IN THE SUPREME COURT OF NEW ZEALAND SC 7/2010

BETWEEN **JOHN HANITA PAKI**
TORIWAI ROTARANGI
TAUHOPA TE WANO HEPI
MATIU MAMAE PITIROI
GEORGE MONGAMONGA RAWHITI
Appellants

AND **ATTORNEY-GENERAL**
Respondent

Hearing: 19 July 2010

Court: Elias CJ
Blanchard J
McGrath J

Appearances: I R Millard QC and M P Armstrong for the Appellants
V L Hardy and D A Ward for the Respondent

CIVIL APPEAL

MR MILLARD QC:

As the Court pleases. I appear with my friend Mr Armstrong seeking leave.

ELIAS CJ:

Thank you Mr Millard, Mr Armstrong.

MS HARDY:

As the Court pleases. Ms Hardy for the Attorney-General and with me Mr Ward.

ELIAS CJ:

Thank you Ms Hardy, Mr Ward. Yes Mr Millard?

MR MILLARD QC:

If the Court pleases, this matter raises important issues under both the Treaty of Waitangi and generally and publicly. The claim is, of course, a claim to half the bed of the Waikato River, I should say the original bed of the Waikato River, opposite the lands of the Pouakani people. The Crown first laid visible claim to that after the Second World War when it started carrying out its hydro works. It says that it acquired that bed under one of two bases. Firstly, section 14 of the Coal Mines Act Amendment Act 1903 to the extent that the river was navigable and in its defence said at the relevant points which indicated that it was taking a segmented approach. Or alternatively if that doesn't succeed they say that they acquired it under the common law principle of ad medium filum aquae.

Implicit in that last assertion is that the original successors or predecessors of the appellants were granted that when the Native Land Court made the grant of the land to them which they then on-sold, at least in terms of the visible land.

ELIAS CJ:

Mr Millard, we have read the submissions put in and I think we've all read, with some care, the judgment, so we're familiar with the background. Indeed I had wondered really whether it might be possible to – I'm not sure whether you're going to enlarge upon the reasons why the Court should entertain the appeal but it did seem to me that there were, you used the words "segmented" there were a number of segments to this appeal which might, all of which might raise matters which would be within our statutory obligation but I wondered whether it could be actually addressed in some sequence because as I understand it you accept that if the Coal Mines Act vesting applies then the claim falls away?

MR MILLARD QC:

With – we accept that section – can I rephrase that slightly? There are two issues under section 14. One is whether it is a navigable river in the relevant sense but even if it is there is a question as to whether the Crown grant, at the time of the Native Land Court, awarded the bed to the then described owners such that section 14 doesn't apply because section 14 says, unless granted under – granted I haven't got the exact wording, but that was why I was just referring to that.

ELIAS CJ:

Yes, that's a point, that would be a point of statutory interpretation though, would it not?

MR MILLARD QC:

Yes indeed.

ELIAS CJ:

Yes. it occurred to me in reading the material, and I'd like your views on this, that whether section 14 did apply to vest the bed of the river in its locality is a matter of general and public importance, but that until that is resolved there probably isn't much room to explore some of the wider matters. It's a matter of some concern that we've got two lots of obiter now from a High Court and the Court of Appeal and I'd be rather anxious that the Supreme Court shouldn't add to that weight unless we need to get into those topics.

MR MILLARD QC:

Yes.

ELIAS CJ:

So I suppose I'm inviting you to, subject to what the Crown may say in response, take it that we don't need to hear from you on the importance of the vesting under section 14 but address whether it would be sensible for us to entertain that matter ahead of some of the other matters. Whether you see that there is some scope for that.

MR MILLARD QC:

Well I understand what Your Honour is saying. It's clearly an important issue, section 14, to know what is the scope of it as a matter of law because it obviously affects a whole lot of rivers and we say that the Courts below got it wrong so that – and if this Court gave leave and came to that view then it would have to move on to the second argument which is the application of ad medium filum and whether or not there were any duties owed by the Crown at the time when it acquired the visible land off the onus had been awarded title by the Native Land Court and in my submission there are real issues that are suitable for the Supreme Court around the scope of section 14 of the Coal Mines Act Amendment Act.

If I could just mention briefly some of the arguments that we would want to raise on that? We say that both Courts approached section 14 as though it was a companion piece to the Water Power Act that was passed at the same time and had the purpose of securing the beds of the relevant rivers for hydro purposes. We say in light of that they then gave section 14 a wide meaning despite the fact it was a confiscatory provision and we say that that approach is wrong and there is a, basically four arguments on that. We say it's factually illogical because the rivers that are most suitable for hydro are ones with steep drops through a narrow gorge which would be less likely to be navigable. It is legislatively illogical because it was tacked on to a Bill concerned with the welfare of miners when they had a companion piece that they could easily have put it in. it is legislatively unnecessary because the Water Power Act in section 2(2) gave the Crown power to take land needed for hydro works and to pay compensation, so why did they need the power under the Coal Mines Act. Fourthly, although the Court of Appeal did an extensive analysis of literature, a lot of it post-1903, and also referred to what they thought Premier Seddon – sorry Minister Seddon as he then was, was saying when he introduced the Electrical Motor Power Bill in 1896, they quoted from Hone Heke, a member of northern Māori on the Water Power Act but they totally ignored what Premier Seddon said when he introduced this very provision because it came in very late of the legislative history of the Coal Mines Bill. It had one attempt part way through based on the width of

the river and that obviously roused opposition so then virtually at the third reading Premier Seddon introduced this Bill and said – this clause and said that it wasn't intended to change the existing law and yet the effect that has been given to this section does change the existing law very significantly if you go back and look at the law on navigable rivers as derived from England and the general Commonwealth area.

So we say that the Courts below got the law wrong and having got the law wrong inevitably came to the wrong conclusion and that a much more restricted interpretation should be given that this confiscatory provision and if one does that one is entitled to look at the river on a segmented basis and indeed should look at it on a segmented basis, The variance of the, my arguments that I would run on that.

ELIAS CJ:

I think Mr Millard we understand the argument and what I'd indicated to you that although we haven't conferred on this, perhaps it's a bit bold, that for my part I think that the section 14 argument is one that, subject to what the Crown says, we should entertain. The question I posed to you earlier was if that's so, is there merit in this Court granting leave in respect of the section 14 vesting point and adjourning, I suppose, the other matters for us to consider leave at a further stage if we reach that point?

MR MILLARD QC:

Well I could certainly see some merit in that and I understand, I'm sorry I didn't fully appreciate that that was the point Your Honour was making earlier. I can certainly see some merit in that given that the second issue and which relates to – well the second broad issue, which relates to the dealing of Crown with Māori in the 1880s does raise some very major issues –

ELIAS CJ:

Well so does the ad medium filum aquae point and it occurs to me that if that argument is to be properly set up the Court may want to consider whether it's

prepared to proceed simply on the basis that both the parties before the Court accept the application or invoke the application of the doctrine.

MR MILLARD QC:

Well we certainly do and the Crown in their defence does because the Crown, both in defence and in interrogatories, must ask well – well in the interrogatories they were asked and in the defence they said, we got title either through section 14 or because of the ad medium filum principle which implies two things. One, that the original owners who were awarded title by the Native Land Court got the bed of the river out to the midway point and that when they then sold on they sold that to the Crown. So it's implicit in the Crown's defence that they accept that that principle applies.

ELIAS CJ:

Yes.

MR MILLARD QC:

Against that background do you want me to go on to develop the arguments around the breach of duty or did you want…

ELIAS CJ:

You carry on Mr Millard. My colleagues would prefer to hear your argument fully developed.

MR MILLARD QC:

So the first point, of course, is that section 14 doesn't apply. Even if it does apply we then say, well the argument about ad medium filum means the bed of the river to the mid-point must have been granted by the Crown who of course had radical title subject to customary Māori ownership when the title was issued in the 1880s and –

ELIAS CJ:

That's a very contestable proposition you're putting to us.

