsel for the assistance I received.

[1023] To acknowledge the parties, I refer to the dignified way in which one of the Crown witnesses thanked the Customary Owners for the generous way he had been treated while waiting to give evidence. He was not the only witness to have been treated this way. The very strong manaakitanga of the Customary Owners was evident throughout the trial and during the site visit. Mutual respect between the Crown and Customary Owners is important to the ongoing dialogue which must now take place to bring this long-standing dispute to a final resolution.

RESULT

[1024] I make interim findings in accordance with [1013]–[1021] above.

[1025] The form of the declarations, ancillary orders, and judgment to be entered shall be finalised after receiving the further information sought in [1012] above and hearing further from the parties.

[1026] As to costs, the plaintiff has been successful in his claim (albeit in a sum likely to be significantly less than what was claimed) and my preliminary view is that he is entitled to an award of costs. However, further submissions on costs will be called for once the final form of relief is settled.

[1027] It is inevitable in a judgment of this length and scale that there will be typographical errors and slips. Within 10 working days of delivery of this judgment, counsel shall file memoranda (preferably joint) identifying such errors and slips together with proposed corrections.

[1028] The Registrar is directed to convene a telephone conference with counsel at the first available date three weeks after delivery of this judgment to address the further information required to finalise the form of relief, costs, and any other issues identified by counsel.

Edwards J

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WAKATŪ (NELSON) AND ENVIRONS

Overview

[1] There are five sites claimed in Wakatū (Nelson) and the surrounding areas: Punawai, Poiwhai, Mātangi Āwhio, the Eel Pond and Mahitahi (Maitai) River, and Mānuka Island.

[2] There is some evidence that Māori were residing in the area when the Company arrived in the early 1840s. That evidence mainly derives from witnesses who were examined during the 1892 Native Land Court hearings. However, the evidence is conflicting as to the hapū residing in Nelson at the relevant time, and it says little about the nature of the occupation.

[3] Most of the historical records suggest that Māori were not living in Nelson when the Company arrived. For example, Hilary and John Mitchell (the Mitchells), who gave evidence for the plaintiff, refer to reports confirming the absence of permanent Māori settlements in the town:

> The native population in this settlement ... is ... only 615. They all reside at a considerable distance from the town of Nelson; -- one pah or village being about ten miles north (Wakapuaka), another eighteen miles westward (Motueka), and the rest in Massacre Bay, at a distance of fifty miles.

[4] The 1845 census of the area did not record any Māori residing in Nelson, and other censuses do not record Nelson as an area of occupation. The Company records from 1842 only report fleeting interactions with Māori in Nelson and do not record any permanent occupation in the area.

[5] There is no real dispute that the area was used for seasonal or temporary occupation for the harvesting of resources. The Mitchells describe temporary camps around the shores of Nelson harbour and on the Mahitahi River, and encounters between early settlers and large groups of Māori who appeared to have harvested large quantities of berries.

[6] Mr Parker, the Crown's historical researcher, also refers to Arthur Wakefield's diary entries in which he recorded the arrival of three waka from Wakapuaka on

12 January 1842. According to those diary entries, Māori on the waka asked permission to sow some potatoes. This was agreed to on the basis that the land was to be given up when the selection of the sections took place.

[7] It is common ground that the arrival of the Company and the settlers established Nelson as the centre of trade, with Māori reportedly converging on the area for that purpose. One of the claimed sites, Mātangi Āwhio, was a central trading site for Māori at the time.

[8] The town Tenths sections comprising one acre each were selected in this area in 1842. The plaintiff says that early choices in the ballot were used to select sites which were occupied. However, Mr Parker says that early choices were made to secure all sea front sections due to their valuable commercial nature and that inferences of occupation cannot be drawn from the location of these Tenths.

[9] The Mitchells refer to the writings of Frederick George Moore, a Company man who worked as an interpreter. He described a meeting where it was agreed that the Customary Owners would choose the sites that they would use when visiting Nelson and leave the others for the settlers. According to Moore, there was also discussion about the construction of stores and accommodation for the use of Māori on these sites. Moore recounts Māori travelling by waka and selecting sites, including a place to land their waka, during this meeting.

[10] However, Mr Parker says Moore was "known to be notoriously unreliable and to exaggerate his own importance in events that took place around him". Mr Parker regards it as significant that Arthur Wakefield's diary for the same period is silent. Arthur Wakefield was regarded by the Mitchells as being "extremely pedantic" about recording precise details of contact with Māori. There are also discrepancies with dates. Notably, the plaintiff did not rely on this evidence in his claim that the Tenths sections chosen in Nelson were in fact Occupation Lands.

[11] Some hostelries were constructed on the Nelson Tenths sites, and there were plans to construct a school and a hospital which did not go ahead. Mr Parker refers to

a letter to the *Nelson Examiner* which describes a situation where Ngāpiko,[1] a Ngāti Rārua rangatira, was indignant that he had been promised land and the use of buildings in Nelson, but when he arrived, he found the land had been leased to another. The Crown says this shows the Customary Owners were not occupying these sites in the early 1840s.

[12] The weight of this evidence suggests occupation in Nelson was on a temporary and seasonal basis. The Customary Owners would travel to Nelson to fish, bird, gather eels and forage, and would set up temporary camps for that purpose. Areas within Nelson city were important areas of trade. The selection of Tenths in the area coincided with the areas that the Customary Owners would use in this way and may have even been chosen by them. It seems likely that there was an intention that the Customary Owners would use and occupy these lands with hostelries and other buildings built for that purpose.

[13] Against that general background, I turn to consider each of the Nelson sites.

Punawai

[14] Punawai is claimed as a kāinga, fishing village and tauranga waka (canoe landing place) primarily associated with Ngāti Kōata. Tenths section 5 was allocated in the area, but the plaintiff claims the site is much larger than this.

[15] There was very little evidence given about this site. Mr Rōpata Taylor, a witness for the plaintiff, said that the kāinga was located on the top of the hill, and that the site extended down to the foreshore. Punawai means "water spring" and there is a natural spring at the bottom of the hill.

[16] Dr Williams, a historian who gave evidence for the plaintiff, says that the site was permanently occupied by Ngāti Kōata both before and after the arrival of the Company. However, there is little evidence to substantiate that conclusion which runs

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[1] There were two men, father and son, named Ngāpiko referred to in the evidence. The plaintiff's evidence tended not to distinguish between the two men or refer to them by their first names. I have followed that approach in this judgment.

counter to the evidence suggesting there was no occupation in the Nelson area at the time of the Company's arrival.

[17] I consider it more likely that Punawai was used for seasonal occupation. That is consistent with the written historical records which suggest that it was a fishing camp and only inhabited at intervals.[2]

[18] While it seems likely that Punawai was an area used by the Customary Owners, there is insufficient evidence to establish that it was a "pā" or "cultivation" site which engaged the Crown's fiduciary duty. Accordingly, breach is not established in relation to this site.

Poiwhai

[19] Poiwhai is located on Russell Street, Nelson, running along Haven Road. The land claimed within this area includes Tenths section 50.

[20] Dr Williams says this claimed occupation area was used intermittently for trade and seasonal harvesting. Mr Taylor says that Poiwhai was a temporary habitation where a kāinga was located. It appears that a hostelry was constructed on Tenths section 50 with the purpose of providing accommodation for visiting Māori.

[21] There is insufficient evidence regarding the scale and the nature of the alleged kāinga to conclude that it was a pā. Breach is not established in relation to this site.

Mātangi Āwhio

[22] Mātangi Āwhio is one of the larger sites claimed in Nelson. The claimed occupation area extends across Haven Road and includes Rutherford Park. The site is located near Poiwhai.

[23] The mapped site includes Tenths sections 62–66 (located around Auckland Point), 148, 227 and most of 229 (approximately eight acres of land), although the area claimed is much larger than this. Henry Thompson, Police

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2 JD Peart *Old Tasman Bay* (R Lucas & Sons Ltd, Nelson, 1937) at 58.

Magistrate in Nelson, used his first choices in the ballot to select sections 62–66. Sections 148, 227 and 229 were selected by Frederick Tuckett, a surveyor for the Company, using much later orders of choice. Three hostelries were built at Auckland Point, although their exact location is unclear. Plans from 1842 suggest that the area which lies between Tenths sections 62–66 on the one hand, and Tenths sections 148, 227 and 229 on the other, was underwater at that time.

[24] Parts of Tenths sections 63 and 64 remain in ownership of the Crown as they are the site of a school which is still used in that area. The sites are subject to rights of first refusal pursuant to settlements with the eight iwi who have interests in Te Tauihu.[3] Wakatū has caveats over this land.

[25] The plaintiff claims Mātangi Āwhio was a pā site. Mr Taylor gave evidence that Mātangi Āwhio was an ancient pā, occupied by many different hapū over the centuries, including the Kurahaupō iwi. He said that the top of the hill was used for beacon fires, and one such fire was lit to communicate to others in Motueka and further north that Nelson had been chosen as the primary location for the settlers. Mr Taylor's evidence was that the kāinga and trading areas were located on the flat areas. The site also includes a very large mahinga kai (food gathering place) known as Parurōroa, where shellfish were gathered.

[26] The claimed site also included the location of a tauranga waka (waka landing site). Mr Taylor gave evidence that the Customary Owners would stand their waka up at this place. This provides one of the explanations for the Māori name for Nelson—Wakatū or Whakatū, which means to stand up.

[27] There is a wealth of evidence regarding this site compared to some of the other sites in Nelson. Based on this evidence, I consider Mātangi Āwhio was an occupation site used for fishing and trading by the Customary Owners. Although it appears to have been used intermittently in the early days, the arrival of the Company and the

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[3] Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014; Ngāti Toa Rangatira Claims Settlement Act 2014; and Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014.

further opportunities for trade meant it acquired a degree of permanence. That is reflected in the hostelries that were built (and used) around Auckland Point.

[28] By 1845, I consider the Customary Owners' occupation of Auckland Point fell within the definition of a pā. Its size, permanent qualities, and its importance to the Customary Owners as reflected in the selection of Tenths sections 62–66, leads to that conclusion.

[29] Determining the boundaries of this site poses some difficulties. The tauranga waka does not, on its own, fall within the definitions of pā, urupā and cultivations. Nor does the fishing area which lies in between. Most of the evidence suggests intense use of the areas in which Tenths sections 62–66 were allocated. I consider these Tenths were allocated in this location because it was a site occupied by the Customary Owners at the time. These Tenths are the best evidence now available of the boundaries of this site.

[30] Some (but not all) land falling within the boundaries of these Tenths has already been returned to Wakatū. That means the plaintiff's proprietary claim in relation to the Occupation Lands only extends to the net balance of the land within the boundaries of Tenths sections 62–66. The net balance of this land is held by the Crown for the purposes of a school.

[31] Weighing the evidence in totality, I find that Tenths sections 62–66 were Occupation Lands and Occupied Tenths. The plaintiff's claim to Occupation Lands is allowed to the extent it relates to the net balance of the land within these Tenths sections.

Eel Pond and Mahitahi

[32] The Eel Pond and Mahitahi River are claimed as mahinga kai and cultivation sites.

[33] Tenths sections 203, 205, 303 and 417 were Allocated Tenths in this area, but the Occupation Lands claimed by the plaintiff extend beyond these Tenths. The

claimed areas are located next to the Nelson courthouse which is an area of land originally reserved as Tenths section 203.

[34] The Eel Pond forms a natural oxbow and is connected to the Mahitahi River. The site claimed by the plaintiff includes the river. Town Reserve H was allocated in the land surrounding the Eel Pond in 1842 and was subsequently granted to the Superintendent of the Province of Nelson in 1856. Tenths section 303 was relinquished in the rearrangement of Nelson township in 1847.

[35] There were conflicting accounts given in the Native Land Court in 1892 about whether the grounds in this area were cultivated and, if so, during which time period. The Mitchells cited evidence that the Customary Owners had sought permission from Arthur Wakefield to grow crops in the area. That request was granted, but only on condition that the land was to be given up when the selections took place. That evidence runs counter to the idea of pre-existing cultivations in the area.

[36] The mixed and sometimes contradictory nature of the evidence regarding cultivations means I am unable to draw any conclusions about whether the area was cultivated by the Customary Owners at the relevant times.

[37] The evidence does suggest, however, that the ponds and river were an important source of eels, whitebait and argillite. Argillite is a precious stone that was traded by the Customary Owners. For the reasons explained in the duty section of this judgment I do not consider this use to fall within the definition of "pā, urupā or cultivations".[4]

[38] In summary, I am not satisfied that this was a site of Occupation Lands which should have been excluded by the Crown in the exercise of its fiduciary duty. Breach is not established in relation to this site.

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4 See judgment above at [363]–[378].

Mānuka Island (Haulashore Island) [5]

[39] Mānuka Island is claimed as a kāinga site, mahinga kai, fishing village and a wāhi tapu. It lies directly opposite Punawai. Tenth section 1099 was reserved on the Island.

[40] The evidence suggests that Mānuka Island was a base for seasonal harvests, and that is not disputed by Mr Parker. That evidence is not enough, however, to establish that the site was either a "pā" or "cultivation" within the scope of the fiduciary duty owed by the Crown. On the evidence available, I am unable to conclude there was a breach of fiduciary duty in relation to this site.

Moturoa (Rabbit Island)

[41] Moturoa (Rabbit Island) is claimed as a mahinga kai and fishing camp site.

[42] There is little evidence regarding this site. Mr Taylor said that his ancestors would travel to Moturoa in the Waimea estuary to collect tuatua. There is some evidence from the Native Land Court that the area was occupied by some of the Customary Owners, although the nature of the occupation is not clear. There is also some archaeological evidence of camp sites, although it is not apparent whether they all relate to the relevant period.

[43] There is a journal entry from John Barnicoat, a Company surveyor, in 1843 which recorded that he had encountered a group of Māori cooking cockles at Moturoa who were from Takapou (Wainui Inlet) and on their way to Nelson. There was also a survey map which included a sketch of a small square labelled "old camp" in the relevant area.

[44] While the area appears to have been occupied at least some of the time, the evidence does not suggest that it was of sufficient scale to constitute a "pā" or site of "cultivations". Breach is not established in relation to this site.

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[5] Te Urenui is listed in sch 5 of the sixth amended statement of claim. The plaintiff confirms he is no longer claiming this site as it falls outside the Spain award boundary.

Grossis Point

[45] The plaintiff's evidence is that Grossis Point was a mahinga kai and fishing campsite that was occupied by the Customary Owners.

[46] There was no contemporary customary evidence or kōrero tuku iho, and no documentary evidence offered in relation to this site. An archaeological report was relied upon by the plaintiff to support the claim to this area. However, I prefer the evidence of the Crown's archaeologist, Professor Richard Walter, regarding this site. Professor Walter explained that the sites in this area mainly indicated occupation in the pre-contact period.

[47] There is insufficient evidence to conclude that this was a site which engaged the Crown's fiduciary duty to exclude it. Breach is not established in relation to this site.

MOTUEKA TO KAITERETERE

Overview

[48] The Motueka, Moutere and Riuwaka districts are home to many of the claimed sites. These sites form part of what Mr Rōpata Taylor referred to as "cultural zones" in his evidence, where several pā were located in close proximity to each other and surrounded by cultivations and other areas of natural resources.

[49] The district was described in a letter from "An Officer of the Surveying Staff" dated 25 July 1842 which was published in the *Nelson Examiner* the following month. Extracts were quoted in the evidence of Hilary and John Mitchell:[6]

> A native village or pah, with a population of about 100 souls, stands near the mouth of the Motuaka; and another, now nearly deserted, is situate under a rocky hill on the northern bank of the Rewaka, at the distance of a mile and a-half from its junction with the sea
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> …
>
> The district may be said to be divided into several separate tracts. That nearest Nelson, and perhaps the most easy of access, is contained between the

6 "The Motuaka District" *Nelson Examiner and New Zealand Chronicle* (13 August 1842).

> Moutera and the Motuaka, and consists of a large flat extent of rich alluvial soil. In the centre of it is a considerable pine forest, commencing about a mile from the coast and extending in a southwestern direction about four miles, with an average breadth of three-quarters of a mile, containing an area of about 2,000 acres. A strip along its northern and eastern frontage is cultivated by the natives, and is considered by them as the most valuable of their territorial possessions in the neighbourhood; consequently they have a great desire to retain a considerable portion of it in their occupation.

[50] The considerable pine forest described in this passage is Te Maatū (the Big Wood). Te Maatū is the subject of several of the plaintiff's claims including those relating to the alienations and exchanges of Allocated Tenths. All claims are addressed below.

[51] The letter also described the large swamp at Riuwaka, and the Riuwaka Valley:[7]

> The principal detriment to this tract is a swamp of considerable size, extending nearly the whole distance between the Motuaka and Rewaka , which cuts off the communication between the sections along the coast and those at the foot of the hills, excepting near the margin of the rivers. It occupies a space of about 1,500 acres, some portions of which, being at a lower level than the sea at high tides, would probably be difficult of drainage, unless by the construction of tidal banks and sluices. There are several small pine groves scattered over the swamp, in which the Maories have potato gardens. The hills at the back of this series of sections are mostly of easy ascent, and available for cultivation, and are valuable for being covered in many places with woods containing fine trees of several useful kinds. The native pah is situate at the eastern side of this tract, which, being a good landing place for large boats at most states of the tide, may be called the key to the district.
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> …
>
> The lowest and widest part of the valley is covered with fern and toi-toi, with a little bush along the sides of the river; but further up where it becomes more confined, its surface is mostly occupied by bush and trees, a portion of which has been partially cleared by the natives for potato grounds, and which they still occupy for that purpose, the potatoes grown there being some of the best flavoured that New Zealand produces. Many beautiful shrubs are found in the woods, and several plants indicative of fertility, as the sow-thistle, cabbage, dock, and plantain grow in great luxuriance, springing up probably in greater abundance after partial cultivation. A small rapid stream called the Atua emptied itself into the Rewaka, close by the old pah. On its banks, about a mile up its course, the Company's men engaged on the survey have built their houses on the side of a hill fronting the bay. The hamlet is named Atua, after the stream.

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7 "The Motuaka District" *Nelson Examiner and New Zealand Chronicle* (13 August 1842).