MR MILLARD QC:

Well that, we've simply taken the Crown –

ELIAS CJ:

I know and that's why I indicated that I, for one, will be concerned if we grant leave on this second aspect by the fact that the two parties who happen to be before the Court at the moment agree on the application of the doctrine i.e. are content to proceed on the basis of *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) and would be seeking this Court's imprimatur of that authority.

MR MILLARD QC:

Well our preferred position would be, of course, to have a declaration that the bed is held in trust for our people.

ELIAS CJ:

Yes.

MR MILLARD QC:

Our fallback provision – situation would be to say that the Crown doesn't own the bed at all.

ELIAS CJ:

Well that's the question I have because everything falls away in terms of the relief you're seeking unless the Crown owns the bed and that's a big question mark at the moment, in my mind, in terms of the materials we've been given.

MR MILLARD QC:

Well it would certainly be a preferable position. There are sort of three possibilities. One, that the Crown owns the bed in trust. Second, is that the Crown doesn't own it or the third is that the Crown does own it.

ELIAS CJ:

Well but the second doesn't assist you at all because your whole proceedings are based on Crown ownership.

MR MILLARD QC:

It doesn't – it is certainly our less preferred decision but it certainly –

ELIAS CJ:

Well you don't have a case if that's so.

MR MILLARD QC:

That's accepted but at least in terms of future benefit to Māori generally and to, and of course that is of interest to my people. That would be better than having said that the ad medium filum rule did apply and the Crown owns it, although it didn't get it under section 14.

ELIAS CJ:

Well I don't think that at this stage we could entertain a wholly hypothetical claim. My concern, rather, is that because the parties are choosing to frame the matter on the basis of Crown ownership, that the argument shouldn't – that the Court shouldn't be co-opted into that position when other parties might take a different view, which is really why I was suggesting that it may be best to deal first with a section 14 vesting and then to consider whether leave should be granted on subsequent matters. However, I, having flagged all of that, I'll let you proceed with developing your argument now Mr Millard.

MR MILLARD QC:

If I can proceed then to the second broad argument which, of course, does proceed on the basis that the original Māori owners on the Native Land Court title received the land out to the mid-point of the river and in that event say there are major issues arising as to the duty, if any, on the Crown at the time when as the only practical purchaser, it purchased this land. There have, of course, been numerous or quite a number of pronouncements on the duty of the Crown by the Court of Appeal in the periods 1987 through to about

1994-1996 and I've listed all those in my synopsis and I won't take you to it other than to perhaps point out the most helpful is *Te Runanga o Te Ika Whenua Soc v Attorney-General* [1994] 2 NZLR 20 and I'm sorry that case wasn't properly reproduced in the bundle so, I did hand out a better copy of that. At page 26, line 37 you have the Court there implying that there could be a claim through the ordinary Courts for breach of fiduciary duty. We say that such an approach is a matter that is important and is a matter that is relevant here. The Courts below have focused on one aspect of fiduciary duty that one's got to act entirely in the interests of the person to whom the duty is owed but in the Canadian cases it's been recognised that the Crown is no ordinary fiduciary and that the fiduciary obligations are shaped by the demands of the situation, and the case of *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at paragraph 92 gives that proposition based on a series of cases in Canada. And we say that that can be used to shape –

ELIAS CJ:

Sorry, is that a reference to your submissions, 92?

MR MILLARD QC:

No, it's paragraph 92 of the judgment in the *Wewaykum* case which is in the bundle.

ELIAS CJ:

Yes, thank you.

McGRATH J:

Sorry, just while you've paused Mr Millard, can you just remind me again what the passage was you were referring to in *Te Ika Whenua*?

MR MILLARD QC:

The passage, the principal passage is the one that starts first of all at page 23, down at line 50.

McGRATH J:

Yes.

MR MILLARD QC:

It talks there about – the Court there talks about aboriginal title and then over the page in the passage that we particularly rely on, it has been authoratively said that, "They cannot be extinguished, at least in times of peace, otherwise and by free consent of the native occupiers, then only to the Crown and in strict compliance with the provisions of any relevant statutes." And then in the next paragraph, "Justice Chapman also spoke of the practice of extinguishing native titles by fair purchase, and extinguishment by less than fair conduct, or on less than fair terms, would be likely to be a breach of the fiduciary duty widely increasingly recognised as falling on the colonising power." And there refers to authorities in Canada. And then over the page at about line 35, the Court refers to the Māori remedy by –

McGRATH J:

Page 26?

MR MILLARD QC:

Yes, page 26.

McGRATH J:

Yes, line 35 right?

MR MILLARD QC:

It's that last sentence of that paragraph starting around there that, or conceivably a Court action based for instance on Māori customary title or fiduciary duty.

McGRATH J:

Thank you.

ELIAS CJ:

Are you going to come on to answer the Crown submission that what we have here is not a purchase but a Court order?

MR MILLARD QC:

Well, it's two stages. There was first of all a Court order which was designed to crystallise the customary rights into a form that would then enable sale. And the whole purpose of the Native Land Court was to expedite and enable sales of Māori customary land to the Crown or to settlers, although in the case of the Pouakani lands being part of Rohe Potae was basically only to the Crown, so that –

ELIAS CJ:

But that was pursuant to an 1883 Act was it because it was about 1873 that the pre-emption went generally, is that right?

MR MILLARD QC:

Yes but then pre-emption was re-imposed on selective areas and it was limited in terms of the number of purchases, sorry, the number of people on the title, but the law kept changing and the evidence, in contemporary evidence, was that the only thing the natives knew at the time was that the only purchaser they had was the Crown, and you see it's the Crown purchasing throughout this area.

ELIAS CJ:

Were there underlying transactions or was it all done through the Court? I'm sorry, I just don't know the answer to that.

MR MILLARD QC:

Well you had the first block Pouakani won.

ELIAS CJ:

Yes.

MR MILLARD QC:

It was basically done through the Court right at the outset because what was inevitable once the land gets into the Native Land Court system, then there has to be surveys, and the survey fees were quite horrendous, in part because the Crown charged Māori in this area, triangulation fees which it didn't charge others. So that inevitably you had to part with land to meet the survey costs. So that the first bit of land that went to the Crown was primarily for survey costs which the Waitangi Tribunal criticised for being of no great value.

There were then Court orders that were disputed and the matter went to a Royal Commission and then went back to the Courts, and there were further Court orders, but of course the consequence of that is that the native owners incurred huge debts just being at the Native Land Court hearings, which of course weren't anywhere near Pouakani and Taupo and Cambridge and so inevitably they had to immediately sell a whole lot of land and the evidence of Mr Stirling was that they put up some nominal owners for some blocks, particularly they put up a female owner so that it was less of an attack on their mana when that land was sold, but it was an inevitable process of going through the Native Land Court. But the Native Land Court itself did not consider the merits of the sale it simply acted as a notary in a sense of the sales in that instance.

ELIAS CJ:

Are you talking about the first block? The block that went, Pouakani 1 went for the survey fees.

MR MILLARD QC:

When I made the comment about it being a notary, the other sales, the deeds went round and one deed took about eight years.

ELIAS CJ:

So there were deeds, there were deeds of sale were there?

MR MILLARD QC:

There were deeds of sale.

ELIAS CJ:

Yes, for all except Pouakani 1.

MR MILLARD QC:

Pouakani 1.

ELIAS CJ:

Yes, okay, thank you.

MR MILLARD QC:

And they sort of travelled round the country collecting signatures –

ELIAS CJ:

We don't have those but it's probably not necessary for us to have them but that's why I had the query.

MR MILLARD QC:

Yes, and then those deeds were eventually noted by the Native Land Court. And relevantly the deed, in its description of the land, referred to the land being "to the Waikato River" and the plan had a red line running along the landward side of the river, so that when the vendor would be signing that deed, the visual evidence was that they were selling only the visible land and there was also – it had to be translated for them and any translation would be, "the land to the river."