[52] A significant Māori presence was also noted as living in these districts at the relevant time. Some estimates from 1840 put it as high as 500 people, while others suggested it was considerably less than this. An official census conducted by John Tinline recorded 194 residents at an unidentified Motueka pā in 1845. A census the following year recorded 159 people at two pā.

[53] JD Peart's map of the Motueka district showing Māori place names from 1937 contains the names and general locations of many of the sites claimed by the plaintiff (for example, Piri-Kahikatea, Hāmate, Putarepo, Pounamu, Te Kūmera, Matakinokino, Wakapaetuarā and Hui Te Rangiora). A Māori name allocated to a particular place adds weight to the plaintiff's claims of occupation of these sites.

[54] There appears to have been significant movement in this region during the 1840s. Coastal erosion and the lack of land may have precipitated the move. This is important for many of the sites as there is a dispute about whether Māori may have abandoned a pā by 1845, and whether they moved on to the Tenths after, rather than before, they were allocated.

[55] There are three early plans of these districts from 1841 and 1842 which identify areas of pā and cultivations. The potato cultivations in Te Maatū; a pā at the mouth of the Riuwaka River; a pā at the mouth of the Motueka River; and a pā on Outer Island are all identified on these plans.

[56] The 100 suburban Tenths were selected within the Motueka and Moutere districts in 1842 and 1843. The selection of these Tenths appeared to coincide with the pā and cultivations noted by surveyors at the time. Tenths section 21 was allocated at the location of the pā at the mouth of the Motueka River (believed to be Wakapaetuarā), Tenths section 92 was allocated on Outer Island, and other Tenths were allocated in Te Maatū, in the location of the potato cultivations. It appears that these sections were increased in size to accommodate the pā and cultivations located on them. However, these areas were not separately identified or excluded as Occupation Lands and remained part of the Tenths.

[57] Prior to the commencement of the Spain Commission hearings, Edward Meurant, Spain's interpreter, had been sent to Nelson in advance to ascertain the views of the different iwi. Meurant spent seven days at Motueka talking with local rangatira. Spain subsequently recorded that upon his own arrival at Nelson in August 1844:[8]

> … there existed a favourable disposition in the minds of those in the neighbourhood of Nelson, Motueka, and Massacre Bay. The Natives from all these places had received large presents from the late Captain Wakefield on his first arrival with the preliminary expedition, which they were ready to admit before me; and under these circumstances, Mr Meurant informed me that he anticipated an early settlement of the question so far as they were concerned, and that although he thought it not unlikely they might expect some small further payment, yet they had all expressed an anxious desire to abide the terms of my decision on the subject and to rest content with whatever I should award them.

[58] Exchanges of Tenths in this area were made during the Spain inquiry in 1844. They are addressed in the body of this judgment, under the Te Maatū heading, together with other exchanges of Tenths made in 1849. The Whakarewa grant to the Bishop of New Zealand also involved Tenths allocated in these regions. That alienation is addressed in Appendix 2.[9]

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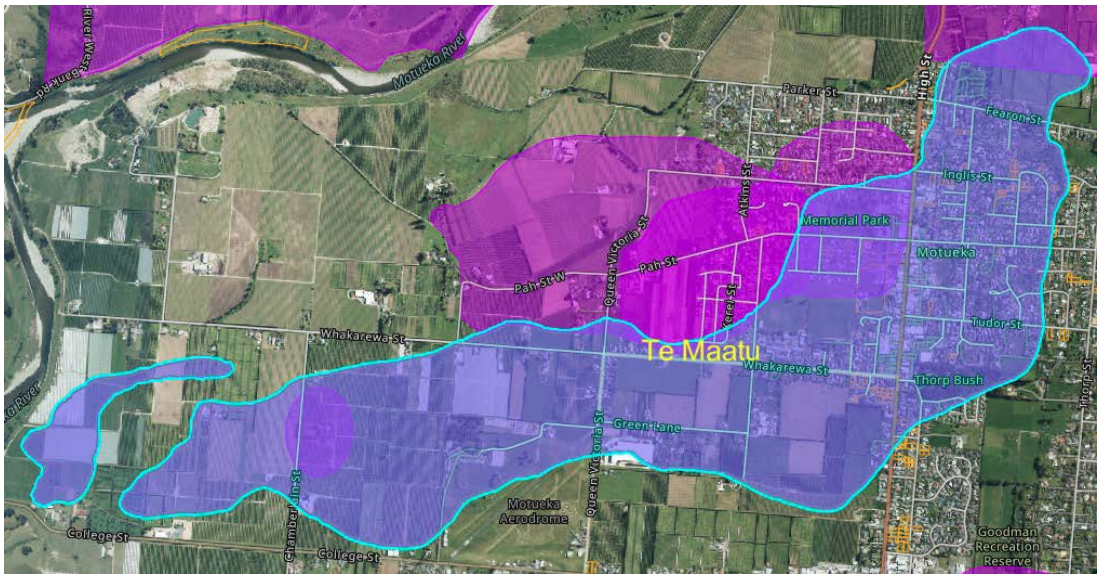
8 A report from Commissioner Spain to Governor Fitzroy regarding the New Zealand Company's claim to the Nelson district (31 March 1845) in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 1 at 55.

9 See Appendix 2 at [17]–[29].

Te Maatū



[59] Te Maatū, also known as the Big Wood, was a large forest in Motueka. It was described in 1842 as "…commencing about a mile from the coast and extending in a south-western direction about four miles, with an average breadth of three-quarters of a mile, containing an area of about 2000 acres".[10] The boundary of the claimed site is depicted in the above image.

[60] The plaintiff claims all of Te Maatū as Occupation Lands and says it should have been set aside in accordance with a stipulation made during the 1841 Kaiteretere hui between the Customary Owners and the Company. One of the sites claimed by the plaintiff as Occupation Lands (Piri Kahikatea) is said to be located within Te Maatū. Other sites claimed as Occupation Lands (for example, Pounamu and Putarepo) overlap or are in close proximity to Te Maatū.

[61] The forest is associated with a number of rangatira including Te Poa Karoro, Te Iti, Ngāpiko and Te Tana Pukekōhatu. A Te Ātiawa rangatira, Horoatua, is said to have named Te Maatū. Two pou of Te Poa Karoro and Horoatua appear at the entrance of what remains of Te Maatū today.

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10 "The Motuaka District" *Nelson Examiner and New Zealand Chronicle* (13 August 1842).

[62] Witnesses for the plaintiff say that Te Maatū was an important resource for the Customary Owners, being referred to as a medicine cabinet and food pantry. Extensive potato cultivations were found in this area, and Mr Taylor explained that potatoes would be planted in the shaded light around the trees. Birds and berries were harvested from this forest as were plants with pharmaceutical properties. Mr Taylor said the forest was also a source of timber for waka and carving.

[63] The forest appears in the sketches by Charles Heaphy (the Company's surveyor) in 1841 including one which shows an area of potato fields running along its northern edge. Diary entries made by Samuel Stephens, another surveyor, also refer to Te Maatū and protestations by "Epoa" (Te Poa Karoro) about surveying in the area.

[64] The Motueka district, including Te Maatū, was surveyed by Stephens in 1842 with the suburban sections (comprising 50 acres each) laid out at this time. In 1843 several Tenths were selected using early orders of choice. Parts of these Tenths (187, 183, 161, 160, 159 and 157) coincided with a long strip of potato cultivations, comprising approximately 71 acres, running along the northern boundary of Te Maatū. The first of the plaintiff's claims considered in this section concerns the status of these Tenths.

[65] In 1844 there was an exchange of Tenths during the Spain commission adjournment. The plaintiff says the 1844 exchanges involved the surrender of 400 acres of Tenths which were not replaced, meaning the full 15,100 acres were not reserved in 1845. As I explain further below when addressing the 1844 exchanges, I consider the Tenths sections received in this exchange fixed the boundary of the area in Te Maatū which should have been set aside as Occupation Lands in accordance with a stipulation made by the Customary Owners at the 1841 Kaiteretere hui.

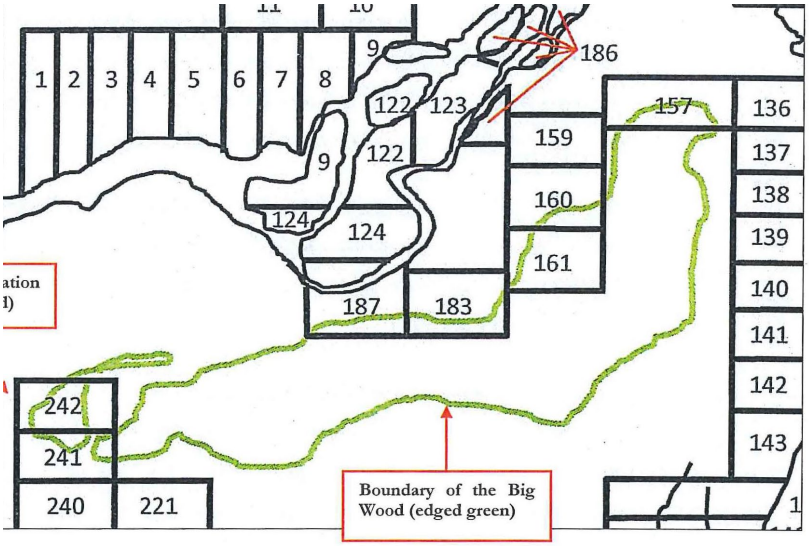
[66] In 1849 there was a further exchange of Tenths involving Te Maatū. The plaintiff claims that this exchange further diminished the Tenths estate by 300 acres. This exchange is the last transaction considered in this section.

[67] Large tracts of the land originally received as part of the 1844 and 1849 exchanges were vested in Wakatū in 1977, with some of the land since alienated. The

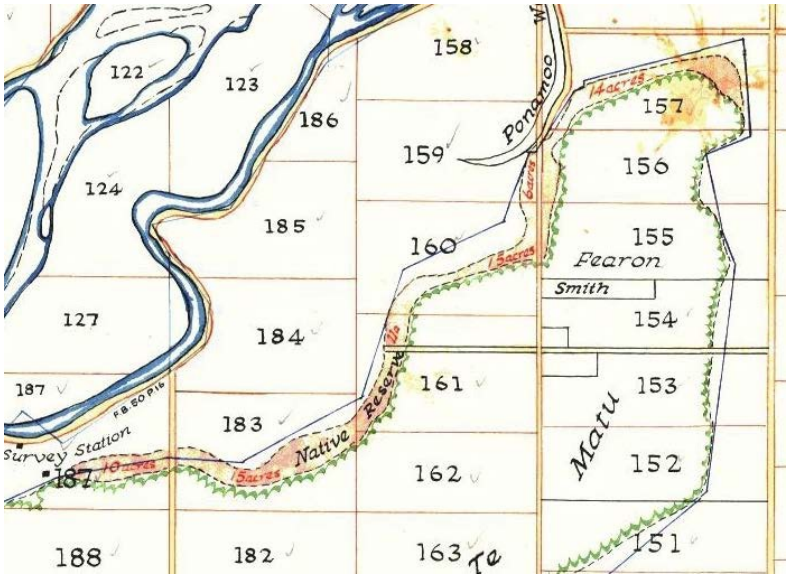
plaintiff's claim excludes this land, reducing the net area claimed in Te Maatū from approximately 861 acres to approximately 452 acres.

Tenths sections 157, 159, 160, 161, 183, 187, 241 and 242

[68] Tenths sections 157, 159, 160, 161, 183, 187, 241 and 242 were selected in 1843. They partly overlapped with the boundary of Te Maatū as shown in the map below:



[69] Those parts of the Tenths sections which fall within the northern boundary of Te Maatū (187, 183, 161, 160, 159, and 157) coincided with a long strip of potato cultivations, comprising approximately 71 acres running along that boundary. These cultivations were marked as "Native Reserve" on Samuel Stephens's surveying map with small acreage figures written in the corner of each section. An extract of that map is set out below:



[70] It appears that Stephens increased the size of Tenths sections 187, 183, 161, 160, 159 and 157 to take account of these potato cultivations. Instead of each of these Tenths containing 50 acres, they contained between six and 15 acres more than that. I accept Mr Parker's evidence on this point which explains why individual figures were marked against each section in Stephens's plan.

[71] Despite this increase, those parts of the Tenths containing the potato cultivations were not distinguished in any way from the rest of the Tenths. That error was identified by Thomas Brunner in a statement he made on 3 January 1870:[11]

> Mr Stephens, the surveyor of the New Zealand Company, when he first laid out the Motueka sections, found there was a long strip of Native cultivation along the border of the wood from Waiponamu to Wakarewa. Instead of leaving this in the possession of the Maoris in accordance with the terms of the Treaty of Waitangi, he included these cultivations in his surveyed sections, so that they were afterwards chosen as Native reserves, whereas they should have been altogether excluded, and the reserves chosen in addition for the benefit of the Natives. He did increase the particular sections which comprised the cultivations of the Natives, so as to make them include fifty acres besides the part cultivated. But the result was that Mr Thompson, the Resident Magistrate, was obliged in order to keep the cultivations of the Natives, to select these sections as Native reserves, under the New Zealand Company's arrangement, which created a confusion in administering the trust, because the Commissioners found themselves obliged to treat the New Zealand Company's reserves as land originally belonging to and always retained by the Natives themselves.

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[11] Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 304.

[72] Witnesses for the plaintiff say that Tenths sections 187, 183, 161, 160 and 157 were redesignated Occupation Reserves which should have been excluded at the outset, with the failure to do so resulting in a loss to the Tenths estate. They also claim that Tenths section 159 was an unoccupied Tenth and so the redesignation of that section without replacement further diminished the Tenths estate.

[73] Starting with Tenths section 159, I accept that it is not shown as overlapping with the Te Maatū boundary in the plan at [68] above. Nevertheless, I consider it too was selected as a Tenth because it contained some of the 71 acres of potato cultivations. That is substantiated by the extract of Samuel Stephens's surveying map from 1842 which is set out at [69]. To the extent there is a conflict in the evidence, I prefer Samuel Stephens's plan which is contemporaneous with the selection of the Tenths.

[74] Alexander Mackay described these sections as being "awarded to the Natives of Motueka by Mr Spain".[12] Dr Williams and the Mitchells also give evidence that these sections were allocated as Occupation Reserves in 1845. Mr Parker confirms, however, that the sections remained as Tenths. I accept Mr Parker's evidence. Rather than being "awarded" to the Customary Owners in 1845 by Commissioner Spain as Occupation Reserves, I consider they remained as Tenths sections.

[75] However, Mackay's suggestion that Tenths sections were redesignated as Occupation Reserves confirms that all overlapping Tenths sections, and not just the 71 acres of potato cultivations, were treated as Occupation Lands. That is consistent with the evidence discussed in relation to other claimed sites of Occupation Lands which shows significant occupation around this area. Accordingly, I consider that the Tenths sections containing the potato cultivations (Tenths sections 157, 159, 160, 161, 183 and 187) should have been excluded as Occupation Lands. They are also to be regarded as Occupied Tenths.

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12 "Memorandum on the origination and management of Native Reserves in the Southern Island" in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 265.

[76] I am not satisfied that sections 241 and 242 were either Occupation Lands or Occupied Tenths. While they fell within the Te Maatū boundary they were at the far end of Te Maatū and Tenths section 241 only partially overlaps with the boundary. The customary evidence was about Te Maatū generally but did not identify these Tenths as a particular site of occupation.

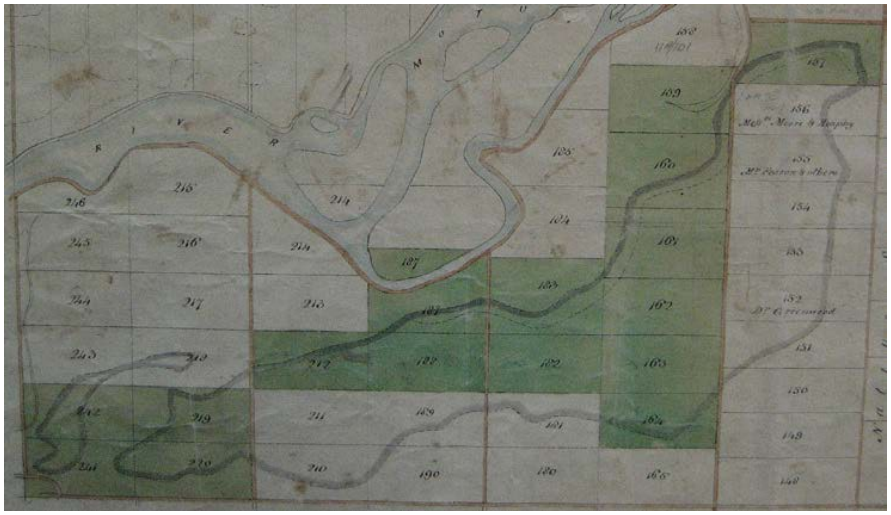
[77] In summary, I find that Tenths sections 157, 159, 160, 161, 183 and 187 containing the potato cultivations were Occupation Lands which should have been excluded from land obtained by the Crown. These Tenths are also Occupied Tenths. The plaintiff's claim for return of the Occupation Lands extends to the net balance of these sections. However, Tenths sections 241 and 242 were not Occupied Tenths, nor allocated for occupation purposes, and remained as Tenths sections.

1844 exchanges during Spain Commission hearing

[78] In 1844, eight Tenths sections outside Te Maatū (being sections 7, 8, 10, 11, 16, 28, 256 and 262) were surrendered in exchange for the receipt of suburban sections located within Te Maatū (162, 163, 164, 182, 188, 212, 219 and 220).

[79] The plaintiff claims this exchange diminished the Tenths estate by 400 acres. This exchange is also relevant to the extent of Te Maatū which was to be set aside as Occupation Lands. For the reasons discussed below, I consider the boundaries of the Tenths sections received in this exchange determined the extent of the Te Maatū land which should have been excluded as Occupation Lands. This was in satisfaction of a stipulation made by the Customary Owners at the Kaiteretere hui with the Company in 1841.

[80] The exchange was made during the course of the Spain inquiry. Although the maps annexed to the 1845 Spain award did not identify the exchange, Spain had signed separate plans which showed the Tenths initially allocated and those received in the 1844 exchange (coloured green) as set out below:



[81] The Tenths sections surrendered (7, 8, 10, 11, 16, 28, 256 and 262) were Allocated Tenths lying north of the Motueka River. Some of these Tenths fall within boundaries of claimed sites of Occupation Lands (for example, Matakinokino and Riuwaka potato grounds). However, I have not found any of these sites to be Occupation Lands and so the surrendered Tenths sections were not Occupied Tenths.

[82] The Tenths sections received in the 1844 exchanges were Tenths sections 162, 163, 164, 182, 188, 212, 219 and 220. Of these, sections 162, 163, 164, 188, 212 and 219 were unsold and sections 182 and 220 were Company reserves.[13] There is a dispute about whether these sections were designated Occupation Reserves. I accept Mr Parker's evidence that they were allocated and remained as Tenths sections.

[83] As already noted, the exchange was made during the adjournment of the Spain inquiry. That adjournment was to allow the Company to negotiate a further payment to settle the Company's claims. One of the outstanding issues was the claim by the Customary Owners that the stipulation made at the Kaiteretere hui that Te Maatū be set aside had not been fulfilled.

[84] There is no real dispute that a stipulation was made at the 1841 Kaiteretere hui to this effect. Evidence supporting such a stipulation includes: kōrero tuku iho of Ngāpiko given in 1892; evidence of Alexander McShane and James Tytler who were both present at the 1841 Kaiteretere hui; and diary entries made by Stephens which

13 I accept Mr Parker's evidence on this point.

record Te Poa Karoro referring to the fact that as the Riuwaka Valley had been given up, they wished to keep Te Maatū for themselves.

[85] The evidence suggests that the exchange was made to fulfil that stipulation. That is substantiated by a letter from George Clarke Junior (a Protector of Aborigines who acted on behalf of Māori during the Spain inquiry) to Governor Grey in 1846. George Clarke Junior explained that at the Spain inquiry "the Natives of Motueka represented to Mr Spain that they had expressly stipulated for the reserve of what is called the 'Big Wood', and complained that the Company had not strictly followed their part of the treaty". He went on to say that the 1844 exchanges were made to fulfil this obligation.

[86] Corroborating that account is a letter from William Fox to William Wakefield on 30 September 1845 regarding the plan attached to the draft Crown grant which appeared not to include the Tenths exchanges. Fox said:[14]

> At the time when the Commissioner and Protector signed the plans referred to, the latter intimated that the Natives were desirous of retaining a portion of the Big Wood at the Motuaka which had not been selected for their reserves (though they had 3 or 4 in it). The settlers in that district were very much opposed to this, but Mr Clarke persisting in it, *and the Commissioner hinting that he had some doubts whether the natives did not intend originally to reserve the wood in question*, I was obliged to succumb to their decision, though not without protest by myself and the settlers interested in the matter. It was agreed finally, that the sections 164, 163, 220, 162, 182, 188, 212, and 219 in the Motuaka district should be taken as Native Reserves, and that the Company should select the same number of sections in exchange from the other native reserves … I now observe that the Exchange of Native Reserves above mentioned is not included in the plan endorsed on the Grant, the Reserves therein being delineated in accordance with the original choice.

[87] The retention of Te Maatū is also referred to in Commissioner Spain's report, the relevant portions of which provide:[15]

> I was satisfied from all the evidence that the Natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the lands 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*

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14 Emphasis added.

15 A report from Commissioner Spain to Governor Fitzroy regarding the New Zealand Company's claim to the Nelson district (31 March 1845) in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 1 at 55 (emphasis added).

> *Motueka, as well as the retention of their pas 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.*
>
> …
>
> But when I found Colonel Wakefield ready, after examining but one Native witness, to negotiate for a further payment, and understood from Mr Clarke that he was prepared to arrange for the final alienation of the Native claims by the payment of a few hundred pounds, which the Principal Agent was willing to advance, I was glad of an opportunity of so easily complying with the expectations without acknowledging the rights of the Natives, and *by effecting an immediate adjustment* of leaving this settlement in quiet possession of the land, and on amicable terms with the resident aborigines.
>
> By this arrangement, the boundaries of the several districts were finally and definitely agreed upon; the Natives received a further remuneration, their pas and cultivated lands were secured to them, *and one or two exchanges of the reserves for their use and benefit were effected by Mr Clarke at their instance and in compliance with their wishes*; and your Excellency will perceive by the minutes that the Natives in the immediate vicinity of Nelson were paid as per margin, for which sum of money they respectively executed the necessary receipts in my presence.

[88] It may be argued that Spain was referring to the initial allotment of Tenths (sections 157, 159, 160, 161, 183, 187, 241 and 242) as fulfilling the stipulation that Te Maatū be set aside. On that basis the lands to be set aside would be limited to the 71 acres of potato cultivation, on these Tenths. I do not agree. Spain did not identify the 71 acres of potato cultivations specifically, instead referring to retention of a "certain portion" of Te Maatū. That certain portion was "as well as the retention of their pas and cultivations". That is, the portion to be retained was to be in addition to the potato cultivations. Furthermore, Spain referred to the allotment into "Native reserves of a considerable portion" of the "Big Wood" in that district. The Tenths which were initially allocated did not constitute a "considerable portion" of Te Maatū as the map at [68] above makes clear.

[89] I consider Spain's reference to the allotment of "Native Reserves" meeting this stipulation must refer to both the initial allotment of Tenths sections and those received in the 1844 exchanges. The exchanges were made at the request of the rangatira ("exchanges … were effected … at their instance and in compliance with their wishes"). The fact that the Customary Owners were insisting on more than just the

land already containing their potato cultivations to be set aside suggests that the original stipulation was for more than the 71 acres of potato cultivations.

[90] I consider this exchange settled the boundaries of Te Maatū to be excluded from the land obtained by the Crown. The Customary Owners agreed to relinquish their claim to all of Te Maatū upon receipt of Tenths sections inside Te Maatū. The evidence shows that the exchange was made with the involvement and agreement of representatives of the Customary Owners. That evidence includes:

(a) Minutes of the Spain Inquiry which record that the "principal chiefs" were involved in discussions with Commissioner Spain and George Clarke Junior about the boundaries of the land, the reserves, and the exchanges to be made.

(b) Samuel Stephens's observations in his diary about meeting with Māori inside the Big Wood to discuss the sections to be exchanged.

(c) The recording of the arrangements in plans signed by Commissioner Spain and George Clarke Junior with the annotations referring to an "agreement" reached in relation to these exchanges.

(d) Plans of the lands and exchanges recorded as being attached to the deeds of release executed by Motueka rangatira on 24 August 1844. I consider it arguable that the reference to "wāhi rongoā" in these deeds referred to those sections reserved as part of the Te Maatū exchange.[16]

[91] The Customary Owners' agreement to the exchange, as recorded in the deeds of release, settled the question of the boundaries of Te Maatū which should have been excluded from the land obtained by the Crown.

[92] For the sake of clarity, I consider the land should have been excluded in its entirety. The allocation of Tenths did not fulfil the stipulation. The only possible purpose of the 1841 stipulation was to ensure the Customary Owners retained

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16 See judgment above at [363]–[378].

ownership and control of that land. Te Maatū was an area from which Customary Owners were already generating a revenue, and from which they were able to sustain themselves. The stipulation made it clear that the Customary Owners were retaining this valuable land for themselves.

[93] I accept that it is somewhat strange that this land was not excluded in its entirety at the time of the exchange, or as part of the Spain award. Commissioner Spain was clearly aware of the distinction between the Tenths and the Occupation Lands, as that distinction was drawn in his award. Nevertheless, I consider it likely that the confusion which had bedevilled the separation of both categories of land also infected this exchange. The fact that the identified potato cultivations were not excluded from the Tenths sections corroborates that view. Confusion, however, does not operate as a defence. It was the Crown's obligation to ensure that the agreed portion of Te Maatū was set aside in its entirety. The failure to do so was a breach of the fiduciary duty to exclude pā, urupā and cultivations.

[94] Accordingly, I find that the Tenths received as part of the exchange, namely: 162, 163, 164, 182, 188, 212, 219 and 220 were Occupation Lands and Occupied Tenths.

[95] As I understand the evidence, most of Tenths sections 162, 163, 164, 182, 188 and 212 have already been returned to Wakatū. To that extent, the breach of the fiduciary duty to exclude pā, urupā and cultivations has been remedied.[17] However, as I understand it, no part of sections 219 and 220 have been returned. Those parts of sections 219 and 220 which fall within Te Maatū are to be treated as Occupation Lands which should have been excluded at the outset. The return of land and its impact on the plaintiff's claim will need to be clarified before the final form of declaratory relief is determined.

[96] Turning now to the Tenths surrendered in this exchange, they were Tenths sections 7, 8, 10, 11, 16, 28, 256 and 262. Although some of these sections (7, 8, 10

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[17] Very small parts of these Tenths are still claimed as part of the plaintiff's claim. It is not clear to me why these parts were not also returned. To the extent the difference may be explained by surveying or mapping discrepancies then they should not be included in the plaintiff's claim for a proprietary remedy.

and 11) may have originally been the site of a pā at Matakinokino, for the reasons discussed in relation to that site, I am unable to conclude that this site was occupied in 1845.[18] Accordingly, I do not consider any of these sections to be Occupation Lands or Occupied Tenths.

[97] If the exchange of Tenths had involved a swap of unoccupied Tenths, then there could be no complaint of breach. However, the swap involved the surrender of unoccupied Tenths to obtain what was effectively Occupation Lands. The surrendered Tenths should not have been alienated to secure land within Te Maatū which should have been excluded from the outset. Effectively, the Customary Owners were being asked to pay for land in Tenths to secure land they had never sold. I consider breach is established in relation to the surrender of these Tenths. The surrender of these Tenths resulted in a loss of 400 acres of Tenths.

[98] The Crown says it is not liable for this exchange as it took place prior to 1845, so before the fiduciary duty in relation to the Tenths crystallised. I do not accept that submission. The 1844 exchange resulted in a loss of 400 acres to the Tenths estate. In 1845, when the Crown's fiduciary duty to reserve 15,100 acres arose, the Tenths estate was down 400 acres. The Crown could not rely on the Tenths originally reserved but surrendered prior to 1845 to discharge its duty to reserve 15,100 acres of Tenths. The Crown's duty in 1845 required it to replace that shortfall. The failure to do so constituted a breach of the duty to reserve 15,100 acres of Tenths.

[99] As already noted, some of the Tenths sections alienated have since been returned to the Customary Owners or entities associated with them (for example, Tenths sections 10 and 11). It may be that the return of this land discharges in part any claim for a proprietary remedy in relation to the breach of fiduciary duty. Further submissions on this will be required before the terms of relief may be finally settled.

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[18] See below at [155]–[161].

1849 exchange of six suburban Tenths

[100] The 1849 exchanges involved the surrender of six Tenth sections (20, 29, 35, 36, 73 and 74) for the allocation of six other sections (181, 184, 210, 211, 218 and 243) as Tenths in and around Te Maatū.

[101] The sections surrendered include Tenths section 20 which falls within the claimed Occupation Lands site of Wakapaetuarā, and Tenths sections 29, 35 and 36 which fall within, or are adjacent to, the Riuwaka potato grounds and Umukuri sites claimed as Occupation Lands. Tenths sections 73 and 74 were located just north of the Riuwaka river. I have concluded that none of the Tenths sections surrendered as part of this exchange were occupied at the relevant time. Accordingly, the sections surrendered were unoccupied Tenths sections and not Occupation Lands.

[102] Of the sections received in the exchange, two were Company reserves (218 and 243) and the other three were owned by settlers while one remained unsold. Sections 210, 211, 218 and 243 overlap with the far end of Te Maatū and are in the general vicinity of Piri Kahikatea, another claimed site of Occupation Lands lying within the Te Maatū boundary. Section 181 also straddles the southern Te Maatū boundary. Section 184 falls within the claimed occupation sites of Awamate, Te Kapenga, Te Āwhina, Hāmate and Putarepo.

[103] I accept Mr Parker's evidence that the sections received in the exchange were held as Tenths land. The land was eventually vested by the Māori Trustee in Wakatū and some of it was later alienated.

[104] A key issue in relation to the sections received in Te Maatū as a result of the exchange is whether these sections should have been set aside as Occupation Lands at the outset, or whether Māori began occupying them after they were allocated as Tenths.

[105] Mr Parker's evidence is that Māori moved onto these sections after 1845, and it was for that reason the exchanges took place. That is supported by correspondence from 1848 which suggests that Māori had "now" partly occupied some of the Tenths within Motueka and had approximately 300 acres under cultivation. There is also

some suggestion in the evidence that this happened because Māori had been given plans of all the "Reserves" (Tenths sections) in the district and considered them their property and were leasing land themselves to settlers.

[106] To address this issue, a recommendation was made that land be allocated from the Tenths for the Customary Owners with permission to let the land but not sell it. This recommendation was picked up by Lieutenant-Governor Eyre in a letter to Alfred Domett (the Colonial Secretary of New Munster):

> Arising from the Motueka Natives [having] already got unauthorized possession of many of the Reserves made there—it will be His Honor's care to see that sufficient lands are left in possession of the Natives for their own uses and requirements and then after receiving the advice and recommendation of the Board on the subject of the Residue to make such arrangements as His Honor may consider best and most equitable under the circumstances, bearing in mind the objects and intentions which the Reserves were originally set apart

[107] Subsequent correspondence also suggests that the concern was to allow the Customary Owners to use the land, but not to lease or alienate it and the exchanges were to give effect to this purpose. In a letter dated 17 April 1849, the Board reported:[19]

> Sir, Since we last had the honour of addressing Your Honour upon the subject of the Native Trust estate, the Board has completed its arrangements for laying out portions of Native sections adjoining the principal road through Motueka and has obtained the frontage required for the proposed village, excepting a small patch of about thirteen acres which some of the Natives, who allege they have an interest therein, refuse to quit or deliver up without money compensation—this of course could not be acceded to and that portion of frontage still remains in the hands of the Natives.
>
> Upon a personal inspection of the Trust estate in the Wood at Motueka, the Board found that the Natives had encroached considerably upon Sections of land belonging to private individuals.
>
> To obviate any difficulties hereafter, the Board at once proposed to the Resident agent of the New Zealand Company and to the principal agents of absentee owners of land to exchange those sections encroached upon for sections belonging to the Trust estate which remained unoccupied

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[19] Letter from the Board of Management to Matthew Richmond (Superintendent) (17 April 1849) (emphasis added).

> were at a distance from any Native Pah and free from cultivations of any kind.
>
> *The sections encroached upon were Nos: 181, 210, 211, 218, 243 and 184. Upon the five first of these Sections considerable cultivations had been formed and it would have been next to an impossibility for the European owners of them to have wrested possession from the numerous occupants. On the last Section No. 184 a considerable Pah had been erected since the original Surveys and the ground so completely covered with [whare] of all kinds that there was little chance of the real owner ever being put into possession of his just rights*.
>
> Under these circumstances the Board deemed it absolutely necessary that the proposed exchanges should take place and after several interviews with the Resident agent and the principal land agents who one and all met the proposition in the most liberal manner, Section No. 181 was agreed to be exchanged for No. 29 in the swamp at Rewaka

[108] I agree with Mr Parker that the evidence suggests that the Customary Owners moved onto the sections located within Te Maatū after the original survey in 1842 and probably after 1844. I say after 1844 as that is when Tenths sections were received within Te Maatū to fulfil the stipulation made at the 1841 Kaiteretere hui that Te Maatū be set aside as discussed above.[20] As set out in my analysis of the 1844 exchanges, it appears that the Customary Owners were involved with the selection of those sections and it is reasonable to infer that if there had been pā and extensive cultivations on the other sections of Te Maatū at this time, they would have been identified.[21] I consider the sections received as a result of the 1844 exchanges fixed the boundaries of Te Maatū to be set aside.[22]

[109] It follows that I do not consider the sections received in the 1849 exchange should have been set aside as Occupation Lands. There is no breach of the Crown's duty to exclude pā, urupā and cultivations in respect of this land. However, that does not completely resolve the question of breach. It remains to be determined whether these sections should be regarded as Occupied Tenths.

[110] The evidence shows that the Tenths sections received in the exchange were allocated for occupation purposes. That follows from the passage of

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20 See above at [78]–[89].
21 See above at [90].
22 See above at [90].

Lieutenant-Governor Eyre's note quoted above.[23] It also follows from subsequent correspondence from Domett to Richmond in which the former instructed the latter to "secure to the Natives possession of sufficient land for their own requirements".[24] The reservation of these areas of land within Te Maatū appear to have been motivated by the same considerations which prompted the creation of the Occupation Reserves in 1846 and 1847. That is, there appears to have been a concern that insufficient land was set aside for "uses and requirements" of the Customary Owners. The difficulty here, however, is that the sections were reserved as Tenths sections rather than Occupation Reserves.

[111] I consider the allocation of Tenths for occupation purposes was contrary to the terms of the trust upon which the Allocated Tenths were to be held. The Tenths were to be used as an endowment and to generate income for all Customary Owners. They were not to be allocated for the occupation and use of local hapū. This constituted a breach of trust, and Tenths sections 181, 184, 210, 211, 218 and 243 are to be categorised as Occupied Tenths (post).

Summary of findings

[112] My findings in relation to Te Maatū may be summarised as follows:

(a) Tenths sections 157, 159, 160, 161, 183 and 187 were Occupation Lands which should have been excluded from land obtained by the Crown. These Tenths are also Occupied Tenths. The plaintiff's claim for return of the Occupation Lands extends to the net balance of these sections. However, Tenths sections 241 and 242 were not Occupation Lands or Occupied Tenths.

(b) The Tenths received as part of the 1844 exchanges (Tenths sections 162, 163, 164, 182, 188, 212, 219 and 220) settled the boundaries of Te Maatū which should have been excluded from land obtained by the

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23 See above at [106].

24 Letter from Alfred Domett (the Colonial Secretary of New Munster) to Matthew Richmond (Superintendent) in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 277.

Crown. These Tenths sections are Occupation Lands and Occupied Tenths. The plaintiff's claim for the return of land relates to the net balance of these Tenths sections within the Te Maatū boundary.

(c) The surrender of Tenths sections 7, 8, 10, 11, 16, 28, 256 and 262 was in breach of trust which resulted in the loss of 400 acres of Tenths. The Crown's fiduciary duty in 1845 required it to replace that shortfall. The failure to do so constituted a breach of the duty to reserve 15,100 acres of Tenths.