So that we say that if you look at what a Māori vendor was thinking of doing at that stage, and this was an area adjacent to the King Country part of the Rohe Potae. There were no European schools in the area, very little European settlement. They would be thinking that they were simply selling the visible land, reinforced by description and title in the plan. So we say that there was, based on the Court of Appeal dicta, and I accept that it's dicta, but

it was over a number of cases with differently constituted Courts. There is a fiduciary obligation that can be tailored to meet both the interests of the Crown and vendors, or alternatively a relationship duty of good faith that was breached here. And in respect of the various defences that the Crown raised and highlight in their submissions, if there is a pre-existing duty then that overcomes the Limitation Act argument because it's a fiduciary duty and either the Limitation Act does not apply at all or, alternatively the provision about breach of trust being an exception to the limitation period if the trustee is still in possession applies. But we accept that the reference to trust there has to be to a trust that pre-dates the actual transaction but we say that does apply here because of the overriding fiduciary type duty owed.

And we say that also should not be affected by laches or acquiescence because the Crown really only started to assert its rights around World War II and following when it started the hyrdo works. By that time any prejudice would have already arisen and although there was a period when Māori did not take steps, they weren't actually consulted about the dams and of course, at that stage the law was pretty clearly unsympathetic to them and it wasn't until the Waitangi Tribunal Act was amended, it was amended to confer power on the Waitangi Tribunal that they could start to think about bringing an historic claim and they did very early on, and widening it to the bed of the river and they've been very persistent in their pursuit of the claim ever since then.

And indeed, have been in negotiations on and off with the Crown on what was to happen to the bed of the river. That was partly why it was expressly excluded from the Act. After the Act they were asked to talk to the other tribes along the river. They got together a group, then there was a change of government and that group was ignored. And even today the Pouakani people are ignored. They're told, "Go through your iwi."

So we say there's been a long history of trying to pursue this claim –

ELIAS CJ:

But that's in respect of management issues because that's what the settlement is about. This is a property based claim.

MR MILLARD QC:

Yes, yes. The Court of Appeal did raise an issue about demarcation but there was before the High Court, not particularly focussed on in the Court of Appeal, plans of the river that show that at the time of the hydro works they did have a very clear definition of where the original bed of the river was.

BLANCHARD J:

How much of the length of the river here is actually dammed and in the form of lakes?

MR MILLARD QC:

I'm sorry, I don't have that answer off the top of my head but there is a reasonable amount of it because you've got the Maraetai and the Whakamaru dams on it.

BLANCHARD J:

And some of it's in its original state is it?

MR MILLARD QC:

Some of it would be, yes.

BLANCHARD J:

And what about the dams themselves, where are they in relation to the land?

MR MILLARD QC:

There's two adjacent to the land.

BLANCHARD J:

Adjacent but not actually part of it?

MR MILLARD QC:

Well, part of the dam would be on the bed of the river that is being claimed, yes.

BLANCHARD J:

And was that ever taken by the Crown?

MR MILLARD QC:

No.

ELIAS CJ:

Weren't some of them taken under the Public Works Act at a later stage?

MR MILLARD QC:

There was some land taken under the Public Works Act in regard to part of Pouakani 1 because for some reason unknown to us, sort of going back to about 1916, some of Pouakani 1 was given to Wairarapa Māori.

ELIAS CJ:

Yes.

MR MILLARD QC:

In compensation for the taking of Lake Wairarapa. Why it was given in this area is not exactly known, and some of that was taken back by the Crown. So you had it vested in the Crown, given by the Crown, taken back to the Crown, into Crown ownership.

BLANCHARD J:

So what we're looking at here is a claim to a bed which in some parts is in its original state, in some parts it is underneath a lake and in small part, underneath some dams?

MR MILLARD QC:

Yes. I'm conscious that I've taken much more than my 15 minutes but –

ELIAS CJ:

Well carry on I think Mr Millard.

MR MILLARD QC:

Well, that really is the essence. I could elaborate at much greater length if required but we simply say that the – if you get past section 14, there is a viable claim here based on Court of Appeal dicta, overseas cases particularly in Canada and that the defence as raised by the Crown do not prevent those from being brought. And this Court, given the significance to Māori should hear the claim.

ELIAS CJ:

And on the point that I asked you about at the beginning, whether it would be possible to hear first the section 14 vesting point, and then to consider leave in respect of the sequential considerations, what's your response on that?

MR MILLARD QC:

We would see that that would be a viable way of dealing with it, and indeed in the Court of Appeal, we had argument on whether the Pouakani Settlement Act prevented the claim and section 14 and then after we'd dealt with that, with submissions on both sided, went into the duty based claim. So a slightly unusual way of doing it but that did just rather highlight the –

ELIAS CJ:

Well that was a sequential argument but judgment wasn't given on the dispositive point.

MR MILLARD QC:

Judgment wasn't given, no, but it was certainly in terms of argument, broken up very much on that basis.

ELIAS CJ:

Yes, thank you. Yes Ms Hardy.

MS HARDY:

Your Honours I thought I would first orient the claim in relation to the maps that have been provided in the bundle, the joint bundle and at tab 17 there are two sketch maps which are taken from the evidence of Mr Brent Parker provided in the Courts below. The first map sketches the Pouakani blocks that are at issue here alongside the river, and the second map marks some key locations in relation to those block, and what's apparent there is that the dams that Your Honours were referring to and questioning, are marked there as Waipapa at one end, Whakamaru at the other end closer to Lake Taupo and Maraetai in the middle. So, that is a sketch of the significant changes to the configuration of the 20 miles of riverbed, or at least half of the 20 miles of riverbed that is at issue in this claim.

ELIAS CJ:

What's the hatching on this? It says Pouakani 2.

MS HARDY:

The hatching is the portion of land that was provided to Wairarapa Māori in exchange for land around Wairarapa in consequence of a deed of settlement in the late 19th century.

The Crown's position is largely two-fold. One needs to consider very carefully what this case is not about in considering whether it's a case of importance warranting leave, and some of these points have been traversed already. It's not an aboriginal title claim. It's not brought by iwi or hapu. It's not a Treaty claim and again, Your Honours have in the bundle –

ELIAS CJ:

Well, it's not a Treaty of Waitangi tribunal claim, but you might want to explain a bit more about its relationship to the Treaty, although I didn't ask Mr Millard about that.

MS HARDY:

Certainly Your Honour, if I can again take you to the joint bundle of documents and to tab 20? What is there is an extremely short excerpt from the Pouakani report that investigated the claims of the Pouakani people into the land transactions, and there are some key points that are made there. One is that this is not a tribal or hapu claim, that's on the first page.

ELIAS CJ:

Well what do you build on that?

MS HARDY:

I build on that, that the Tribunal, in other decisions or recommendatory reports, has made it clear that in relation to claims to rivers, the idea that title holders might be the owners is not one that accords with Treaty principle and the Pouakani report itself said that it would not be making recommendations on the claims that went into the river because that would require a much broader view of the Māori interests that might be at play. The same sorts of points were made in the Ika Whenua report and in the Wanganui River report itself.

ELIAS CJ:

So it's only in relation to that, to the points that have been made in Waitangi Tribunal reports about the nature of property in rivers that you're talking about. I wondered whether it was a more general submission that denying individuals the property protection of the Treaty but it isn't. You're talking –

MS HARDY:

It doesn't go as broadly as that –

ELIAS CJ:

No, thank you.

MS HARDY:

– Your Honour but it is a turn to the particular nature of the interests that are at play in river claims that the Tribunal has acknowledged in its context of examining claims in accordance with Treaty principles.

ELIAS CJ:

Yes. Except that it's a little inconsistent, it seems perhaps, for the Crown to rely on, as its fallback position, on the property interest acquired from individuals and to say that individuals cannot have property interest in the bed of the river, relying on the Waitangi Tribunal reports. I mean there's a dissonance between the approaches here.

MS HARDY:

Well as Your Honour commented earlier, this is a property –

ELIAS CJ:

Yes.

MS HARDY:

– claim and the response is in property terms and it's correct that the entire thrust of the appellant's claim here rests on the operation of the ad medium filum rule as an entitlement to them as riparian owners.

ELIAS CJ:

Yes.

MS HARDY:

In fact if they were to argue against that in a broader Treaty context of there being more broader iwi hapu rights then their claim would fall away. The Crown has responded to that in the legal argument but as the Court will be aware in the broader Treaty context there have been steps of negotiating issues of management over the river and since the Court of Appeal hearing the Waikato River settlement has actually passed into law. There is a – that deals with the lower Waikato River. The upper river, which is the area of

Pouakani, co-management principles are recorded in a Bill currently before the House and there is a further discussion going on between the Crown and Maniapoto who are to the east but also to whom these claimants whakapapa so there is a layer, if you like, of treaty activity going on but that is not what this case is about.

ELIAS CJ:

No, we're looking at property interests.

MS HARDY:

Exactly.

BLANCHARD J:

If the Bill, which is currently before the House, should pass, does that have any effect on this case?

MS HARDY:

Because, as the Chief Justice commented, it's about management and not ownership, it wouldn't have a direct engagement with the claims about ownership. What, in fact, iwi and the Crown have done in relation to all of those discussions is to put aside the contested issue of ownership. In some cases the claimants have said they don't want to talk particularly about an ownership because that's not their conception of relation to the river so the short answer is the current legislation would not undo a claim to private ownership but you would have a layer of joint management sitting over the top.

BLANCHARD J:

But if you have that joint management, and given the nature of the asset we're talking about, if that Bill passes does the Crown then really care who the owner is?

MS HARDY:

Well the Crown has an interest in the ownership of riverbeds and claims its property rights.

BLANCHARD J:

Yes, but given the way in which I assume the Act would then govern who can do what with the asset, what's the significance of property right to the Crown any longer?

MS HARDY:

Well the arrangements in the legislation are about if you like resource management kinds of issues.

BLANCHARD J:

Yes.

MS HARDY:

This claim is about the declaration of a trust over a portion of a riverbed and the – I think it's at paragraph 30 of the Harrison J decision, His Honour rehearses the outcomes that were being sought by the plaintiffs which run along the lines to paraphrase of accounting "for profits" direct consultation about any activity and all of those obligations having run from 1840 so the Crown is acutely concerned about the nature of the claim and perhaps more importantly the remedy sought by the appellant's in this case.

ELIAS CJ:

And the general application of principle which would apply to all rivers.

MS HARDY:

Well conceivably though I'll come to the point of general application of the section 14 issue.

BLANCHARD J:

I've still got my doubts about the long-term significance of this from the Crown's point of view. I can well understand the significance from the claimant's point of view. It just seems to me a pity that it has to be resolved by litigation given the legislative framework which will exist once that Bill is passed.

McGRATH J:

Ms Hardy, by rights you're saying that the legislation will apply, it's premised on the basis it will apply whoever the owners of legal interest in the land may be?

MS HARDY:

Yes I suppose that the Crown has embarked on the legislation on the understanding that the riverbed is Crown owned but – and over that then is layered a co-operative management approach with iwi and with local authorities.

BLANCHARD J:

But the legislation doesn't actually say that they're Crown owned –

MS HARDY:

No the legislation does not alter any existing legal arrangement whatever that might be as to ownership of the riverbed.

McGRATH J:

Your position is that it would apply to whoever was the owner if this litigation were to proceed and a finding were made?

MS HARDY:

That would be our position.

BLANCHARD J:

Well it's a question of what Parliament's position is.

MS HARDY:

Well it applies to –

BLANCHARD J:

Is Parliament saying this, in effect, this applies regardless of who owns it. Here are the rules for management. Which includes participation by Māori.

MS HARDY:

It doesn't explicitly say the former but it does say the latter and I suppose an analogy would be with the Resource Management Act where controls exist over private and public property so it is a management regime rather than an ownership regime.

McGRATH J:

Anyway that's the executive's position on what the language of the Bill means.

MS HARDY:

Yes. So that was my first point was that this is not a claim about Treaty interests or Aboriginal rights issues. As the Chief Justice pointed out it actually rests on what one might regard as controversial matters that this Court may one day look at such as the status of *Re the Bed of the Wanganui River.*

ELIAS CJ:

Yes what bothers me, of course, is, as I indicated, whether if we get to the, get past the section 14 argument the Court being asked because of the position both parties take in this litigation to give its imprimatur to a highly contestable or potentially contestable position.

MS HARDY:

I do agree that that's the position that the Court would –

ELIAS CJ:

And if we got to that point it seems to me that the Court might well have to appoint an amicus or maybe more than one amicus to make sure that we were aware of the implications of what we were being asked to do since both parties, if we get past section 14, have common interest in accepting that the doctrine ad medium filum aquae applies, which is why I raised, is it a good idea to embark upon all of that until it's clear what the status is under the Coal Mines Act.

MS HARDY:

Well Your Honour I think those concerns about the need to in effect reconstruct the claim into something that it is not to put it in –

ELIAS CJ:

No, I wouldn't be interested in doing that at all.

BLANCHARD J:

We couldn't do that because the claimants might be a quite different group of people.

ELIAS CJ:

Yes. It's rather not because the parties are putting up a very sweeping claim to us coming up with a judgment, arguably as the lower Courts have done, which may affect other parties not before the Court.

MS HARDY:

Well in my submission the parties have, well at least the plaintiff and then the appellant have from the outset put up a narrow property rights claim. They've done that in relation to the fiduciary argument. In relation to the section 14 argument they've taken an approach that, and conceded and there's a statement of facts that's recorded in the bundle, and both of the decisions of the Court below record the concession, that it was made by the plaintiffs in relation to the application of the proviso that sits at the beginning of section 14 which is the "save as by any Crown grant" the Crown takes the bed

of a navigable river. They said that they accepted if the river was navigable then their case failed. The Crown has prosecuted both the first instance hearing and then on appeal based on that concession. So again if this Court were to look broadly at the issue of what section 14 means, it's my submission that this is not a good case for that kind of an enquiry.

The key Crown submission, and we've rehearsed this in the written submission that has been made, is that it's actually very difficult to unpick this case into layers and with respect to suggest that we might tackle the section 14 issue, see where that takes us, if you like, and then contemplate how to manage the many other layers of this claim which go from standing, timing, fiduciary duty, breach of fiduciary duty, it's like an onion with many layers, and in my submission there are some problems with that approach and I would invite the Court to look from the, if you like, the end point of the Court of Appeal judgment and move back and again this is – the Court of Appeal is at tab 2 of the bundle and if one turns to paragraph 119 there, there is in my submission powerful language from the Court of Appeal which says essentially, even if one were to get through the navigability issues, even if one were to establish a fiduciary duty, there are difficult and perhaps insurmountable problems of demarcation. There are accretion interests which have occurred and the conclusion is that it is very difficult to see how the kind of obligation that is being argued for by the plaintiffs, which is the accounting for profits, the consultation, which I referred to at paragraph 30 of the Harrison J decision, very difficult for the court to realistically contemplate a remedy of that sort and in my submission that's got a lot of resonances with the Cooke J comments in the *Ika Whenua* case where while exploring notions of fiduciary duty in obiter, was quite emphatic that the kind of relief being sought, relating to the dams there on the Rangitaiki River was not something that the Court would realistically contemplate. So my submission is given those real complexities and hurdles in relation to the relief the –

ELIAS CJ:

That wasn't a property claim though, was it, I can't remember?

MS HARDY:

It was judicial review Your Honour –

ELIAS CJ:

Yes.

MS HARDY:

– I think seeking an injunction to prevent the transfer of the dams on the river.

ELIAS CJ:

Yes, it was under the state owned enterprises legislation so it was different.

MS HARDY:

Yes. But the point I think is common in that the Court, if you like, looked at the end result.

ELIAS CJ:

But the Court can't say it's too difficult and that's effectively what they're saying here. That might be so as a matter – when you get to relief but surely the Court has to deal with the claim of right first?