(d) The use of Tenths sections 181, 184, 210, 211, 218 and 243 for occupation purposes was a breach of trust. These Tenths sections are to be categorised as Occupied Tenths (post).

Puketūtū

[113] Both Dr Williams and Mr Taylor identified Puketūtū as a cultivation and tauranga waka site located near the mouth of the Motueka River. At trial, Mr Taylor also identified an urupā at the site.

[114] The location of this site coincides with Tenths sections 144, 145, 146 and 147 and part of section 143 also falls within the site.

[115] Portions of sections 145–147 containing just over 29 acres were vested in the Bishop of New Zealand in 1853 as part of the Whakarewa grant. Mr Parker states that this land had been leased to settlers at the time the vesting took place. Most (if not all) of that land was revested in Māori ownership under the Ngāti Rārua-Atiawa Iwi Trust Empowering Act 1993.

[116] In 1863 some of this land was allocated to members of Ngāti Tama, who were close relatives of Ngāpiko (a rangatira of Ngāti Rārua and Ngāti Tama). However, the land remained recorded as Tenths.[25] The residue of this land, and part of Tenths section 143 was vested in Wakatū between 1977–78 and some of it has since been

[25] See Appendix 2 at [58]–[64]; and Native Reserves Act 1873, sch D.

alienated. The net claimed area is 68.8 acres of the gross area of approximately 922 acres.

[117] It seems likely that Puketūtū was occupied at the relevant time and included the site of an urupā. The site is associated with Ngāpiko and his wife, and it is marked on the JD Peart map. Historical records support the existence of a European cemetery located on the site of an old urupā in the area. The fact that members of Ngāti Tama appeared to relocate to this area in the 1850s (a fact supported by archaeological evidence) also supports the plaintiff's claim to occupation, as does the allocation of Tenths sections in the area.

[118] The weight of this evidence suggests that Tenths sections 144, 145, 146 and 147 were allocated in this area because the lands were occupied at the time. The number of the Tenths allocated in this area, which are all adjacent to each other, gives some idea of scale. The boundaries of these Tenths are the best evidence of the boundaries of the Occupation Lands at the time. This means that Tenths sections 144, 145, 146 and 147 are also to be regarded as Occupied Tenths.

[119] To sum up, I find that Tenths sections 144, 145, 146 and 147 lying within the boundaries of the claimed site were Occupation Lands, and these Tenths sections were also Occupied Tenths. The plaintiff's claim to Occupation Lands is established in relation to the net balance of these Tenths, lying within the boundaries of the claimed site.

Pounamu

[120] Pounamu is located on Tenths section 157 which was allocated in 1843. It is claimed as a pā site with associated cultivations.

[121] The boundaries of the claimed site cover the entirety of Tenths section 157. This section intersects with the tip of Te Maatū and was the site of some of the potato cultivation sites. I have already found that Tenths section 157 was Occupation Lands and an Occupied Tenth.

[122] The evidence regarding occupation of this site is relatively strong. Mr Taylor says his ancestor, Wi Parana, and his whānau were living at Pounamu in 1842. Stephens's surveying map from 1842 does not mark this area as a pā, but there are some black markings in the area which could indicate the presence of whare. The fact that a Tenth was allocated in this area corroborates occupation of this site, as does its close proximity to Te Maatū.

[123] Mr Morgan also gave evidence about this land being where his ancestor and namesake, Te Poa Kokoro and his people lived. That is supported by information from the Tinline census which recorded 30 of "Te Poa's people" living in the area in 1847. Evidence given before the Native Land Court in 1892 also named "Te Poa" and others who were cultivating in this area. JD Greenwood's map from 1848 does not mark a pā in the area, but it does show markings on the section which corresponds with Tenths section 157 which could indicate the presence of buildings.

[124] The Crown says that this site does not meet the definition of "pā" in the Spain award. However, given the purposive interpretation I have taken to the terms used in that award, I am satisfied that this site falls within the category of Occupation Lands, either as a permanent residence or as a site of cultivations, or both.

[125] I accept Mr Parker's evidence that this section remained a Tenth section.[26] All of Tenths section 157 is claimed as Occupation Lands. I consider the Crown's intention in allocating a Tenth in this area was to reserve the area as Occupation Lands.

[126] Accordingly, I consider Tenths section 157 should be regarded as Occupation Lands and an Occupied Tenth. The plaintiff's claim to Occupation Lands is established in relation to the net balance of this Tenths section.

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[26] To the extent that Mr Taylor maintains his 2011 evidence that this section was redesignated as an Occupation Reserve then it is rejected in favour of Mr Parker's evidence on this point.

Te Kapenga, Awamate, Hāmate and Te Āwhina

[127] Te Kapenga, Awamate, Hāmate and Te Āwhina are all sites in close proximity to each other.[27] They lie adjacent to the northern boundary of Te Maatū. Mr Taylor explained in evidence that all these sites are best understood as a cultural zone and they are claimed together as a single site.

[128] The area as mapped overlaps with Tenths sections 121, 187, 183, 184, 160 and 161. There is an overlap with Te Maatū with sections 160, 161, 183 and 187 (the site of the potato cultivations) also falling within the boundary of this site. The area also overlaps with Putarepo which covers Tenths sections 160, 161 and 183. Tenths section 184 was received in the 1849 exchanges.

[129] Mr Taylor said in evidence that **Te Kapenga** was a pā located on Tenths section 184, however it is located on Tenths section 121 on ArcGIS. Te Āwhina marae is also located within this zone, and the present-day marae is located on Tenths section 183.

[130] **Awamate** refers to a blind channel (the name translates to "dead river") which was a watercourse of the Motueka River. Mr Taylor identified it as the curved line running through Tenths sections 184, 187, 121, 122 and 185.

[131] Mr Taylor said in evidence that it was around 1848, or possibly a few years before or after this date, that the Customary Owners living at Wakapaetuarā came across to join relatives living in these areas and elsewhere.

[132] Mr Parker's evidence is that JD Greenwood, a Motueka settler, wrote in January 1848 to Richmond, the Superintendent of the Southern Division, suggesting various courses of action to improve conditions for Māori and settlers in the district. He attached a map to his letter which indicated the site of a pā in a location around the boundary of Tenths sections 183 or 184. Mr Parker suggests that the "new" pā was on the site of Te Āwhina marae.

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[27] Te Āwhina is not claimed as a separate site in sch 5 of the sixth amended statement of claim. However as it was referred to in evidence it is listed as a separate site.

[133] A report from the Board of Management of Native Reserves dated 17 April 1849 (quoted above at [107]) refers to several sections located in and around Te Maatū being "encroached considerably upon" and prompting the 1849 exchanges. One of these was section 184, in which it was noted that a "considerable Pah had been erected since the original Surveys and the ground so completely covered with [whare] of all kinds". For reasons discussed in relation to the 1849 exchanges, it appears that this occupation occurred after 1845.

[134] Based on this evidence, I consider it likely that a marae was located on either section 183 or 184. It seems likely that this area was occupied in 1845, as Mr Taylor dates the Te Āwhina marae from the early 1830s, and the church which stood on the site of the current church from 1850. Te Āwhina is also adjacent to the large potato cultivations of Te Maatū and it makes sense that the Customary Owners would base themselves close to a key source of food and medicine.

[135] It is possible that section 183 and the areas surrounding it became more heavily populated when the Customary Owners at Wakapaetuarā travelled south to join their relatives living in the area. However, that does not mean it was not occupied in 1845. I have already found that part of Tenths section 183 was Occupation Lands falling within the Te Maatū boundary that should have been set aside. This provides further confirmation of that occupation albeit of a different form.

[136] The evidence regarding **Te Kapenga** is somewhat mixed. There is some evidence in the way of recollections from settlers as children which supports the existence of a marae in the vicinity of Tenths section 121, and the very allocation of a Tenth in that area adds weight to the claim. The area is also marked on JD Peart's map. However, there is no other documentary evidence corroborating the plaintiff's account, and the evidence that does exist is somewhat countered by the fact that the area is not marked on any of the early survey maps or sketches of the area.

[137] On balance, while I accept that Te Kapenga may have been a place of occupation in 1845, I cannot be satisfied on the evidence that it was of such a scale or nature to fall within the definition of a "pā". Therefore, I cannot be certain that the failure to exclude this area was in breach of the Crown's fiduciary duty.

[138] The exact location of the urupā was difficult to pin-point. **Hāmate** was also difficult to place despite being marked on JD Peart's map. Mr Taylor located both sites very close to, but just outside the boundary of, surrounding Tenths sections 161 and 183. While I do not dispute the evidence regarding these sites, there is insufficient evidence for me to be confident of their location or boundaries. I have already found that parts of Tenths sections 161 and 183 were occupied by virtue of the potato cultivations that existed on these lands.[28] I am not satisfied that occupation extended beyond these two Tenths.

[139] The evidence with respect to **Awamate** does not fall into any of the Occupation Lands categories. The strength of that site is the support that it lends to the claims there were pā and cultivations in the area due to the contribution of this water course to the fertility of the earth in that area.

[140] In summary, while the area may have been separately occupied, the only evidence which suggests occupation falling within the definition of pā, burial grounds and cultivations is the evidence locating Te Āwhina Marae on either Tenths sections 183 and/or 184. The evidence is not sufficient to determine the boundaries of the wider area.

[141] Tenths section 184 was only received in the 1849 exchanges, so it cannot be said that this Tenths section was originally allocated because of occupation in the area. However, Tenths section 183 was allocated to accommodate the potato cultivations in this area, and I have already concluded that this was an Occupied Tenth. I consider the existence of a marae in this vicinity just strengthens this conclusion.

[142] I have already found that Tenths section 183 was Occupation Lands and the plaintiff's proprietary claim to the net balance of this Tenth is established. Similarly, I have already found Tenths section 183 is an Occupied Tenth. My findings in relation to this site simply confirm those findings.

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[28] The description of the sites in this judgment suggest that the urupā may have been located in close proximity to the potato cultivations which would be inherently unlikely. However, as seen in the ArcGIS map the areas are a sufficient distance apart to make occupation in both those ways plausible.

Putarepo

[143] Putarepo is claimed as a pā site. As mapped it appears to overlap with Te Maatū and other claimed sites such as Awamate, Te Kapenga, Te Āwhina and Hāmate.

[144] Parts of Tenths sections 160, 161 and 183 fall within the boundary of this site as mapped. As noted in relation to Te Maatū, these Tenths sections coincide with the potato grounds shown in the area. I have already concluded that these sections were lands which should have been excluded as Occupation Lands.

[145] The witnesses had difficulty in pin-pointing the exact area of Putarepo with several of the plaintiff's witnesses identifying it as being in different places. There was also mixed evidence on the nature of the site. Mr Taylor described it as a swampy area (he translated "repo" to mean swamp) with the soils being used as a preservative, particularly with garments and flax. He did not give evidence of pā, urupā or cultivations in the area. Dr Williams on the other hand claimed Putarepo was a pā site with cultivations and she relied on Ngāpiko's evidence at the Native Land Court to substantiate the claim.

[146] There was insufficient evidence regarding the location of this site, and whether it contained pā, urupā and cultivations, to conclude that the Crown breached its fiduciary duty in failing to exclude this site as Occupation Lands. Breach is not established in relation to this site.

Piri Kahikatea

[147] This claimed site falls within the south-western boundaries of Te Maatū. The evidence on behalf of the Customary Owners conflicted as to the nature of this site and its location. Accordingly, there was insufficient evidence to conclude that this was a stand-alone site of Occupation Lands that should have been excluded.

Te Kūmera and Raumānuka

[148] Te Kūmera and Raumānuka are claimed together as a single site including a kāinga, mahinga kai, tauranga waka and urupā. The site is located on the coastline up

to the Motueka River. The southern boundary of the site is adjacent to Tenths section 157, the claimed site of Pounamu.

[149] As mapped, the area includes Tenths sections 126, 127, 129, 132 and 136–138. Mr Taylor said in evidence that the area is associated with the Tūrangapeke whānau, but no other details were given. Dr Williams says that sections 126, 127, 129 and 132 were redesignated Occupation Lands in 1863 by James Mackay. That certainly appears to have been the intention, but the sections nevertheless remained as Tenths sections.[29]

[150] Mr Taylor pinpointed a large urupā at Te Kūmera in the sand dunes, close by to Tenths section 132, although not located in any of the Tenths sections. His evidence was supported by the finding of bones in the vicinity. It is also supported by the recollections of Edmond Parker who remembered tidal burials in Te Kūmera in the early days (however, the Crown says that, based on Edmond Parker's birth date, his recollections would have been after 1850).

[151] Writing in the 1930s, Harry Washbourn recalled Raumānuka as a fishing port, fish curing station and tauranga waka. It was also referred to as the Manuka Bush port connecting two pā and being close to fishing grounds. Washbourn described "cart loads of old [Tōtara] carved figure heads" there, as well as sections of old canoes and fish curing places. However, these recollections could not be dated, and the Crown suggested they might be after 1857.

[152] None of the early survey maps of the area show any pā, urupā or cultivations to the south of the Motueka River, although they do show pā in other areas, including one to the north of the Motueka River. JD Greenwood's map from 1848, however, shows a "pah" on the south side of the Motueka River, near Tenths section 126.

[153] The evidence is not as detailed as some of the other sites, making it particularly difficult to assess. Nevertheless, I consider there is sufficient evidence to show that Tenths sections 126, 127 and 129 were occupied in the 1840s. The presence of an urupā near Tenths section 132 corroborates that view, as does the existence of a "pah"

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[29] See Appendix 2 at [58]–[64]; and Native Reserves Act 1873, sch D.

noted on JD Greenwood's map from 1848 which corresponds with Tenths sections 126, 127 and 129.

[154] Accordingly, I find that Tenths sections 126, 127, 129 and 132 were Occupation Lands and Occupied Tenths. Much of the land within these Tenths sections has already been returned and so the claim to Occupation Lands relates to the balance of the land within these boundaries.

Matakinokino

[155] Matakinokino is claimed as a pā and cultivation site. Tenths sections 1–9 cover the area as mapped, however Dr Williams said in evidence that Tenths sections 10 and 11 also lay within the site.[30]

[156] Mr Taylor said the site was associated with Ramari Herewini of Ngāti Rārua (also known as Ramari Tekauri) but he otherwise did not have kōrero tuku iho about this site.

[157] Dr Williams relied primarily on the evidence given by Ramari Herewini during the 1892 Native Land Court hearings. Ramari Herewini described the land at Matakinokino as her lands and the lands of her forefathers. She also described her land at Whakarewa being taken for a school. She described giving up some land but keeping the Motueka river land. She said that the Government had taken the land at Motueka and "I gave up the rest".

[158] Dr Williams also referred to evidence recording the recollections of people such as David Drummond and Charles Thorp. The first of these men recalled that when he was a boy there were two small pā in the Motueka district—one called Umukuri and the other "Matakina". He also referred to an abandoned pā which may have been the Matakinokino pā. Charles Thorp is said to have made a deposition about being driven off land at Matakinokino by several Māori armed with tomahawks who accused him of trespassing on "native cultivations".

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[30] Tenths sections 1–5 are shown in the ArcGIS as being reserved occupation sites, but there was no evidence nor submissions directed to this claim.

[159] Also supporting the plaintiff's claim of occupation is the fact that Matakinokino appears on JD Peart's 1937 map.

[160] Against that evidence, however, is the fact that a pā was not recorded in any of the early surveys or plans of the area. Furthermore, Tenths sections 7, 8, 10 and 11 were all surrendered during the 1844 exchange. Stephens wrote to Fox in November 1844 saying that he had personally examined the sections to be surrendered in the exchange. He confirmed there were no gardens on any of these sections (although there was evidence of a little clearing on Tenths section 11 "several years ago"). There was no mention of a pā.

[161] On balance, I consider Matakinokino was likely occupied at some stage, but whether it was still occupied in 1845, and whether the nature of the occupation was sufficient to meet the definition of a "pā", cannot now be ascertained. The extent of the evidential uncertainty around this site means I am unable to be satisfied that this was the site of a pā, urupā, or cultivation at the relevant time. Breach is not established in relation to this site.

Umukuri and Riuwaka potato grounds

[162] Umukuri and the Riuwaka potato grounds are addressed together. Umukuri is located inside the much larger area claimed as the Riuwaka potato grounds. Umukuri is claimed as a pā and cultivation ground. Riuwaka is claimed as a cultivation site. Two claimed pā sites (Wakapaetuarā, and Matakinokino) are in close vicinity.

[163] I consider these sites were likely the sites of cultivations and even a small pā at some point in time. Written observations of one of the settlers who lived in the area when he was a boy referred to a pā site at Umukuri and another at Matakinokino although he described one of those pā sites being abandoned. There was also evidence presented to the Native Land Court in 1892 that referred to Umukuri as being a site of cultivations.

[164] Potato cultivations in the Riuwaka valley were referred to by Barnicoat in 1842. A sketch by Stephens from 1842 also depicts the Riuwaka potato grounds, although it is difficult to ascertain their exact location. There are archaeological

records of Māori-made soils in the area which are consistent with potato grounds in the area.

[165] Tenths sections 28, 29 and 33–37 fall within the boundary of the claimed Riuwaka site. While it seems likely that these areas were sites of occupation, neither Dr Williams nor Mr Taylor were able to pinpoint the occupied locations with any precision. From the documentary records before the Court, it seems likely that the Riuwaka potato grounds were significantly smaller than the area now claimed by the plaintiff.

[166] Even if these boundaries were able to be defined more carefully, there is some evidence that the Customary Owners may have agreed to surrender some or all these sites. As discussed in relation to Te Maatū, Stephens recorded in his 1842 diary that he had encountered "Epoa" (Te Poa Kokoro) when surveying in the area. Te Poa Karoro had told him that they had "given up" the Riuwaka valley as they wished to keep Te Maatū themselves.

[167] Furthermore, Tenths section 28, which falls within the boundaries of the claimed Riuwaka potato grounds area, was surrendered as part of the 1844 exchanges. Another Tenth, section 11, which falls just outside the boundaries of the Riuwaka potato grounds was also surrendered in this exchange.

[168] In discussing the 1844 exchanges, Stephens noted that the sections to be exchanged were chosen because there were no cultivations on them. In terms of section 11, he noted there had been a small clearing of section 11 "some years ago" but he was "not aware that the Natives take any account of it, as the total quantity of bush on the section scarcely exceeds half an acre. Half that section is in the big swamp".