MS HARDY:

Well the submission I'm making is the Court worked through the –

ELIAS CJ:

Well it didn't, really, did it? I mean the Court of Appeal – I've looked at your submission, the paragraphs that you say indicate that there are concurrent findings of fact and the Court of Appeal simply picks up what Harrison J says and says it's all very difficult and Harrison J rehearses some of the historical reports and draws some inferences from them but it's hardly very detailed analysis either in the High Court and certainly not in the Court of Appeal, is it?

MS HARDY:

There's not a detailed articulation in –

ELIAS CJ:

No.

MS HARDY:

– the judgment but what the High Court had before it was extensive evidence –

ELIAS CJ:

Yes.

MS HARDY:

From the Crown historian Dr Loveridge and contrary views expressed by Mr Stirling, hundreds of pages of evidence on each exhibit and it heard all of that material and concluded there that, didn't locate a breach there. The Court of Appeal was also taken to that material and what they say at the conclusion of their judgment when they look at the practicality of relief in this case is to identify real difficulties over the, well I should say that's really about the breach which is their point in paragraph 118 as to whether they could find breach. Paragraph 119 is about the difficulties of declaring the trust sought over the strip of the river that did exist in 1903 and that has now changed in its configuration significantly. So twofold the problems and in my submission if the Court looks at the end game, if you like, then the concept of looking at the section 14 issue in isolation starts to have the appearance of a more academic enquiry than the Court would ordinarily entertain.

ELIAS CJ:

Well it's, on the Crown's principal argument, it's wholly determinative so it's not necessary to get into what you call end game?

MS HARDY:

Well it's wholly determinative on an appeal finding in favour of the Crown but if the Court were to find that section – that it might survive the section 14 vesting then the next enquiry would be, well it would be all of the other remaining

issues which involve timing, standing, the existence of a fiduciary duty of the kind argued for, breach and then a discretion as to remedy as to the terms of the constructive trust that are being sought.

BLANCHARD J:

By timing you mean limitation?

MS HARDY:

Yes, yes.

ELIAS CJ:

Except that this argument that you put forward, as I understood it, was to persuade us that dealing with the section 14 argument first would not be a good idea and what I'm pointing out to you is that on the Crown's argument it's determinative. You don't get past that into these difficulties?

MS HARDY:

That's a correct proposition, yes. The reason also that the Crown has reservations about this Court looking at the section 14 issue is because again the way that it has been pleaded and prosecuted by the plaintiff is that the issue is squarely whether the river, the relevant river for these proceedings, is navigable so as to satisfy section 14 and what, again what the Courts below did is examine copious amounts of evidence or particularly Mr Brent Parker's evidence about the use of craft on the river. That's canvassed in the material obviously that's on the record for the Court of Appeal and the evidence, the broad outcome was that approximately 76 percent of the river as a whole was navigable. There was also evidence of navigability through the 20 mile portion that is at issue here so there is actually a –

ELIAS CJ:

There's evidence of use of craft on the river?

MS HARDY:

Yes.

ELIAS CJ:

There is a question – it did seem to me that the judgments are fairly light in legal analysis on this and that there is quite a lot of case law which one would have expected to be referred to. I'm not sure on what basis it was put, that it was a straight question of fact whether boats could move on the water or what but there's not very much in the judgments.

MS HARDY:

The matter was fully argued before the Court –

ELIAS CJ:

Yes I understand that.

MS HARDY:

– with reference to the case law that addressed both the issues of the nature of the test generally, the segmented or whole of river issue. What case law there is in relation to the use of craft or what is meant by navigability.

ELIAS CJ:

Yes, it just doesn't show up in the judgments. So it's difficult to know what test is being applied. It simply said that it's a question of fact. For example, in the – no that's fine, yes.

MS HARDY:

Your Honours the Court in the High Court and Court of Appeal did run through an analysis based on the submissions of both parties as to what the appropriate approach was in law as well as looking at the facts and preferred the approach that came through some of the Canadian jurisprudence such as *R v Nikal* [1996] 1 SCR 1013 to look at a whole of river test rather than a purely segmented one but my –

ELIAS CJ:

I wasn't really thinking of the whole of river one so much as the navigability question and whether commercial use was the correct test.

MS HARDY:

The Court it seems Your Honour accepted the language of section 14 which is about susceptibility to use rather than actual use and then the evidence which the Court adopted, certainly Harrison J explicitly, from Mr Parker which produced the figure of the substantial figures of navigation 76 percent, were accepted by the Court and those figures are built on more detailed information about the nature of the craft and so forth so at least implicit there is an analysis of that kind. That leaves me to submit that even on the navigability issue this is a case which is very much focussed on particular facts of this river and this portion of the river and I would reject the appellant's suggestion that it's available practically really to the Court to look at an interpretation of section 14 that might address a range of hypotheticals. So for instance if there were a case, a property claim in relation to a river that was say half navigable and half not, and that was very clear, then, in my submission, that would be something for the Court to address on those particular facts rather than – and I'm not sure that a theoretical finding about the meaning of section 14 would enable an answer to be delivered on that kind of question but what's apparent here is that there is an analysis that is being conducted by the Courts below about the whole of the river, an interrogation of this portion of the river, and a satisfaction on those facts that the section is satisfied and again –

ELIAS CJ:

Well except that one outcome of the determinations from the Courts below is the application of the relatively recent Canadian authority about the whole, if part of the river is navigable, the whole river is treated as navigable. That's a very – that's a black and white position that now has been reached as a matter of New Zealand law which one would have thought has implications for all rivers, all rivers that have some navigable reaches. So that's a pretty significant determination which stands if we don't give leave to appeal.

MS HARDY:

What I submit would stand would be a reliance on the *Nikal* case which is the I think 1996 Canadian case which stood for the proposition that interruptions, such as rapids, would not be determinative of meaning that the applicant or plaintiff couldn't satisfy the section 14 test. So to that extent the Court of Appeal has endorsed that analysis –

ELIAS CJ:

Yes.

MS HARDY:

But in my submission that doesn't cover all rivers anywhere and that the scenario I described earlier of perhaps a half river being navigable and half not, in my submission isn't particularly addressed either by the *Nikal* analysis or by the Court of Appeal and that it's likely that those sorts of – any distinctive facts of that kind will need to be considered by the Court on a case by case basis.

ELIAS CJ:

I had thought that the lower Courts really had, maybe I'm thinking of the Harrison J judgment more than the Court of Appeal's, had said that if part of the river is navigable the whole river is treated as a navigable river as a matter of statutory interpretation under section 14.

MS HARDY:

The –

ELIAS CJ:

Which is an analysis that would apply also to tidal reaches only.

MS HARDY:

I think tidal reaches are always regarded as owned by the Crown so the purpose of the section 14 provision is to deal with non-tidal areas.

The High Court in the context of looking at the claim before it, the Waikato River does talk about applying a whole of river approach. It simply, in my submission, that the analysis and the case law on which that sits certainly properly applies to the Waikato River but speculatively there might be other configurations where one should look at an alternative analysis and where it would be appropriate for argument to be made distinguishing the case. But as I say in my submission that's speculating about the kinds of claims that may or may not come to the Court in the future.

ELIAS CJ:

Well are you saying that the position has not been reached on the lower Court determinations that if part of a river is navigable the whole is to be treated as a navigable river for the purposes of section 14?

MS HARDY:

I think that that's overstating the finding of the, with respect Your Honour, the finding. It's not just any part. The Court looked at the –

ELIAS CJ:

Well can you take us to the passage that you say makes it arguable for the future?

MS HARDY:

My friend has pointed me to paragraph 86 of the High Court decision.

BLANCHARD J:

Well wouldn't we be more concerned with what the Court of Appeal had to say. In their paragraph 85 says, "That on the application of section 14 to the facts of this case, the Waikato River from the foot of the Huka Falls to Port Waikato was a navigable river and vested in the Crown." Now that's got to include some bits that were not practically navigable?