[169] Importantly, one of the rangatira to sign the deed of release for Riuwaka was Hemarama Te Ngako (also known as Te Ngakau) of Te Ātiawa.[31] Although we cannot know for sure what the Customary Owners understood when they signed the deeds of

[31] The Mitchells say he was probably responsible for the naming of Umukuri in the Motueka Valley.

release, there is an available inference that areas within the Umukuri and Riuwaka potato boundaries were given up with the consent of Customary Owners at the time.

[170] Finally, Tenths sections 29 and 35–36 were surrendered in the 1849 exchanges. In a letter regarding the exchange, the Board recorded that it had been agreed to exchange the sections encroached upon (those received as part of the exchange within the boundary of Te Maatū) for those sections "free from cultivations of any kind". While this is not determinative of the claim, it nevertheless adds to the uncertainty about the extent of the cultivations and Occupation Lands claimed in 1845.

[171] On balance, I consider it likely that these sites contained cultivations, and possibly a small pā, at some point in time. However, there is a lack of evidence about the exact location of these sites and whether they were still occupied in 1845. The evidence suggests some of the area was surrendered which just adds to the picture of uncertainty. Overall, I consider there is insufficient evidence in relation to these sites to support the plaintiff's claim. Breach is not established in relation to the Umukuri and Riuwaka potato grounds.

Wakapaetuarā[32]

[172] Wakapaetuarā was a large pā site located between Riuwaka and Motueka on the northern bank of the Motueka River. The land was very fertile in this area but also prone to flooding.

[173] The plaintiff's claimed site encompasses sections 20, 21 and 22 which were reserved as Tenths in 1842. Stephens's surveying map from 1842 locates a pā and three small boxes on Tenths section 21. Mr Parker's evidence is that Tenths section 21 may have been increased in size to accommodate the pā.

[174] It seems likely that the Customary Owners shifted from an old pā (perhaps Hui Te Rangiora) to Wakapaetuarā in the early 1840s. That is confirmed by Ngāpiko's evidence given during the Native Land Court hearings and by other historical sources.

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[32] The submissions on this site contained numerous different spellings: Whakapaetuara, Wakapaetuara, Wakapaetūāra and Wakapaetuarā. I have relied on and used the spelling in the second brief of evidence of Mr Taylor.

That is also consistent with the markings on Stephens's map which marks a "new pah" in the vicinity of Wakapaetuarā. The "old pah" is also marked on this map.

[175] The evidence of the parties is also consistent that there was a move away from Wakapaetuarā in the 1840s. Mr Taylor's evidence is that the Customary Owners moved from this pā across the river to sites at Te Kūmera, Raumānuka, Pounamu, Te Kapenga and Hāmate. Mr Parker suggests that the Customary Owners moved away because Wakapaetuarā was washed away by coastal erosion. Documentary records suggest there were several floods in the area and that erosion had occurred over several years. The Motueka river changed its course over these years and moved across the location of Tenths section 21 where the pā was located.

[176] What is less clear is when the move from Wakapaetuarā occurred. The records suggest that the Customary Owners were still occupying the pā in 1844. Edward Meurant, who assisted the Spain Commission, and George Clarke Junior, spent several days at Motueka before the formal Spain hearings began. Records made by Edward Meurant state that both stayed at Wakapaetuarā at this time. Meurant stayed at a pā after the hearings, although it is not clear whether this was the same one.

[177] Mr Taylor thought the move may have happened around 1848 or a few years earlier but he could not be certain. Mr Parker suggested that the pā may have been abandoned by 1848, also citing records from around this time. The fact that Tenths section 20 was surrendered in the 1849 exchanges suggests that by this time at least it was not occupied.

[178] From this evidence I conclude that Wakapaetuarā was a pā site occupied by the Customary Owners until at least 1844. The boundaries of this pā site are difficult to determine due to changes in the course of the Motueka River and coastal erosion over time. However, the best evidence is the allocation of Tenths section 21 in this area, and Stephens's plan showing the location of the pā and other buildings. This pā should have been excluded when it was first surveyed in 1842. However, whether it should have been excluded in 1845 depends on whether the pā was abandoned by this time.

[179] On the evidence before me, I cannot safely conclude that Wakapaetuarā was occupied in 1845 or in the years that followed. The evidence of coastal erosion, flooding and movement during this time means the evidential picture is uncertain. Therefore, I cannot be satisfied that the Crown breached its fiduciary duty by failing to identify and exclude this pā after 1845.

Hui Te Rangiora and Motu Kiore

[180] Hui Te Rangiora and Motu Kiore are addressed together. The net area claimed across both sites is very small (0.0023 acres).

[181] Hui Te Rangiora is claimed as another pā site. It is named after the tūpuna Hui Te Rangiora who is remembered through a tekoteko (carved figure) on the whare Tūrangāpeke at Te Āwhina Marae in Motueka.

[182] There was significant confusion about the location of this site, but the plaintiff's witnesses appeared to locate it close to the mouth of the Riuwaka River, on part of Tenths section 92. This is known as Goodalls Island. It was formerly an island but is now attached to the mainland. Tenths section 92 was located here. However, there is no documentary record of a pā existing at that location at the relevant date.

[183] Outer Island is still an island which lies adjacent to Goodalls Island. This was referred to in evidence as Motu Kiore, but there was significant confusion over the labelling of this site. Part of Tenths section 92 and Tenths section 93 were located on Outer Island. Dr Williams's evidence was that this island was the site of a pā and urupā since lost due to coastal erosion. Mr Taylor identified the urupā on Outer Island but was not aware of the pā site.

[184] As for Outer Island, I accept that there was an urupā on the Island. That is substantiated by koiwi (bones) found in the area. However, the archaeological evidence suggests this site may have been pre-European, and the plaintiff's witnesses did not have any specific kōrero tuku iho regarding this urupā.

[185] A pā was marked on Tenths section 92 on the Outer Island together with three structures on Stephens's 1842 maps. There was also archaeological evidence

consistent with the post-contact period. Mr Parker's evidence was that Tenths section 92 was likely increased to accommodate this pā. However, significantly, there is no kōrero tuku iho regarding a pā on this site, nor what became of it. For example, there is no evidence of the pā name or who lived there. There is also a real possibility that this pā was washed away or abandoned as it was not recorded in JD Greenwood's map of the area from 1848. The extent of coastal erosion in the area adds some weight to that view.

[186] Dr Williams relies on statements made by JD Peart that there were cultivations on parts of Outer Island too, but again, other than the allocation of a Tenth in this area (section 92) there is little other evidence to support the plaintiff's claim.

[187] On balance, I consider sections 92 and 93 are likely to have been the sites of Occupation Lands, being urupā, pā and possibly cultivations. However, there is insufficient evidence to determine whether these sites remained occupied in 1845 or the years following. There is evidence that the sites may have washed away.

[188] Given the lack of evidence regarding these sites, and the uncertainty in the evidence that does exist, I am not satisfied there is sufficient evidence to find either site was Occupation Lands in 1845.

RIUWAKA TO KAITERETERE[33]

Puketāwai (Puketāwhai)

[189] Puketāwai is claimed as a pā site, a kāinga and tauranga waka.

[190] In 1847, Charles Heaphy produced a plan of sites occupied in western Blind Bay and in Massacre Bay. In the course of that work, he produced a plan of sites occupied by Māori. This plan showed an "old Pah" which was marked with a letter "b". On the plan he noted:

> The land marked "b" at the Riwaka R is the site of a deserted pā. It is included in a "Battery Reserve" upon the Company's Plan, the natives removed from it in 1842 and the site of their new pā has been reserved for them by the

[33] The plaintiff confirms he no longer claims Te Puna a Riuwaka as it falls outside the Spain award boundary.

> Company's Agent. It was accordingly not staked, and it is recommended by the surveyor that it remain a Public Reserve.

[191] The land surrounding the "old Pah" was excluded from the Company's 1848 Crown grant as public reserve "P". The later history of that reserve is unknown.

[192] There was some confusion in the evidence about whether Puketāwai was the site of the "old Pah" as noted in Heaphy's sketch books and plans or whether Hui Te Rangiora was the site of the "old Pah". Despite that confusion, there was agreement that Māori had left the "old Pah" in 1842.

[193] I accept that, in accordance with tikanga Māori, this site was not fully "abandoned" and the connection with that site remained. However, I consider the Crown's duty to exclude Occupation Lands extended to lands which were in actual occupation in 1845. It seems apparent from the evidence that whether this site should be excluded was considered at the time, and it was elected not to reserve it as an Occupation Reserve. At this remove in time, I am not persuaded that this decision was a breach of the Crown's fiduciary duty.

Anawakaū, Anarewa and Tapu Bay

[194] These sites are claimed together. They are claimed as sites of wāhi tapu and a kāinga. Some of the claimed area falls outside the Spain award boundaries.

[195] The Mitchells refer to historical sources which describe Anawakaū as an old pā site or an old village, mostly washed away. Anarewa is referred to as a cave, occasionally used as a sleeping place and formerly used as a hiding place from enemies. Mr Taylor described Anarewa as a place of ritual for tohunga Tamati Parana which made the place tapu. The nearby Riuwaka River was also tapu as it was known for its healing properties.

[196] While there is evidence of occupation in these areas, there is insufficient evidence of the scale and nature of occupation to fall within the definitions of pā, urupā and cultivations. I am not satisfied on the evidence that the Crown breached its fiduciary duty in relation to these sites.

KAITERETERE TO TE MATAU

Overview

[197] The region from Kaiteretere north encompasses sites in Western Blind Bay and Massacre Bay. Very few Tenths were allocated in this area, but several Occupation Reserves were set aside. These Occupation Reserves remained in customary title.

[198] Surveys of the area were first undertaken by Charles Heaphy and Charles Ligar in 1846. They were surveyed again in 1847 by Heaphy and Donald Sinclair (the local police magistrate).

[199] Heaphy's plan and field book which he took with him on the survey includes sketches and observations of the claimed areas. Heaphy's plan used colour and notations to identify: those areas which the Customary Owners were entitled to under Spain's award; those areas claimed but which no supporting evidence of occupation had been identified; areas which had been surveyed but which Māori would not allow to be staked; and areas marked "a", being small plots occupied by Māori in harbours or safe havens which were used by both Māori and Europeans. Heaphy recommended this latter area be set aside as public reserves. Other notations were made in relation to specific sites.

[200] Heaphy and Ligar initially set aside 737 acres. A further 826 acres was added to the reserves making a total of 1,563 acres of land reserved in this area. Mr Parker refers to one of Sinclair's plans from this time which uses colour to demarcate between land reserved under Spain's award, and the additional acreage reserved.

[201] The surveyed Occupation Reserves were defined in plans annexed to the 1848 grant. However, it is not clear whether all these Reserves were in fact set aside. As is explained in relation to some of the claimed sites, it appears that some of the Reserves may have either been abolished, replaced, or consolidated with other sections and Occupation Reserves.

[202] There was a subsequent rearrangement of the Occupation Reserves between 1853 and 1856. Donald McLean, the Land Purchase Commissioner, executed several

deeds of release at this time with particular iwi and hapū. Those deeds of release purported to settle any remaining claims to land in the area. As previously discussed, to the extent the rearrangement of these Occupation Reserves is said to constitute a breach of fiduciary duty, then I consider the duty at issue falls outside the scope of this proceeding.[34] But even if I am wrong about that, there is insufficient evidence to conclude that these rearrangements constituted a breach of the Crown's duty.

Kaiteretere[35]

[203] Kaiteretere is claimed as a wāhi tapu and seasonal harvesting site. It is claimed as a wāhi tapu site because of the meeting between the Customary Owners and the Company in 1841. Its importance also arises out of its strategic advantages. Mr Taylor claimed that there was a fortified pā at the end of Kaiteretere beach which was important for defensive purposes due to its hard cliffs on both sides. An island at the end of the beach, Kākā Island, was set aside by the Crown as an Occupation Reserve. Kākā Island is not claimed as a site of Occupation Lands.

[204] Dr Williams relied on evidence of witnesses given before the Native Land Court to establish occupation in this area. For example, Ngāpiko claimed that Kaiteretere was occupied by Ngāti Rārua and that there were several Ngāti Rārua (who he named) residing at Kaiteretere at the time Captain Wakefield arrived. Other witnesses, such as Ramari Herewini, corroborated that evidence.

[205] The Mitchells, however, were more circumspect in their evidence, suggesting that it was not clear whether there were any permanent residents at the time of the Company's arrival, although they considered it likely that local hapū would have used the bay and the environs.

[206] I accept the Mitchells' evidence that local hapū would have used the bay and its environs. I also accept that it was regarded as wāhi tapu. However, I do not consider this evidence establishes either the scale or type of occupation which engaged

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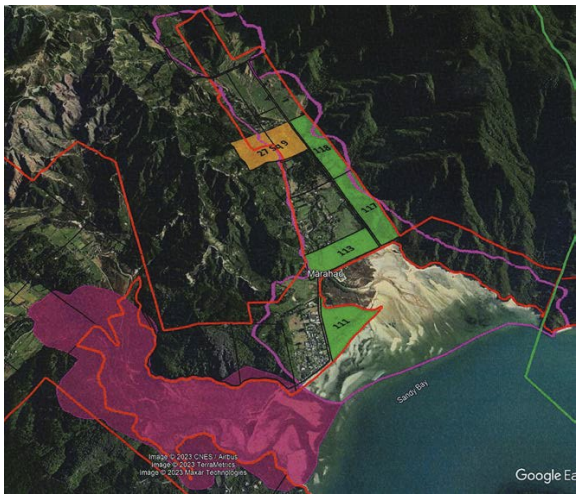
34 See judgment above at [410]–[416].

35 Mr Taylor notes that "Kaiteriteri" is an incorrect spelling of the name. I have adopted Mr Taylor's spelling in this judgment.

the Crown's fiduciary duty to set aside pā, urupā and cultivations. The evidence falls short of proving breach in relation to this site.

Mārahau, Mārahau Hill and Sandspit, and Anatuwhero/Otuwhero (Sandy Bay)

[207] This is a large zone comprising several different, interconnected, sites. The colour blocked area in the image below shows the claimed Anatuwhero/Otuwhero (Sandy Bay) site. The adjacent area shown in outline is the Mārahau claimed occupation site. Tenths sections 111, 113, 117 and 118 fall within that boundary, as does section 27.



[208] The plaintiff claims kāinga, cultivations, and mahinga kai were located here. An urupā is also said to be in this area.

[209] Mr Taylor gave evidence of the extensive occupation of this site. He said that together with Te Maatū, this site provided nourishment and an economic base for trade with settlers. The gardens had a good water supply, and hapū and whānau would collect kaimoana in the area.

[210] Both Mr Taylor and Mr Mokena referred to the urupā at Mārahau hill as did Dr Williams. One of Mr Taylor's tūpuna, Wi Parana, lived in the area, and other Customary Owners such as Te Teira and Iraia were also of Mārahau. Occupation has been continuous with whānau still staying at the campground near the beach

throughout the year. Wakatū now owns this land, together with other land, in this valley.

[211] In addition to the kōrero tuku iho, there are several documentary records referring to occupation in this area in the mid-1840s:

(a) In 1840, Frederick George Moore noted that he was visited in Mārahau by about 20 waka full of Customary Owners.[36]

(b) Arthur Wakefield's diary records Wi Parana as one of the Chiefs that met with Company representatives at Kaiteretere in 1841. He was described as a rangatira of Mārahau.

(c) The 1847 Tinline census records 14 people at the Mārahau settlement.

(d) In 1849, two kāinga were recorded at the site, one led by Wi Parana (14 residents) and the other by Te Teira and Iraia (35 adults, seven children). They were recorded as having significant land in cultivation and livestock between them.

[212] Tenths sections 111, 113, 117 and 118 were selected in this area in 1843. The status of them thereafter is unclear. Dr Williams refers to these Tenths as being reallocated for occupation purposes. Mr Parker gives evidence that these Tenths were allotted to local Māori as part of the 1856 rearrangements by Donald McLean. He also records that "[a]ll or parts of sections 113, 117, and 118 were leased at various times and it appears the rents were collected for distribution to the allotted owners".[37] It appears that these Tenths were allotted to "Teira and his people" in 1863.[38] Despite these "allotments", Mr Parker says these sections remained as Tenths.

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36 Mr Parker queries why Māori would canoe over to Mr Moore if they lived there. However, I accept Mr Taylor's explanation that the waka were being used in the same way you use cars or bikes today.

37 I have assumed that "allotted owners" refers to the customary owners of these Occupation Lands rather than the beneficiaries of the Tenths. That is, the Tenths were being administered as Occupation Reserves with the rents being received directly by those in occupation, rather than the land being administered as Tenths with a portion of the rent being distributed to the Customary Owners in their capacity as beneficiaries of the Tenths trusts.

38 See Appendix 2 at [58]–[64].

[213] In 1847, Charles Heaphy visited Western Blind Bay. He identified three sites (which he coloured yellow) between Otuwhero and Mārahau, and another three sites in Mārahau itself (two coloured yellow, one coloured red). An excerpt from this plan is shown below:

[214] The key to Heaphy's plan records that the land coloured red had been surveyed as occupations which the Customary Owners were entitled to receive under Commissioner Spain's award. The lands coloured yellow were claimed by the Customary Owners but evidence had not been produced to support the claim of the occupation being "previous to the formation of the Colony or subsequent to the payment of [George Clarke Junior] for the districts". Mr Parker surmises that this payment relates to the deeds of release entered into at the end of Commissioner Spain's hearing on 24 August 1844. I accept that as a plausible explanation.

[215] Occupation Reserves L, M and N were subsequently defined in the plans attached to the 1848 Crown grant, together with two Public Reserves. Occupation Reserve L appears to have been located in the vicinity of the land-coloured red on Heaphy's plan, in Mārahau. Occupation Reserves M and N were located at Otuwhero in the position of two of the yellow parcels marked on Heaphy's plan. Heaphy's field book records these two Reserves as being a "corn ground" and "potato ground".

[216] It is not clear what happened to these Reserves. They may have been abolished as part of the 1856 rearrangements undertaken by Donald McLean to settle existing claims. The abolition of these Reserves could have been in substitution for section 27

which was set aside for the Parana family in 1856. About this transaction, McLean wrote:[39]

> Wi Parama wishes to have a reserve marked out for him at Marahau beyond Motueka. It seems that Mr. Tinline has already marked one off. There are ten men, besides women and children at this place. These Natives should therefore have 100 acres reserved for them, with a right to purchase more land if they require it, at 10s. per acre; to exchange section No. 111 for section No. 120

[217] As noted by Mr Parker, section 111 was a Tenths section, but it was not exchanged for section 120 as suggested by McLean. Instead, section 27, square 9 of 83 acres was set aside for Wi Parana and others. That section was vested in Wakatū in 1977. Other land in this vicinity has also been vested in Wakatū.

[218] This evidence suggests there was significant occupation at Mārahau in the mid-1840s and beyond. However, determining the boundaries of that occupation is more difficult. The best evidence is the boundaries of the Tenths sections allocated in the area (Tenths sections 111, 113, 117 and 118), and the Occupation Reserves. Accordingly, I consider the Crown breached its fiduciary duties by failing to exclude the pā, urupā and cultivations from the land the subject of Tenths sections 111, 113, 117 and 118.

[219] There is evidence that the plaintiff's claim for breach may have been settled, either by the 1856 McLean rearrangements, or by the 1863 allotments. That appears to be the intent of those subsequent rearrangements and allotments. However, whatever the intent or practice "on the ground", the legal status of those sections remained as Tenths, as recorded in sch D of the Native Reserve Act 1873 and the Native Reserves Amendment Act 1896. That means the land remained in Crown ownership and was not vested in the Customary Owners at all. These Tenths may have been treated as Occupation Reserves, but their legal status did not actually change. Accordingly, I am not satisfied on the evidence that the Crown's breach was remedied by either the 1856 or 1863 "allotments".

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[39] Donald McLean "Memorandum of Instructions" in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 1 at 306.

[220] Therefore, I find that the Crown breached its fiduciary duty to exclude pā, urupā and cultivations from Tenths sections 111, 113, 117 and 118. The claim is limited to the net balance of land lying within these Tenths (some of it having been vested in Wakatū). The occupation of these Tenths means that the benefit of them was lost to all Customary Owners. Accordingly, these Tenths are also to be treated as Occupied Tenths.

Wenua Kura (Whenua Kura)

[221] Wenua Kura (Whenua Kura) is claimed as a kāinga and fishing station. Mr Taylor gave evidence that the site was sometimes associated with kokowai—a clay ochre the Customary Owners would use as a preservative and in rituals and ceremonies.

[222] In 1847, Charles Heaphy recorded three huts in the area, but marked it as an area that Māori used as a place of shelter and refuge, which was not constantly occupied. Heaphy recommended that the area vest in the Crown as a Public Reserve, and Reserve H was set aside at Wenua Kura for that purpose.

[223] I have no difficulty in accepting the kōrero tuku iho about how this site was used by the Customary Owners at the time, especially in relation to the collection of kaimoana (seafood) around the southern point of Wenua Kura. That evidence is consistent with Heaphy's own observations and notes made at the time.

[224] However, the type of use and occupation is not one which fits within the scope of the fiduciary duty found by the Supreme Court. That is, it is not either a pā, urupā or cultivation site. Breach is not established in relation to this site.

Motuarero-iti (Fisherman's Island)

[225] Motuarero-iti is a small island which is claimed as an occupation site and urupā. Mr Taylor gave evidence that the Customary Owners would use it to store food away from their primary homes. This would protect the food from predators and also ensure that food stocks could be appropriately managed within communities.

Dr Williams gave evidence that this was the site of a former pā, and huts had been recorded as being on the island.

[226] In 1847, Heaphy recorded that part of the island should be set aside as a Native Reserve labelling it as a "burial place". Heaphy also noted a fishing station as being present in his field book. Reserve J, labelled "wāhi tapu" was an Occupation Reserve set aside in this area. Another part of the island was reserved as a public utility reserve, Reserve K. This appears to be in the general location where the fishing station was reserved in 1847.

[227] The evidence is consistent with occupation by the Customary Owners at the relevant dates. However, I consider the best evidence of the extent of these sites is the boundaries of the reserves set aside. Breach is not established in relation to this site.

Motuarero-nui (Adele Island)

[228] Motuarero-nui is a larger island located close to Motuarero-iti. It is claimed as a kāinga and a pig-raising area. Mr Taylor gave evidence that the island was also used for other purposes such as beacon fires on the summit to signal danger.

[229] Heaphy recorded that Māori claimed the whole of Motuarero-nui but he recommended that the claim be disallowed and so no reserve was set aside. In 1848, Heaphy recorded on his map:[40]

> The whole of Adele Island is claimed by the natives on account their having kept pigs upon it *lately*. The surveyor does not recommend such claim to be allowed.

[230] Three structures were also identified as being near the coast. Public Reserve I was set aside in the location of these three structures.

[231] Once again, it is clear from the evidence that the Customary Owners used this area and there is no reason to doubt the customary evidence regarding this site. However, the use of this site does not fall within the scope of the fiduciary duty found by the Supreme Court (pā, urupā and cultivations). Heaphy's map notation ("upon it

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[40] Emphasis added.

lately") raises questions about whether the Customary Owners were still using the site to keep pigs, and if so, whether the entire island was used for that purpose. The state of the evidence means I cannot be satisfied that the Crown breached its fiduciary duty in relation to this site.

Te Pukatea (Astrolabe), Rākauroa and Pōtikitawa

[232] These three sites are located close together and are considered part of a cultural zone:

(a) Te Pukatea is claimed as a papakāinga and fishing area. Some of the area claimed falls outside the Spain award boundary and has been excluded from the total acreage claimed. Mr Taylor said the kainga was down on the flat and the higher, defensible area, was used to store kumara and other food.

(b) Rākauroa is claimed as a kāinga.

(c) Pōtikitawa is claimed as a kāinga, pā, urupā and cultivation site.

[233] Dealing with Te Pukatea first, Heaphy noted a fishing station here and sketched five rectangles of varying sizes at this site. He marked it "a" on his map, being a small area (less than an acre) located in a boat harbour or place of shelter and occupied (but not constantly) by Māori and used by "coasting craft" also. Two public reserves, Reserve F and Reserve G, were subsequently set aside in the general vicinity of this area.

[234] Heaphy's sketch indicates that the Customary Owners were using the fishing area at the time. To that extent it corroborates Mr Taylor's evidence that Te Pukatea was a fishing area. However, there was no kōrero tuku iho about the nature of the fishing stages noted on Heaphy's plan, or other evidence to support the claim that this was the site of a papakāinga. Moreover, Heaphy's notation about intermittent use raises doubt about whether this area of use falls within the definition of "pā, urupā and cultivations". Ultimately, I am not satisfied that there is sufficient evidence to show that this is a site that should have been excluded from the land obtained by the Crown.

[235] Turning to Pōtikitawa next, I note that Occupation Reserve E was set aside at this site which substantiates the plaintiff's evidence concerning occupation. However, it is not possible to determine with any accuracy the boundaries of this site approximately 180 years later. Despite its imperfections, the best evidence of boundaries is that established by the Occupation Reserve itself. Breach is not established in relation to this site.

[236] Finally, there was very little evidence given about Rākauroa, although I acknowledge that inferences may be drawn from its location in relation to the other two sites. On the evidence that was adduced, I cannot be satisfied that this was a pā, urupā or cultivation site that engaged the Crown's fiduciary duty. Breach is not established in relation to this site either.

Wairinga/Wairima (Bark Bay)

[237] This site was claimed as a papakāinga site which was located in an advantageous location for horticulture and gathering. Mr Taylor described the area as having a unique form of cockle. He also gave evidence of numerous urupā in the area, up and down the coast. He marked it as an area of very high cultural and historic value.

[238] Like other sites in the region, Heaphy identified this site as one of occupation but marked it with an "a" and recommended it be set aside as public reserve. In his field book, Heaphy recorded this site as a "travelling station", and in 1848, Public Reserve D was set aside in this area.

[239] There seems no reason to doubt Mr Taylor's evidence about urupā located in the general vicinity. However, there is real difficulty in identifying the area in which those urupā were located and the precise acreage which should have been excluded. Location is also difficult to reconcile with the other evidence, including evidence of horticulture in the area, the lack of any claim to the area made in the Native Land Court in 1892, and Heaphy's observations of the area.

[240] Precision assumes some importance in a claim for breach of fiduciary duty where the return of land and damages are sought as relief. A private law claim does

not appear to be the most effective way of providing relief in relation to this site, at least insofar as it involves urupā. For present purposes, and based on the mixed nature of the evidence, I am unable to determine that the Crown breached its fiduciary duty in relation to this site.

Awaroa, Waiharakeke and Tōtaranui

[241] The plaintiff says that all three of these sites are satellites of a cultural zone.

(a) Awaroa is claimed as a large kāinga named after the "long river". The plaintiff says it is associated with Merenako of Te Ātiawa (wife of Te Poa Karoro also known as Pene Miti Kakau or Pene Te Poa).

(b) Waiharakeke is claimed as an occupation site named after the flax in the area.

(c) Tōtaranui is claimed as a kāinga and mara named for the big tōtara trees in the area.

[242] Dr Williams referred to notes taken by Sherwood Roberts who stayed in Tōtaranui in 1856:

> There was formerly a Maori Pa on the south side of the river, close to its mouth, with Mara, or cultivated land, along the flat. When I visited it in February, 1856, I resided in the whare which had belonged to the Rangatira, as it, with several other less pretentious huts, were deserted, but not tapu.

[243] On the one hand, this passage refers to a pā and cultivations on the site. On the other, the pā appears to have been deserted by 1856—although it is not clear when that occurred.

[244] By way of response to this evidence, Mr Parker points out that Heaphy visited the area in 1847 but did not set aside any Occupation Reserves in the area. The inference to be drawn from that conclusion, in Mr Parker's opinion, is that the site was not occupied at that time.

[245] Several Occupation Reserves were identified, or ultimately set aside, in the area:

(a) Public Reserve A was set aside in Awaroa. That accords with Heaphy's identification of the site with a marked "a" on his map.

(b) In 1856 McLean instructed a surveyor to set aside a reserve of 50 acres for Merenako and Pene Miti Kakau at Awaroa. This reserve was not ultimately set aside.

(c) In 1856, McLean also instructed a surveyor to set aside a reserve of 50 acres for Ihaka Te Meri at Waiharakeke although this reserve was also not set aside.

(d) Section 5 Block VI Tōtaranui Survey District was reserved as an Occupation Reserve in Waiharakeke in 1856. This was to comprise 100 acres but was later found to comprise 112 acres.

[246] Mr Parker considers that the 100-acre block at Waiharakeke (Section 5 noted at (d) directly above) might have been set apart as replacement for the two 50-acre blocks referred to in (b) and (c) directly above. However, this does not accord with Alexander Mackay's written records which suggested that two reserves created in Middle Bay and Anapahi, totalling about 17.5 acres, had been abolished in 1856 "with the concurrence of the Natives and 100 acres set apart at Waiharakeke, near Tōtaranui instead".[41] Mr Parker suggests that Alexander Mackay may have been mistaken, or all interests were combined in the one block at Waiharaheke.

[247] Looking at this evidence in totality, I consider it shows use and occupation across all three sites. That is substantiated by the intention to allocate Occupation Reserves in this area and the actual allocation of reserves in the area. There is little evidence regarding the nature of any agreement reached in relation to the allocation of the 112-acre Waiharakeke reserve in this area. On its face, the allocation of this reserve

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41 Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 314.

has every appearance of settling any claims to occupation in the area. In light of this evidence, I cannot conclude that the Crown breached its fiduciary duty in relation to any of these three sites.

Anapae/Anapai/Anapahi

[248] Anapae/Anapai/Anapahi is claimed as a site of cultivation north of Tōtaranui. As noted in relation to the previous three sites, a reserve was initially set aside in Anapae, but was later abolished in the 1856 rearrangements.

[249] I agree with the plaintiff that the allocation of an Occupation Reserve in this area supports the customary evidence that this was an occupation site. However, as the Crown submits, it also discharges the Crown's duty in relation to this site. To the extent the claim extends to the management of these Occupation Reserves, then I record that the abolition of this Reserve in 1856 appears to have been made with the consent of the Customary Owners with the Waiharakeke site allocated in replacement. Breach is not established in relation to this site.

Anatakapau (Anatakapu) and Te Matau

[250] Anatakapau and Te Matau are considered together. The plaintiff claims Anatakapau as a cultivation site and Te Matau, also known as Separation Point, is claimed as a papakāinga site.

[251] The Separation Point area is a boundary marker between Mōhua (Golden Bay) and Aorere (Tasman Bay). Mr Taylor explained the importance of Te Matau to the Customary Owners:

> All our Tainui-Taranaki hapū have connections to Te Matau. It is important to Ngāti Kōata because of the tuku whenua with Ngāti Kuia, as it is said that Tūtepourangi gave his mana of the land though to Te Matau. My understanding is that Ngāti Koata have a mixed view that it is to this point and then others say it is to Farewell Spit. So, it can depend on who you talk to. The Ngāti Rārua, Te Ātiawa and Ngāti Tama people have some different kōrero, but recognise that the reference to the tuku extends as far as Te Matau. For this reason, politically it is a really important site and that is why we need to acknowledge it. Te Matau is often referenced in whaikōrero given its symbolic significance to all the Tainui-Taranaki hapū.

[252] Heaphy's field book from 1847 marked several areas "red" on his map in this vicinity and old cultivations were recorded at Anatakapau. The red colour on his map indicated they were zones which Māori were entitled to receive. Next to these sites, an asterisk was recorded on his map which, according to the key denoted "lands surveyed but which the Natives would not suffer to be distinguished by line or stakes".

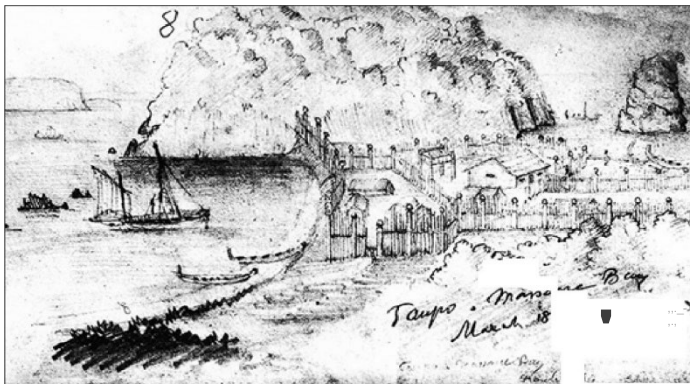
[253] Several Occupation Reserves were created in the area: Reserves X, Y and Z. Reserve Z was increased in size in 1856, and Reserves X and Y were given up or exchanged for other land.

[254] The evidence is fairly consistent that both sites were occupied at the time and should have been set aside. The Crown discharged that duty in relation to the Occupation Reserves set aside in this area. To the extent the claim extends to the management of these reserves, then I note the evidence suggests the 1856 rearrangements may have been made with the acquiescence of the Customary Owners. I am not satisfied that breach is established in relation to this site.

WHARAWHĀRANGI TO AORERE

Wharawhārangi, Ngārara Huarau and Taupō

[255] The plaintiff treated these three sites as a cultural zone because of their proximity to one another. Wharawhārangi is claimed as a kāinga site with cultivations. Ngārara Huarau (Ngārarahuarau) is a taniwha: a shape changer with different forms and a regulator of behaviour. It is claimed as a kāinga site. Taupō was a palisaded pā and included an urupā site. It is shown in a sketch Barnicoat made on a visit to the area in 1844:



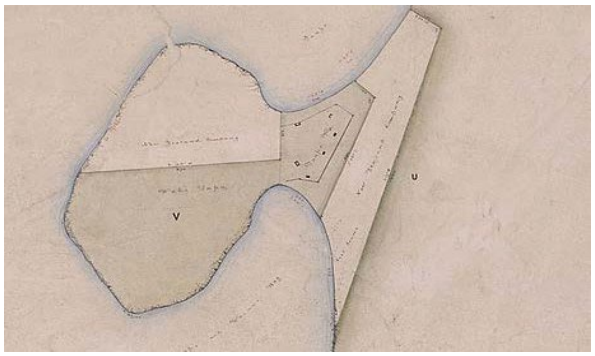
[256] Occupation Reserves were made in the area and were excluded from the 1848 Crown grant:

(a) Wharawhārangi was reserved as part of Occupation Reserve W and Reserve U.

(b) Ngārara Huarau was reserved as Occupation Reserve U.

(c) Taupō was reserved as Occupation Reserve V.

[257] Occupation Reserve V did not originally contain the entire area of Taupō Pā, as shown in the plan accompanying the 1848 Crown grant:



[258] The strip running between Reserve V and Reserve U is marked "Coal Seams" and "New Zealand Company". As previously discussed, Sinclair and Heaphy had been instructed to avoid laying out reserves where coal was evident.[42]

[259] On its face, the failure to reserve all of Taupō Pā would appear to be a breach of fiduciary duty, with valuable coal resources taken for the Company's own use. For completeness, however, I note the report of a meeting between Arthur Wakefield and the Massacre Bay Customary Owners in 1842 which records agreement that land could be taken and there would be no obstruction in taking the coal. While there is good reason to treat the record of such meeting with a healthy dose of scepticism, any

[42] See judgment above at [354].

concerns about the nature of such an agreement cannot now be tested some 180 years later.

[260] In any event, sometime between 1856 and 1866, Reserve V was expanded to encompass both the isthmus and the entire hill and was vested in Eruera Rauhihi. Therefore, to the extent there was a breach in failing to set aside Reserve V, it appears to have been subsequently remedied by the expansion of the reserve and the vesting of it in the Customary Owners who had a proprietary interest in the area.

[261] Reserves W and U were also altered in the 1856 rearrangements. It appears that Reserve W was increased in size. Reserve U was abolished, but it appears that other land was reserved in substitution. For example, in 1856, 100 acres was set aside for Paramena Haereiti, the principal rangatira of Ngāti Tama in the area. Mr Parker suggests that this reserve was in substitution for Reserve U.