MS HARDY:

That's correct Sir but importantly too is the point made applying section 14 to the facts of this case and so what the Court has done is looked at the river as a whole. It's acknowledged that small – that interruptions, rapids would not dissuade the court from applying section 14 so the configuration of part of the land along the 20 mile strip here did mean that it wasn't navigable, parts were and so looking at that characteristic of the river as a whole the Court found navigability and in my submission that does not translate into saying that for all rivers where a portion is navigable the bed vests in the Crown by virtue of section 14. It is a factual enquiry.

ELIAS CJ:

Where do they undertake this factual enquiry? I can't remember. Do they indicate what that led them to that conclusion?

MS HARDY:

The Court of Appeal refers to the Harrison J decision on the factual enquiry at paragraph 69 of the Court of Appeal judgment. What the Court of Appeal had –

ELIAS CJ:

I'm sorry, just pause because it starts at 66 and 67 may cite with apparent approval this reference to "*a* navigable river" and "*the* bed of such river" and, "The Judge said that a river is either navigable or it is not." So they do seem to be accepting that if part of the river is navigable, the whole is a navigable river for the purposes of section 14.

MS HARDY:

They do prefer the whole of river rather than a patchwork analysis, that's correct Your Honour. The point I'm making that is at paragraph 85, there is a focus on facts of the case.

ELIAS CJ:

The facts of the case may well be that simply that a portion of the river or some portions of the river are navigable, and then the whole bed vests or there'll be a lot of rivers where that's so. It also means that that early legislation vesting the outlet to Huka Falls was unless – oh I suppose it precedes the 1903 Act, does it. I can't remember the Huka Falls legislation. What date is that?

MS HARDY:

Well 36.

ELIAS CJ:

36. Well that makes it –

MS HARDY:

26 sorry Your Honour.

ELIAS CJ:

26. It would have made it unnecessary. It's also contrary, the point that's made, to the Crown's initial impulse in its pleadings here.

MS HARDY:

The, can I take the first point –

ELIAS CJ:

Yes.

MS HARDY:

– which is that the 36 legislation might be unnecessary which, that was a vesting in the Crown and then holding on trust for Tuwharetoa linked to the lake bed and the portion of the –

ELIAS CJ:

Extinguishment of customary title and any other property interests.

MS HARDY:

And a trust layered over the top of that.

ELIAS CJ:

Yes but if the Crown owned it, it could simply have declared the trust. So there was, it certainly wasn't relying on section 14 on the basis that some reaches of the Waikato River were navigable and therefore the whole river was.

MS HARDY:

Ah, no well it dealt with the lake bed and the river but in my submission that doesn't answer the question of the application of the 1903 legislation.

ELIAS CJ:

No it probably doesn't. It simply means that it is a fairly bold step that the Courts have now come to and it is probably a point that this Court should look at.

MS HARDY:

Well Your Honours I think I've put the argument against that proposition and I understand the point the Court is making to me.

The written submissions traverse the various layers of issues that fall beneath, if you like, the navigability issue. I can go to those submissions but if the Court is minded to focus on the section 14 issue then I will not.

BLANCHARD J:

You've got a standing argument, haven't you?

MS HARDY:

Yes.

BLANCHARD J:

That presumably, logically comes first.

MS HARDY:

Well yes it does. The standing argument is essentially that, and this is a point that was made at the outset of this hearing, that this is about a property claim seeking relief that links to that sort of an argument with the remedy sought of a constructive trust and the point that the Crown has made in the Courts below is that the Pouakani people as named, or the individual plaintiffs in this proceeding don't have standing as successors to the title holders to bring this claim.

Again perhaps it might help just to orient back to the maps that we started with at tab 17. What occurred, and this is the first map that marks out the blocks, was the granting of title through a Native Land Court process to individual owners. So just by way of example B8 at the top end of that map had six owners identified and C3 in 1891 had one owner identified by the Court. The Crown's position is that plaintiffs bringing a claim for a property kind of case here need to be able to demonstrate that they are the legal successors.

ELIAS CJ:

Was there evidence about that? I mean was there evidence that these plaintiffs descended from any of these named owners?

MS HARDY:

No there was not evidence that they were the legal successors and in fact the Crown had earlier made an application on this point in advance of the hearing and what the Judge dealing with that issue at that point was made what was then a rule 78 order that enabled the named plaintiffs to bring the proceeding –

ELIAS CJ:

In a representative capacity.

MS HARDY:

In a representative capacity.

ELIAS CJ:

For the successors?

MS HARDY:

That's correct. For whoever might be determined…

ELIAS CJ:

Leaving that to be determined later.

MS HARDY:

Yes.

ELIAS CJ:

Which would be done through the Māori Land Court would it?

MS HARDY:

Well, we've heard no evidence about the approach that would be taken.

ELIAS CJ:

But that is the only way it could be done couldn't it? There'd have to be some succession inquiry.

MS HARDY:

There is a jurisdiction under I think section 18 of Te Ture Whenua Māori Act that enables an inquiry into succession but that has not been – that step has not been taken.

ELIAS CJ:

Do we have that representative, the order before us? And presumably there was a judgment was there?

MS HARDY:

I have a copy of the order in my papers. I don't believe it was put into the case on appeal.

ELIAS CJ:

Is there a judgment that preceded – well, have you just got the straight order or do you have any reasons?

MS HARDY:

Mr Ward reminds me it was at the conclusion of a minute following a phone conference. The order I have doesn't, and no decision recording particular reasons attaching to that.

ELIAS CJ:

Was that a course the Crown agreed to during the course of that conference, dealing with it by way of a representation order?

MS HARDY:

The Crown had raised the standing issue.

ELIAS CJ:

Yes.

MS HARDY:

Had been concerned about it. The Judge indicated that the declarations for relief were trimmed down to being a pure declaration and not a pursuit of trust property or accounting for profits or the other relief that had been sought in the fourth amended statement of claim, then, and I'm recalling that the, that if the Crown were not to argue an estoppel against other claimants if the plaintiffs were not to succeed, then the rule 78 order should issue and it did and at that point the Crown did not pursue – did not oppose that order but it continued to raise the issue of whether that amounted to standing suitable –

ELIAS CJ:

But it clearly didn't because the standing issue would be left to be determined by the subsequent succession orders. There must be people who can succeed to these owners if that is the outcome. I'm just really wondering whether the standing point, given the procedure that the Crown doesn't seem to have objected to in the end. You objected to there not being standing but that was overcome by the device of a representation order leaving it to be determined at the end of the day who succeeded to any property interests found to exist.

MS HARDY:

Well the Crown's position through litigation is that while the rule 78 order allowed the proceeding to continue, it behoved the plaintiffs to identify those who would have the legal rights in advance and, the Crown has certainly argued in the High Court and Court of Appeal that the rule 78 order, and the plaintiffs also argued for the deed of mandate given to certain Pouakani individuals to negotiate Treaty settlements was not a sufficient basis for the kind of orders that were being sought in this proceeding.

ELIAS CJ:

But you didn't appeal the representation order?

MS HARDY:

We didn't appeal the representation order.

BLANCHARD J:

I really don't follow the logic of the Crown's approach on this. If you haven't appealed the representation order, the declaration if made would be in general terms and it would then be necessary for the identification who had the advantage of it, if they wished to take matters further.

MS HARDY:

I take Your Honour's point.

ELIAS CJ:

And indeed, even though it first seemed a bit strange, the reliance on the negotiating group, it makes some sense in the context of a representation order and the fact that the Waitangi Tribunal didn't proceed with the river claim.

MS HARDY:

Well the difficulty that the Crown saw with the approach was that the broad group, if you like, that was satisfactory to the Crown for the purposes of the settlement discussions, which has been labelled the Pouakani people, was in fact a broad and undefined group that related to the block as a whole –

ELIAS CJ:

Yes I understand that, yes.

MS HARDY:

– and not the title holders of the riparian blocks who are the necessary individuals, if you like, who were bringing this particular kind of property claim.

ELIAS CJ:

Well except that it has proceeded on the basis of representatives to bring the claim on behalf of those owners to be determined, if it ever gets to that point.