[262] The totality of the evidence points to occupation of these areas at the relevant time. I consider the boundaries of the Occupation Reserves set aside in 1848 are the best evidence of the boundaries of the occupied sites. While there may have been an initial breach in relation to Occupation Reserve V, that breach was subsequently remedied by the expansion of that reserve, and the vesting of that land in the Customary Owners. On the basis of this evidence, I am not satisfied that the Crown breached its fiduciary duty to exclude pā, urupā and cultivations from these sites.

[263] To the extent the plaintiff's claim relates to changes made to these Reserves following the 1848 grant, then the claim falls outside the scope of this proceeding. But even if I am wrong in that analysis, I cannot be satisfied on the evidence that the subsequent changes to the reserves were made as part of an exchange or a rearrangement that was agreed. There is insufficient evidence to prove the Crown breached its duty in relation to these reserves.

Wainui, Takapou (Takapu) and Anatimo

[264] Wainui is claimed as a papakāinga with cultivations. The Wainui site also encompasses Anatimo and Takapou. Anatimo was a kāinga and cultivation site,

together with an urupā. Takapou was described as a kāinga in some sources and a pā site with cultivations in others.

[265] The 1848 Crown grant included Occupation Reserves Q, R, S and T which covered this area. Mr Parker says these reserves then became section 9 and section 11. Section 11, square 12 replaced Reserve T. Section 9, square 12 was set aside at Takapou and at Anatimo. He cites evidence which suggests that changes to the Occupation Reserves were made with the agreement of local Māori. I accept that evidence, which was not seriously contested.

[266] On the basis of this evidence, I consider the Crown discharged its fiduciary duty to reserve these areas, and that any exchange or rearrangement occurred with the consent of the Customary Owners. Breach is not established in relation to these sites.

Tata and Ligar Bay

[267] Tata and Ligar Bay are also addressed together. Tata was a small papakāinga site associated with Te Aupouri Matenga. Ligar Bay is also claimed as a papakāinga site close to Tata and Wainui. It is associated with the Ngāti Rārua rangatira, Kawatiri and Te Aupouri Matenga.

[268] Tata became wāhi tapu after Te Kawatiri Tinirau and a group of 11 others drowned when their waka capsized. The Te Aupouri whānau moved from Tata to Motupipi following that tragedy. Ms Trina Mitchell emphasised in her evidence that even though people moved away from the area when it became wāhi tapu it did not mean that they had relinquished ownership of it. Rather, it made it even more important for the area to be protected and looked after.

[269] Dr Williams and Mr Parker agree that Occupation Reserves M, N, O, P and Q (totalling approximately 21 acres) were reserved in both areas. It appears that these reserves were then abolished and replaced by a 100-acre reserve created over Tata and Ligar Bay.

[270] The creation of the Reserves appears to have discharged the Crown's duty. On the basis of the evidence called at trial, I am not satisfied that the Crown breached its fiduciary duty in relation to either Tata or Ligar Bay.

Pōhara

[271] Pōhara is claimed as a kāinga site with an urupā. Reserve L shown in the plans annexed to the 1848 grant covers this area. Dr Williams expressed some doubts about whether it was ever actually set aside for individual owners. However, those doubts are insufficient to rebut the presumption that the area was reserved. Breach is not established in relation to this site.

Motupipi

[272] Motupipi was an important pā site with associated cultivations and an urupā. It is where Ms Mitchell's great-grandparents lived. The area extends towards the river mouth and sandspit and is very tidal. Customary Owners used to gather pipi and other kaimoana from the area.

[273] Ms Mitchell said in evidence that the boundaries of Motupipi should be extended because there were burial caves and rocky shelters back in the grove. Given the difficulties in determining boundaries 180 years later, I consider Reserves H, I, J and K, (as merged with sections 5 and 6) are the best evidence of those areas occupied at the time. Breach is not established in relation to this site.

Tākaka, Waitapu, Waingaro (Waikoho) and Patoto (Patatou)

[274] Tākaka was a site of a pā and cultivations. The area borders Motupipi, Waitapu, Waingaro and Te Waikoropupū Springs. Waitapu was also a pā site, located on the flat and extending out over the entire foreshore and inland area. Waingaro was a kāinga and Patoto was a pā, urupā and mahinga kai.

[275] There is agreement between the experts that Reserves A–G were set aside in this area and subsequently allocated to Ngāti Tama and Ngāti Rārua. Mr Parker says it appears that all these reserves survived unchanged in McLean's 1856 rearrangements, apart from Reserve D, which was incorporated into Tākaka

Section 13. The only issue between the parties is whether the Occupation Lands extend beyond the sites already reserved.

[276] I consider the best evidence of boundaries is that established by the reserves that were set aside at the time. On the basis of that evidence, I am not satisfied that the Crown breached its duties in relation to these sites.

Te Waikoropupū Springs

[277] Te Waikoropupū Springs area covers the springs itself and extends back to Waingaro. It is claimed as a wāhi tapu site. Ms Mitchell recalled her grandmother taking visitors to the site to cleanse themselves (especially their feet) before they would leave Mohua and carry on the journey. The site was also used for spiritual purposes such as karakia and other blessings. There were no reserves made in this area.

[278] The significance of this site and relationship of the Customary Owners to it is one which New Zealanders in this century can understand. However, I am not certain that the importance of wāhi tapu sites to Māori in general (beyond the protection of urupā) were understood in the 1840s. As I have explained elsewhere in this judgment, the fiduciary duty found by the Supreme Court focused only on pā, urupā and cultivations. In the context of this proceeding, I am not satisfied that the failure to set aside this area as a pā, urupā or cultivation site was a breach of the Crown's fiduciary duty.

Rangi-ata (Rangihaeata)

[279] Ms Mitchell's evidence is that Rangihaeata was a significant papakāinga site with burial caves at the headland.

[280] Dr Williams cites the Mitchells' evidence that those associated with this area include Ngāti Tama rangatira Inia Ohau, also known as Rangiata Inia Ohau and Wi Ngaparu of Ngāti Tama. The latter signed the 1844 deeds of release as "Ko Wiremu o Rangi-ata".

[281] No Occupation Reserves were created in this area. That is significant given other Occupation Reserves were created in nearby areas, including on the other side of Tākaka River.

[282] While I accept that there is some evidence of occupation in the area, that evidence is, on its own, insufficient evidence of a pā, cultivation or urupā which would engage the Crown's fiduciary duty. Breach is not established in relation to this site.

Pariwhakaoho, Puramāhoi and Te Waikaha

[283] Pariwhakaoho, Puramāhoi, Te Waikaha are claimed as papakāinga, cultivations and urupā sites.

[284] Dr Williams and Mr Parker agree that Occupation Reserves W, X, Y, and Z were initially set aside and were then later consolidated into Pariwhakaoho Section 79. The only issue therefore is the extent of the Occupation Lands.

[285] I consider the best evidence of the boundaries of these sites is the Occupation Reserves set aside at the time. Breach is not established in relation to these sites.

Onekaka

[286] Onekaka is claimed as a kāinga and cultivation site.

[287] Ms Mitchell said the area was quite a transient area which was used for fishing and mahinga kai. Before the Native Land Court, Ngāpiko claimed that Onekaka was owned by Hikaka of Ngāti Rārua.

[288] There were no reserves made in this area despite it being located between Tukurua and Puramāhoi where Occupation Reserves were set aside.

[289] The evidence regarding this site is insufficient to conclude that it was a pā, or a site of cultivations at the relevant time. Breach is not established in relation to this site.

Tukurua

[290] Dr Williams and Ms Mitchell both say that Tukurua was an important papakāinga site with cultivations and urupā. This site was reserved as Occupation Reserve T and Reserve U which was the urupā.

[291] The boundaries of the Occupation Reserves may not be entirely accurate, but nearly 180 years later they provide the most reliable evidence of the size of these Occupation Lands. Breach is not established in relation to this site.

Parapara

[292] Dr Williams records that Parapara was a Ngāti Tama papakāinga site led by the rangatira Henare Te Ranga.

[293] Dr Williams and Mr Parker agreed that Parapara was initially reserved in the 1848 Crown Grant and then abolished and replaced by other sections. Therefore, the issue in relation to this site is whether the full extent of the Occupation Lands were reserved.

[294] The boundaries of the Occupation Reserves are the best evidence of the size of the Occupation Lands at the time. There is no breach in relation to this site.

Aorere

[295] The plaintiff claims this as an important pā site with cultivations and mahinga kai. There were numerous and extensive reserves made in this area. To the extent the Occupation Lands claimed extend beyond these reserves then the boundaries of the Occupation Reserves are to be preferred. Breach is not established in relation to this site.

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[1] This claim is addressed under the Te Maatū heading in Appendix 1.

1844 exchanges during Spain Commission hearing

[2] This exchange is addressed under the Te Maatū heading in Appendix 1.

1847 remodelling of Nelson settlement

[3] In 1847 there was a remodelling of the Company's plan for the Nelson settlement. This was prompted by difficulties encountered by the Company at the outset in selling the sections. The Company's proposal for the Nelson township comprised 1000 allotments, including the 100 town Tenths sections which were allocated in 1842. By this time only 530 of the 900 allotments for sale had been sold. Some of the purchasers were overseas, and those that were resident were not concentrated in one place. That increased the costs of infrastructure and had a negative impact on the value of the town sections.

[4] There were several schemes proposed by the Nelson settlers to address this issue. None of these schemes proposed a reduction in the Tenths estate. Indeed, some of the documents regarding these early proposals recorded that as Tenths sections had generally been allocated where the Customary Owners were in actual occupation, "it would be neither right nor expedient to attempt any alteration".[1]

[5] However, one of the schemes promoted in 1847 involved landowners giving up the sections they had selected in 1842 and participating in a re-selection of a reduced number of town and suburban sections. That proposal included a proportionate reduction in the Tenths to limit them to one-tenth of the land actually sold to the settlers, with the remainder available for re-selection. That is, the Tenths were to be reduced from 100 to 53 town Tenths sections.

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1 "Proposed Adjustment of the Nelson Land Question" *Nelson Examiner and New Zealand Chronicle* (24 January 1846).

[6] Governor Grey approved this proposal but he did so on the basis that the Tenths sections should be subject to the same conditions as the settler sections in any remodelling. That approval was initially for a reduction of both the town and suburban Tenths sections. However, in February 1848 it was decided that the suburban Tenths would not be reduced, with the concern being that if the proposal was "likely to create any misunderstandings with the Natives, it had perhaps better not be done".[2]

[7] Forty-seven town Tenths were withdrawn from the scheme.[3] Richmond, the Nelson Superintendent, selected the Tenths sections to be withdrawn. He said he had retained Tenths with frontages or those that were likely to become valuable. Re-selections took place over April and May 1848. The Crown did not allocate any substitute Tenths for the sections withdrawn. Dr O'Malley said in cross-examination that the Tenths were the only sections withdrawn, and the Company and settler allocations were not so reduced. Mr Parker agreed with this evidence.

[8] There was very little evidence about what happened to these sections after they were withdrawn.[4] It seems that the 47 withdrawn town Tenths were not excluded from the 1848 grant to the Company. Counsel for the plaintiff's written submissions referred to the Company having "gained" 47 acres from the Tenths, with that land reverting to the Crown in 1850 following the collapse of the Company. Dr O'Malley referred to the later sale of these sections during cross-examination. There is no dispute that the withdrawn Tenths were not replaced. On the basis of this evidence, I accept that the withdrawn 47 town Tenths became Crown land and were permanently lost to the Customary Owners. Clifford J summed up the position in the first High Court judgment:[5]

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2 Letter from William Fox (Resident Agent of the Company) to Matthew Richmond (Superintendent of Nelson) (5 February 1848) in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 273.

3 Tenths sections 20, 21, 46, 47, 191, 194, 253, 256, 303, 382, 387, 529, 551, 561, 575, 608, 625, 626, 650, 706, 718, 722, 768, 777, 778, 784, 797, 798, 828, 831, 855, 858, 860, 897, 926, 939, 941, 943, 945, 951, 953, 954, 956, 1051, 1084, 1088 and 1091. Section 303 falls within the boundary of the Eel Ponds—a claimed occupation site. However, I have found this site did not fall within the definition of pā, urupā and cultivations to which the fiduciary duty relates: see Appendix 1 at [32]–[38].

4 Mr Parker provided title history summaries for Tenths alienated to 1882 as an appendix to his 2023 brief of evidence. There were no submissions made in reliance on this evidence.

5 *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [158].

> As can be seen from the great congruence between the Company's 1842 survey plans and the maps of Nelson today, the "reduction" [of town Tenths] was but a temporary phase in the development of Nelson, whilst the loss to the Nelson Tenths Reserves was permanent.

[9] The Crown says there is no evidence that Governor Grey acted disloyally, in bad faith, or contrary to the best interests of the Customary Owners at the time. The attempts to explore alternatives and the otherwise "thin" nature of the evidence as to Governor Grey's reasons for the decisions taken at the time, are emphasised by counsel for the Crown. Crown counsel also submits that if the decision to withdraw was not made then there was a real risk that the Nelson settlement would have failed which would not have been in the interests of the Customary Owners.

[10] The points Crown counsel make are relevant to the nature of the breach, but they do not suggest there was no breach at all. Nor do they provide reasonable justification for what occurred. The Crown held the 47 town Tenths sections on trust. The terms of that trust prohibited the Crown from alienating the Tenths. The withdrawal of 47 Tenths sections was in breach of the terms of trust and resulted in a loss of trust property.

[11] Whether that breach of trust was also a breach of fiduciary duty is relevant to remedy and to the application of the Limitation Act. I accept that there is little evidence concerning Governor's Grey's reasons for the decision made at the time. I also accept that the little evidence which does exist suggests that Governor Grey only approved the proposal on the basis that the Tenths sections would be subject to the same conditions as the settler sections in any remodelling. Given the risks to the Nelson settlement if the remodelling did not go ahead, then this points to an initial decision made in good faith.

[12] However, it is hard to get past the fact that, whatever Governor Grey may have said or intended initially, the end-result was that only the Tenths sections were withdrawn. I agree with counsel for the plaintiff that the discriminatory end-result was the most egregious aspect of the re-modelling. That speaks to disloyalty on the part of the Crown. The interests of the settlers and the Company were preferred over the interests of the Customary Owners and trust assets were permanently alienated.

This represents a breach of fiduciary duties owed by the Crown in its capacity as trustee.

[13] Accordingly, I find that the withdrawal of 47 Tenths sections was not legally justified and represented a breach of trust and a breach of fiduciary duty. It does not appear that any of these sections have been returned to Wakatū or any of the Customary Owners, but I require confirmation of that fact before finding that the total acreage lost was 47 acres.

1848 exchange of Tenths section 203 Nelson

[14] In 1848, Tenths section 203 Nelson was exchanged for Tenths section 733 Nelson. Tenths section 203 overlapped with the Eel Ponds that the Customary Owners claim as Occupation Lands. The plaintiff says that the alienation of Tenths section 203 was a breach of the ongoing duty to return this section to the Customary Owners.

[15] I have found that the Eel Ponds did not meet the definition of pā, urupā and cultivations.[6] Accordingly, the exchange did not breach the Crown's duty in relation to the Occupation Lands. Nor did it breach the duty in relation to the Tenths. Section 733 was another Tenth section and the exchange was approved on the basis that the sections were of materially the same value. There was no loss to the Tenths estate. Breach is not proved in relation to this exchange.

1849 exchanges

[16] This claim is addressed under the Te Maatū heading in Appendix 1.

1853 Whakarewa grant

[17] On 25 July and 4 August 1853, Governor Grey issued two grants of land to the Bishop of New Zealand for a school at Whakarewa. The total grant was of 1,078 acres of land, with just over 918 acres comprising Tenths sections. The grant was both for the building of the school itself and an endowment for the school. The school was *not* for the exclusive use of the Customary Owners.

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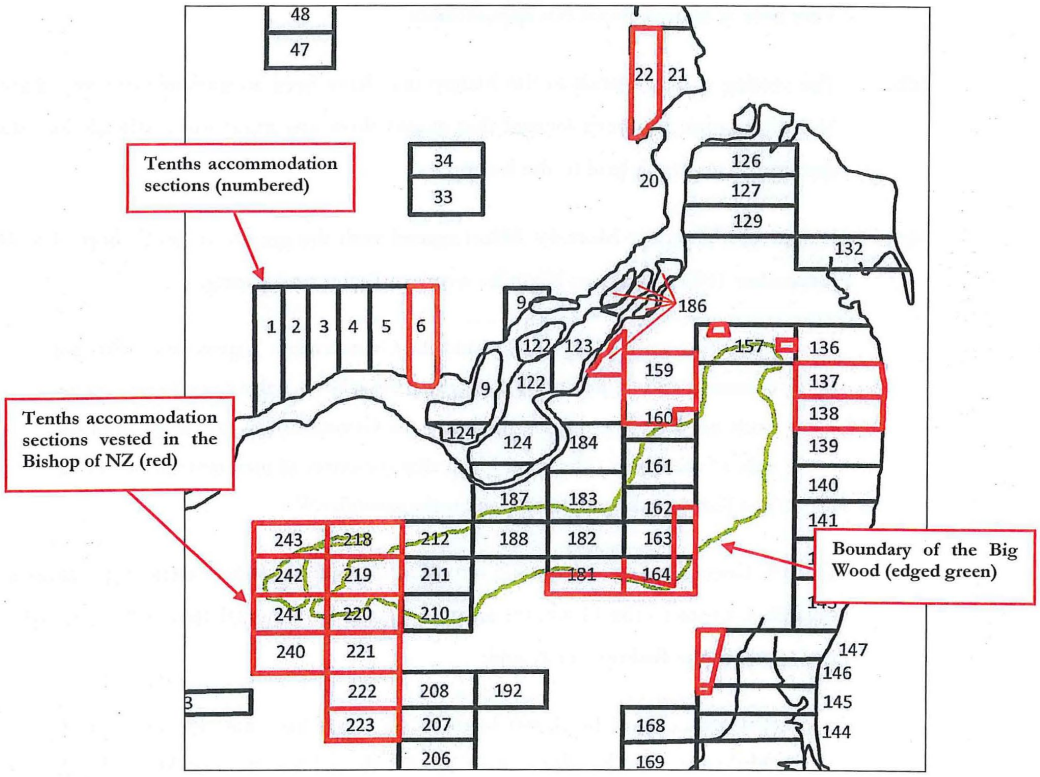
6 See Appendix 1 at [32]–[38].

[18] Few details now exist about the decision to make the grant. About this time, the Board of Management for the Tenths had been abolished, and it appears that the decision may have been made by Governor Grey himself. The factors which informed his decision and the terms upon which the grant was made (for example, whether the land would revert back to the Tenths trust if the school purpose failed) are unknown.

[19] The sections granted to the Bishop were Tenths sections 6, 22, 137, 138, part 145, part 146, part 147, part 157, part 159, part 160, part 162, part 163, part 164, part 181, part 186, 218, 219, 220, 221, 222, 223, 240, 241, 242 and 243. In his 2011 evidence Mr Parker produced a plan showing the approximate location of these sections (coloured red):



[20] As can be seen, many of the Tenths the subject of the grant were located in and around Te Maatū. Others fell within the boundaries of sites which the plaintiff claims should have been excluded as Occupation Lands, namely: Matakinokino, Wakapaetuarā, Raumānuka, Te Kūmera, Piri Kahikatea, Puketūtū, Pounamu, Putarepo, and Te Maatū itself.[7]

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7 I have found that Tenths section 159 was also an Occupied Tenth, see Appendix 1 at [112(a)].

[21] The grant appears to have been controversial at the time and there was opposition to it from several different quarters. However, there also appeared to be support from some of the Customary Owners as evidenced in letters from Tamihana Ngāpiko and Te Iti sent in December 1853. Nevertheless, opposition to the grant subsequently grew when the Customary Owners were asked to move from some of the land, and petitions for the land to be returned were also made after the school closed in 1881.

[22] Under the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993 all Tenths the subject of the grant were returned to Ngāti Rārua-Ātiawa Iwi Trust. [8] Other assets of the Whakarewa school trust board were also vested in the Ngāti Rārua-Ātiawa Iwi Trust.[9] The beneficiaries of that trust are the descendants of Ngāti Rārua and Te Ātiawa manawhenua ki Motueka iwi who were named in the 1892 and 1893 lists of the Native Land Court as beneficiaries of the Tenths.[10]

[23] Counsel for the Crown submits that the 1853 grant was not in breach of trust. The Crown says that the initial grant of the land for a school is consistent with the terms of the trust and was supported by the Customary Owners at Motueka. Any opposition is said to have only come later in relation to administrative decisions made by the Anglican Church and not the Crown. In any event, the Crown says that if the 1853 grant was a breach of trust, the breach is limited and does not fall within s 21(1)(b) of the Limitation Act as no trust property or proceeds were converted by the Crown for its own use.

[24] I have found that many of the Tenths the subject of the grant were Occupied Tenths.[11] The Crown's failure to exclude the underpinning Occupation Lands, and to reserve the Tenths from the land obtained by the Crown, were breaches of the fiduciary duties found by the Supreme Court. The focus of this section therefore is on whether the grant of the other Tenths was in breach of trust and breach of fiduciary duty.

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8 Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993, schs 1 and 3.
9 Sch 3.
10 Schs 2 and 3.
11 Those being Tenths sections part 145, part 146 and part 147 (Puketūtū); part 157 (Pounamu); and part 157, part 159, 160, part 162, part 163, part 164, 219 and 220 (Te Maatū).

[25] There can be little doubt that the Whakarewa grant was in breach of trust. The Tenths were inalienable prior to 1856. While the terms of trust permitted the building of structures on the Tenths, those had to be for the exclusive benefit of the Customary Owners. The intended school was not for the exclusive benefit of the Customary Owners. The fact that some of the Customary Owners may have consented to the grant is not enough to establish acquiescence. The Tenths were for the benefit of *all* Customary Owners. There is no evidence that *all* Customary Owners consented to the grant. Breach of trust is established.

[26] The question is whether this breach was also a breach of fiduciary duty. I accept that any alienation of trust property must be considered a breach of fiduciary duty. The Crown's duty was to preserve the Tenths for the Customary Owners and not give it away to third parties. The alienation of trust property is inherently disloyal.

[27] The difficulty here is that there is very little evidence to determine whether the grant was intended to be a permanent alienation, or whether it was intended that the land would revert to the Tenths estate if the school failed. The latter situation would still be a breach of trust, but it may be more difficult to establish that it was also a breach of fiduciary duty. The terms of trust allowed the land to be used for the building of institutions, such as a school for the Customary Owners. The grant was generally consistent with those terms except that the school was not for the exclusive use of the Customary Owners. Moreover, there is no suggestion that the Crown was acting in bad faith in making the grant. Rather, the Crown may have genuinely believed that the grant would benefit the Customary Owners. The apparent support of some of the rangatira of the Customary Owners no doubt strengthened that view. If the land was to be returned to the Tenths trust in the event the school purpose failed, then arguably the breach of trust was more like a breach of reasonable skill and care in the management of trust assets rather than a breach of fiduciary duty.

[28] The fact that the land and assets of the Whakarewa trust were eventually returned to some of the Customary Owners is also relevant here. The return of land compensates for any breach of fiduciary duty. And, arguably, the return of the Whakarewa trust assets compensates for any loss of use of those Tenths. In the

absence of evidence and submissions to the contrary, it seems that any breach of trust has been remedied.

[29] Weighing the evidence in totality, I consider there is sufficient evidence to find that the Whakarewa grant was a breach of trust, but there is insufficient evidence to conclude that it is also a breach of fiduciary duty. Moreover, I am not persuaded that the plaintiff has proved loss in relation to this transaction. The claim fails on this ground but would falter at the Limitation Act stage in any respect for reasons explained in the judgment. Accordingly, I find that that plaintiff is unable to prove his claim in relation to this transaction.

1858 exchange of sections 142 and 143 Motueka

[30] In 1858, Tenths sections 142 and 143 Motueka, comprising 90 acres, were exchanged for 90 acres of Tenths section 165 Motueka (which had been amalgamated with Tenths section 180 Motueka).

[31] A small part of Tenths section 143 falls within the boundary of Puketūtū in Motueka which the plaintiff claims as Occupation Lands. The plaintiff says that this part of Tenths section 143 should have been returned to the Customary Owners and should not have been part of the suburban sections at all.

[32] For the reasons discussed in relation to Puketūtū, I have found this site comprised Occupation Lands which should have been excluded from the land obtained by the Crown following 1845.[12] The boundary of this site is limited to the net balance of Tenths sections 144–147. I could not be certain that the boundary of this site included part of Tenths section 143. Accordingly, this part of section 143 was not considered Occupation Lands. Because the same acreage (90 acres) of Tenths was maintained in the exchange there was no breach of trust in relation to this transaction.

1864 exchange of sections 139, 140 and 141 Motueka

[33] In 1864, Tenths sections 139, 140 and 141 Motueka, totalling 148 acres, were exchanged for 150 acres in section 9 Tākaka which falls within the boundary of

[12] See Appendix 1 at [113]–[119].

Motupipi which the plaintiff claims as Occupation Lands.[13] Section 9 was originally owned by Mr Thorpe. He was also the lessee of Tenths sections 139, 140 and 141 Motueka.

[34] Dr O'Malley gave evidence that the exchange had arisen because the Customary Owners at Motupipi had been promised a reserve in return for their giving up cultivations east of the Motupipi river.

[35] Mr Parker agrees, referring to the fact that James Mackay, the Assistant Native Secretary, wrote to the Commissioners of Native Reserves seeking consent to the exchange. This was approved by the Native Minister in February 1863. However, before the exchange took place, the Governor took back the powers of the Commissioners appointed under the Native Reserves Act 1856, and subsequently delegated them to James Mackay. Mr Parker considers it likely that the exchange was able to proceed after this time and he refers to a deed dated 11 June 1864 recording the exchange, which was endorsed by the Executive Council on 21 July 1863.

[36] The exact status of section 9 after this exchange is not clear. It appears to have been recorded as a Tenth in the returns tabled under the Native Reserves Act 1873 and the subsequent amendments but appears to have ceased to be a Tenth after 1896. It is not clear to me from the evidence that section 9 was in fact occupied after this exchange—although presumably that was its purpose.

[37] I have found insufficient evidence that Motupipi was a site of Occupation Lands. To the extent that the plaintiff's claim relates to the alienation of Occupation Lands then it cannot succeed.

[38] As for the exchange of the Tenths, then it is relevant that it took place after the enactment of the Native Reserves Act in 1856. That statute afforded broad powers of management and disposition, including the alienation of Tenths in certain circumstances.[14] Given those broad powers, I cannot be satisfied on the evidence that

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13 Section 9 Tākaka is referred to as section 9 Motupipi in the plaintiff's closing submissions.
14 See judgment above at [103]–[104] and [304].

this exchange was in breach of the Crown's duties. Breach is not established in relation to this transaction.

1864 sale of section 344 Nelson

[39] In July 1864, 0.71 acres of Tenths section 344 Nelson was sold to settlers for £70. The proceeds were used to buy Tenths section 58 Picton which consisted of 46 acres, zero roods and 28 perches.[15] Tenths section 344 was divided into two parts, with the smaller part falling with the boundaries of the Eel Ponds, claimed by the plaintiff as Occupation Lands.

[40] The plaintiff says that the sale was of the larger portion of Tenths section 344 (which was not occupied). He says this was a breach of fiduciary duty as the land purchased in replacement, Tenths section 58 Picton, was not the same kind. That is because the Picton section was well outside the Spain award boundary and was not Occupation Lands of the Customary Owners.

[41] I have found that the Eel Ponds were not Occupation Lands. Accordingly, the transaction did not involve the alienation of those lands. Beyond that, the nature of this alleged breach is different to the others. It does not challenge the alienation *per se*, but the conditions of the exchange. That exchange appeared to be authorised under the terms of the Native Reserves Act 1856. There was no evidence nor submissions directed towards the loss sustained by the Customary Owners as a result of this transaction. Ultimately, I consider there to be insufficient evidence relating to this transaction to conclude it was in breach.

1864 sale of section 161 Motueka

[42] In November 1864, one acre of Tenths section 161 Motueka was sold to the Central Board of Education for £100. Part of Tenths section 161 had been included in the 1853 Whakarewa grant. Counsel for the plaintiff proceed on the basis that the part alienated in 1864 was not the part included in this grant.

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15 "Schedule of Native Reserves in the Province of Nelson" in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 333.

[43] Tenths section 161 falls within the boundary of Te Maatū and Putarepo claimed by the plaintiff as Occupation Lands. For the reasons explained in relation to Te Maatū, I consider these were Occupation Lands and the failure to exclude Tenths section 161 constitutes a breach of the Crown's fiduciary duty to exclude Occupation Lands.

[44] However, the alienation of the Tenths section was permitted by 1864 and there is insufficient evidence to conclude that the transaction constituted a separate breach of trust.

1869 exchange of sections 266 and 269 Nelson

[45] In 1869, Tenths sections 266 and 269 (totalling 1.85 acres) were exchanged for Nelson Tenths section 946 (one acre) and an equality of exchange payment of £55. The plaintiff says the net reduction of 0.85 acres was not replaced and that this amounted to a breach of the Crown's duties in relation to the Tenths.

[46] There was limited information about this exchange. Again, it took place at a time when the Crown reserved broad powers of management and disposition. On the basis of the evidence adduced at trial, I am not satisfied that the exchange constituted a breach of the Crown's duties.

1870 sale of sections 145 and 146 Motueka

[47] In 1870 a sale of 13,875 acres comprised in parts of Tenths sections 145 and 146 Motueka were sold to the Nelson Province for £100 for use as a cemetery. These parts of the Tenths did not form part of the Whakarewa grant. However, they fall within the claimed area of Puketūtū.

[48] The genesis of the sale appears to be a request by settlers for parts of sections 146 and 147 for a cemetery. James Mackay advised against the sale. That was because it was intended at that time that the seaward portions of sections 144, 145, 146 and 147 be vested in Ngāti Tama. That allocation was made on 17 December 1862.

[49] Nothing happened in response to the request for the cemetery. However, in December 1870, an Order in Council was issued pursuant to the Native Reserves Act 1856 and its 1862 amendment that vested parts of Tenths sections 145 and 146 in the Nelson Council. Those Tenths sections vested (145 and 146) were therefore different to those originally requested in the petition (146 and 147). In 1879 the cemetery was permanently reserved.

[50] The plaintiff says that this transaction breached the Crown's duty in relation to Occupation Lands as it represented an alienation of those lands, or alternatively it breached the obligation in relation to the Tenths. I have already found that Tenths sections 145 and 146 were Occupation Lands and Occupied Tenths.

[51] However, if I was found to be wrong in these determinations, then I would hesitate before making any findings in relation to the subsequent alienation of this land. The evidential picture is patchy in relation to this transaction. There is an eight-year delay before the land was sold, and a further nine years before it was used for a cemetery. The initial sections requested by the settlers are different to those eventually vested, and it is not clear why there was a change. Other sections falling within this boundary were vested in Ngāti Tama and there is no evidence of objection by Ngāti Tama to the sale at the time (although the absence of evidence does not mean there was no opposition). The fact that the sale was affected by Order in Council also suggests that different considerations may have been at play in the decision to alienate this land.

[52] I consider there to be insufficient evidence to conclude that the alienation of these Tenths sections was a breach of the Crown's fiduciary duties.

1874 sale of section 205 Nelson

[53] In 1874 Tenths section 205 Nelson was sold to the Nelson Provincial Government for £200 for a school site. This section fell within the boundaries of the Eel Pond in Nelson. The plaintiff claimed the Eel Pond as Occupation Lands and says the alienation of Tenths section 205 was a further breach of the obligation to return these lands to the Customary Owners.

[54] As noted previously, I found that the Eel Pond did not fall within the definitions of pā, cultivation or urupā and so did not fall within the scope of the Crown's fiduciary duty. Accordingly, alienation of this section was not an alienation of Occupation Lands. The plaintiff does not claim that the sale of this Tenths section also constituted a breach of the trust obligations in relation to the Tenths. There is insufficient evidence to prove such a claim in any event. Accordingly, breach is not established in relation to this section.

1856 abolitions of the Occupation Reserves

[55] A series of rearrangements of Occupation Reserves and other sections were made in 1856 by Donald McLean, Land Purchase Commissioner. Some of these claims are addressed in Appendix 1 in relation to particular sites.

[56] Some of the Reserves appear to have been abolished and replaced.[16] However, there is insufficient evidence to be able to ascertain why this was done, or whether it was done with the consent of the Customary Owners. Moreover, the alleged loss that was suffered as a result of these exchanges is not always obvious or particularised.

[57] Even if there was a fiduciary duty in relation to the management of the Occupation Reserves, there is insufficient evidence to conclude the abolition of them was a breach.

1863 redesignation of 12 suburban Tenths sections as Occupation Reserves

[58] In February 1863, James Mackay was Commissioner with responsibility for the Tenths. Mackay recommended that 12 suburban Tenths be allotted to local hapū and whānau for occupation purposes. The plaintiff claims that this resulted in a net loss to the Tenths estate of 600 acres.

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16 For example, Dr Williams gave evidence that Reserves L, M and N at Mārahau "could have been incorporated into Section 27, abolished, or replaced"; Reserve B at Anapai/Anapae/Anapahi was abolished and replaced with a reserve at Waiharakeke; Takapau Reserves R and S, and Anatimo Reserve R, were replaced with Section 9, square 12 of 26a 2r; Tata and Ligar Bay Reserves M, N, O, P and Q were abolished and replaced by 100 acres at Tata; Tākaka Reserve D was incorporated into Tākaka section 13.

[59] Mackay's recommendation was endorsed by the Native Minister at the time. Mackay recorded the arrangement in relation to eight of the sections in an undated memorandum:[17]

> Sections 126, 127, 129 and 132 were sub-divided at the same time amongst members of the [Ngati Rārua] and [Ngāti Awa] tribes who had been overlooked at the previous apportionment.
>
> The whole of the Native reserve sections at [Mārahau] were given up to Teira and his people, and Sections Nos. 111, 113, 117 and 118 at Sandy Bay were apportioned as follows:—
>
> Section 111, for Peti and her children and their relatives; Section 113 for Teira and Munu and their children and relatives; Section 117 for Wiremu Waiti, Warena, Hakopa te Nukaroa, and Iraia, and Section 118, for Wiremu and his relatives.

[60] As for the other four sections, Dr O'Malley explains:[18]

> In addition to these eight sections, in December 1862 Mackay had recommended that "the seaward portion of Native sections 147, 146, 145, and 144, and the point between section 144 and the River Moutere should be given for the use of the Natives of the [Ngāti Tama] tribe resident at Motueka".

[61] The evidence on the status of these Tenths sections is not entirely clear. Despite the evident intention to reallocate these Tenths as Occupation Reserves (either in 1856 or in 1862), they nevertheless remained as Tenths.[19]

[62] The 12 Tenths sections fall within three sites of Occupation Lands:

(a) Te Kūmera and Raumānuka (Tenths sections 126, 127, 129 and 132).

(b) Mārahau (Tenths sections 111, 113, 117 and 118).

(c) Puketūtū (Tenths sections 144, 145, 146 and 147).

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17 James Mackay Junior "Memorandum" in Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 310.

18 Footnotes omitted.

19 See Native Reserves Act 1873, sch D; and Native Reserves Amendment Act 1896, sch 1.

[63] I have already found that each of these sites was Occupation Lands and the failure to exclude pā, urupā and cultivations was a breach of fiduciary duty.[20] I have also found that each of these Tenths were Occupied Tenths. The Crown breached its fiduciary duty in failing to allocate these Tenths from land obtained from the Crown. This was a breach of fiduciary duty that gives rise to a proprietary remedy and a claim for the lost benefits arising from these Tenths. The plaintiff's claim is already established in relation to these sections and the subsequent reallocation in 1862 does not add anything to those conclusions.

[64] If I am found to be wrong in my conclusions regarding these 12 sections, then I would hesitate before finding the redesignation in 1862 was a breach of fiduciary duty. That is because the redesignation was made pursuant to broad statutory powers of management and disposition. The exercise of a statutory discretion is different in kind to the breach of fiduciary duties found by the Supreme Court. Moreover, it is difficult to second guess the exercise of that discretion at this remove in time and on the available evidence. Accordingly, I would not have separately concluded that the redesignation of these 12 Tenths in 1863 was a breach of trust and breach of fiduciary duty.

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[20] See Appendix 1 at [113]–[119] (Puketūtū), [148]–[154] (Te Kūmera and Raumānuka) and [207]–[220] (Mārahau).