MS HARDY:

As I mentioned Your Honours earlier, I have traversed in the written submissions issues about the fiduciary duty but unless Your Honours are minded to consider appeal on that issue, I won't address. But if there are any questions on that or if you would prefer that I do run through that material.

ELIAS CJ:

I think we might take a short morning adjournment at this stage and we'll tell you when we get back whether we need to hear you further on that Ms Hardy, thank you.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.50 AM

ELIAS CJ:

Ms Hardy, there is one thing that I'd like to raise with you and that is the fact that it seems that the fact that the Crown has ownership is fundamental to the plaintiffs' claim here, the appellants' claim. Am I right in thinking that the only basis on which the Crown could or asserts ownership are the two bases that are mentioned in the pleadings? That is to say, section 14 vesting or ownership ad medium filum aquae?

MS HARDY:

That's right.

ELIAS CJ:

But you don't own all the land. You don't own all the – the Crown doesn't, as I understand it, own all the riparian lands at the moment so is it your position that to the extent that lands have been disposed of to others, they have the ownership ad medium filum aquae?

MS HARDY:

The Crown owns, I think the land that is adjacent to the river –

ELIAS CJ:

Do you mean the Queen's Chain?

MS HARDY:

Well it's not a Queen's Chain per se but there have been acquisitions –

ELIAS CJ:

I see.

MS HARDY:

– along the way and there have been intervening transactions after the 1890 transactions that are at issue here including two to the Pouakani Number 2 block going to one of the other Māori and then the Crown has acquired via Public Works Act takings land along the riverbed. There are – some land is held by Mighty River Power and there is a portion of land vested as a reserve in the Taupo County and this is rehearsed in the evidence of Mr Brent Parker in the case on appeal.

ELIAS CJ:

So is the Crown's position that those owners hold ad medium filum aquae?

MS HARDY:

Well the Crown's position is that the –

ELIAS CJ:

Leaving aside section 14.

MS HARDY:

If section 14 were lifted –

ELIAS CJ:

Yes. Well if it doesn't apply.

MS HARDY:

If it didn't apply, then there is an argument that the, that riparian owners other than the Crown would own into the riverbed.

ELIAS CJ:

And did they hold on – do they have land transfer titles and does the Crown indeed have Land Transfer Act titles to its riparian lands here?

MS HARDY:

Perhaps if I could refer to the particular evidence that's on the record.

ELIAS CJ:

I just wondered what impact that might have, maybe none.

MS HARDY:

Your Honours, as I've mentioned the evidence about the current landholding that's relevant to the river is set out in the evidence of Mr Brent Parker, that's on the case on appeal page 359.

ELIAS CJ:

We don't have that of course at the moment because leave hasn't been granted.

McGRATH J:

Is that the Court of Appeal?

MS HARDY:

That's the, yes. Yes that's the case on appeal.

McGRATH J:

In the Court of Appeal?

MS HARDY:

In the Court of Appeal. And appendix 1, at which pages are attached to the conclusion of that brief, sets out the full current ownership. So for example Mighty River power Limited does have a certificate of title in relation to the land that it holds.

BLANCHARD J:

Is that where the dams are?

MS HARDY:

Yes the Mighty River Power obviously owns and operates the dams along the stretch of the river.

BLANCHARD J:

When the flooding occurred, when the dams were constructed, what was done about title to the beds of the lakes?

MS HARDY:

My understanding is that there were Public Works Act takings in relation to the beds of the lakes.

BLANCHARD J:

And did those extend to the original beds of the river?

MS HARDY:

Sorry Your Honour?

BLANCHARD J:

Did those extend to the original bed of the river?

MS HARDY:

Can I just check with my friend who dealt with this argument below? Your Honour my apologies for that. My friend explains that the takings were not of the lake beds themselves under the Public Works Act. There were portions of the riverbed taken but not the, if you like, the extent across – between the riparian banks.

ELIAS CJ:

Not the riverbed then?

MS HARDY:

Portions of the bed alongside the border of the river but not –

ELIAS CJ:

I see, portions.

MS HARDY:

– the bed in its entirety.

ELIAS CJ:

I see, not to the middle.

MS HARDY:

Yes.

BLANCHARD J:

And were those portions just the portions that were thought to be owned by someone else at the time?

MS HARDY:

My understanding is that they were portions considered key for the development of the dam system so that certainty was produced in relation to those portions for the construction of dams for instance.

BLANCHARD J:

Yes but if the dam was then going to cause inundation of land which was considered not to be Crown land, one would have expected that taking would have to occur there or you'd have a rather unhappy landowner.

MS HARDY:

So what was taken were, if you like, the dry land pre the dams along the perimeter of the river in order to facilitate the development of the hydroelectric system. The Crown, assuming under the 1903 legislation, that it owned the bed and the combination of those two approaches providing the basis on which the dam infrastructure proceeded.

BLANCHARD J:

Right. Thank you.

ELIAS CJ:

Sorry, so the answer is, to the question I asked, is just those two bases? There's no other basis on which the Crown is said to own the riverbed?

MS HARDY:

No those are the two grounds of ownership asserted by the Crown.

ELIAS CJ:

Yes so if the Crown doesn't own the riverbed then the claim is misconceived?

MS HARDY:

That's right because the plaintiffs entirely rely on a trust applying to Crown land and in fact interestingly on the other side of the river transactions occurred in the 19th century transferring riparian land to private owners and clearly that precludes the kind of trust argument that's been prosecuted here by the plaintiff.

ELIAS CJ:

So the trust could only be in respect of half the river on – if the riverbed is owned ad medium filum aquae?

MS HARDY:

That's right and that's really the point that the Court of Appeal was emphasising when it looked at the potential for the relief that was being sought here and pointed out that the kind of trust that's being argued for is, if you like, a remnant strip of land that was once the half extent of the 20 mile strip alongside the Pouakani blocks that has now been significantly reconfigured. So now presumably it's located somewhere through the middle of the path. There were three dams along the side. There are some alternative land holders along the river as well and really it's a combination of the timing point. The statute of limitations is important here as well as laches, as well as really the just the practicality of the order being sought which is, as I mentioned before, articulated in that paragraph 30 of the Harrison judgment.

ELIAS CJ:

Presumably the riparian purchases on the other bank of the river, those lands were taken under the Public Works Act were they? I mean if the lands are inundated.

MS HARDY:

There hasn't been an investigation of the outside but common sense would suggest that in order to produce the hydroelectricity scheme, there have been takings as appropriate along both sides of the river.

BLANCHARD J:

My experience of investigations of what went on when dams were being constructed all over the country would suggest to me that you can't assume anything.

ELIAS CJ:

Yes, that's probably right.

BLANCHARD J:

It was very, very casual, and even when it came to the setting up of Electrocorp, they were still faced with an enormous problem trying to regularise everything because of the sloppy way in which the Crown's legal people, and I'm not talking about Crown Law, had gone about things or not gone about things decades earlier.

MS HARDY:

As I've noted, they're not factual points that we investigated in the same way as we investigated the bank directly relevant to the Pouakani blocks.

ELIAS CJ:

Thank you.

BLANCHARD J:

What sort of width are we talking about here? I appreciate it will be variable but what's half the Waikato River at this point likely to amount to?

MS HARDY:

I don't have the information and I'm –

ELIAS CJ:

You could take a view.

MS HARDY:

I'm looking at the maps and my reliability is guessing distances is not one on which the Court should put any weight.

ELIAS CJ:

It's a pretty substantial river even there isn't it?

MS HARDY:

It looks – I'm looking at the photographs that are in the Brent Parker evidence and there are some narrow strips that look like they would be a matter of a mile or so but there are quite broad lake like strips where one would expect several miles across.

ELIAS CJ:

Miles?

BLANCHARD J:

Miles?

ELIAS CJ:

Hundreds of metres perhaps.

MS HARDY:

So that, when one looks at that and compares it with the evidence of Mr Parker in relation to the navigability evidence that he gave about the

original stretch of the river, the 20 miles alongside, then what it demonstrates is that the once existing river is now, if you like, probably tucked as a ribbon within the broad lake areas.

BLANCHARD J:

Yes.

ELIAS CJ:

Thank you Ms Hardy.

MS HARDY:

Can I just add in conclusion?

ELIAS CJ:

Yes.

MS HARDY:

Your Honours raised as a preliminary issue the question of standing and I addressed that. The written submissions do also address as another key issue the question of statute of limitations and laches and I won't rehearse all of that but just to reiterate that the Crown's position is that the section 21 Limitation Act exclusion of applying limitations, is not one that's relevant here where a remedial trust is sought as relief. And that as a consequence the proceeding seeking declaration of breach of trust and the remedy is well time barred and although I appreciate the Court's interest in exploring the notion of looking at the section 14 issue as a discrete one, in my submission the case needs to be looked at in the round, including what the repercussions are from interrogating the section 14 issue and lay down to that is the timing problem, the issues around the fiduciary duty owed, but most particularly the potential for the relief being sought being able to be practically found and the breaches on which that rests being practically found.

ELIAS CJ:

Can though, questions of limitation and laches be sensibly addressed until the nature of the wrong, if there is a wrong, is identified?

MS HARDY:

Well the nature of the wrong is articulated in the pleadings as being a breach of a fiduciary duty and the remedy is identified in the pleadings of basically, a remedial trust and in my submission that's enough to provide a sound analysis of the application of the statute of limitations. I'm conscious that there is a recent change in the approach of the appellants to lay some emphasis on the Hammond J obiter comments about a good faith argument, but it seems to me that that is captured by – is really a reiteration of the broad Treaty argument which I addressed at the outset of my submissions.

ELIAS CJ:

Which may feed into the fiduciary duty also. It doesn't seem really that the labels matter as much as what has found to have happened. I'm not sure whether you call it an obligation of good faith or a breach of fiduciary duty in this sort of context, whether that matters very much. It's all in the same ball park isn't it?

MS HARDY:

Well the Crown wouldn't agree that those are interchangeable concepts that the key aspect of this litigation, and it differs from other litigation, that might come to the Court in the future or that has been to the Court, is that it is about a group of individual title holders, or at least, there's still to be proved successors in title.

ELIAS CJ:

It's brought on behalf of individual title holders, yes?

MS HARDY:

Yes, and they are arguing a property rights claim and they are clearly arguing for a relief that sits on that claim and it's got the qualities of a private law

fiduciary argument, and it seems to me that the pleadings are clearly that and not a much broader brush Treaty or good faith argument, which is more about the relations between Crown and Māori in its broader sense which, the Crown would say, links more closely to the kind of discussions that have led to the legislation about the Waikato River that we talked of earlier.

BLANCHARD J:

But until we've heard that argued out, it may be difficult for us to determine for example, whether this is a matter covered by the Limitation Act or whether the Court would be approaching it by way of analogy with the Limitation Act because the rights being asserted were essentially rights in equity.

MS HARDY:

But Your Honour, either way it's a Limitation Act or an analogy by Limitation Act point that would apply to this kind of a pleading of fiduciary duty and breach.

BLANCHARD J:

Maybe but we'd have to know what it was we were talking about before expressing a view I would have thought. And these are things that don't need to be determined in relation to section 14 which does seem to an issue which stands in relative isolation.

MS HARDY:

Well my point about section 14 and the pleadings are narrow as to what they challenge about section 14, it's purely the navigability point. So any issue that had been raised in the pleadings is the question of whether the relevant riverbed or river here is navigable so as to satisfy section 14 but the point of bringing in the other layers of the claim are that if the – that looking ahead I would submit it is important for the Court to determine whether that risks being a purely academic analysis of section 14 because if in fact – because section 14 is only a step for the plaintiffs to get to their argument about fiduciary duty and relief and in relation to which they'll have to argue against the statute or limitations and I think very clear laches problem of demonstrating breach.

So that's where the case heads, Your Honours, if one embarks on a section 14 enquiry.

ELIAS CJ:

It's really just how you start peeling the onion and –

MS HARDY:

Or whether –

ELIAS CJ:

And the section 14 point does have the advantage that the Court can be confident that all aspects of the argument will be properly ventilated before it. Once we move past that there's a risk of arguments that it doesn't suit the parties to bring to the Court which we – while we wouldn't be deciding them, we have to be careful we don't cut across them, so as I indicated to Mr Millard it seems to me that we might be in the position of having to appoint an amicus if we go ahead on the basis of – well even if we get to the ad medium filum aquae point, which is not a problem we have with the section 14 argument.

MS HARDY:

Um –

ELIAS CJ:

Sorry. There was one question I wanted to ask you and that is, I should have checked this, but what is the basis on which declaratory relief was thought to be appropriate in this case? Is that under the Declaratory Judgments Act or what basis is it, is declaration sought? Is there any – was there any discussion about that? No, okay, that's fine. Thank you Ms Hardy. Yes Mr Millard?

MR MILLARD QC:

May it please the Court. First of all deal with the river claim, section 14. In my submission this really is a question of law and first and foremost it's really, it's a mixture of law and fact but the first point is that it is a question of law and as

the Court has observed, the Court of Appeal didn't really go beyond a legal finding and then simply accepted the Harrison J factual findings which were also based on a legal test that we say is wrong. But if one's trying to look at some of the factual issues, if I refer the Court to paragraph 96 of the judgment of Harrison J and in particular paragraph 3 or subparagraph 3 of that. Harrison J has started off up at Lake Taupo and is now working down but it's only at subparagraph 3 that he really gets to the area relevant to the Pouakani People and although this isn't the whole of the area because their land adjoins about 22.2 miles of river, sorry 22.6 miles of river, but you can see that as a factual issue he's found that the river was little used in the next section including most of the Whakamaru Gorge, which is all against the Pouakani lands and all of the Maraetai Gorge, which is also all against the Pouakani lands. And my learned friend took the Court to the maps at page, tab 17, and if one looks there you can see the sort of gorges that must have been behind Maraetai and Whakamaru, if you look at the sort of lake that is there, looking particularly at the first map with the first lake being the one behind Maraetai, sorry if you're coming downstream, I should reverse the order. The first date that one comes to beside Pouakani B10 and Pouakani B6A is the Whakamaru and then the next lake is the Maraetai Lake. So that if one wants some confidence that this isn't just an abstract legal issue, the land beside this – sorry the river besides this bit of land was, on the finding of Harrison J, deep gorges that weren't basically used for navigation.

ELIAS CJ:

I also recall, I'm not sure where I've picked this up from, but it was in preparing for this hearing, it maybe that it's the American approach referred to I think in that article by Rosin. But somewhere I have picked up that the approach is that there was a presumption against navigability which – at common law, which is to be established. It maybe that that didn't feature at all in the argument in the lower Courts but I think I have read that –

MR MILLARD QC:

Well it's certainly the English common law beyond the title reaches the presumption is against navigability but that was the Courts below rather swept

that to one side and said, oh no, no, because this is part of the package with the Water Power Act we don't need to look at the common law, that's all gone, which runs contrary to what Premier Seddon said, that he wasn't changing the law when he introduced this. To the extent that they drew support from the Canadian case like *Nikal*, that was a case in British Columbia and the Court there did indicate that different rules applied on the Eastern Seaboard of Canada in Nova Scotia for instance. If these judgments stand it would be very difficult if an argument comes up in relation to in the other river or indeed the Waikato River to argue against the concept of just part of the river needs to be navigable and then the whole lot vests in the Crown. Therefore in my submission it is important that issue be tested in this Court. There was some debate on the issue about standing and the relief sought.

ELIAS CJ:

Could we have a copy of the representation order, just if one of you can pass it in to the Registrar later, that will be fine.

MR MILLARD QC:

I would have to do that later.

ELIAS CJ:

Yes.

MR MILLARD QC:

It was something that evolved over a period of time. We started a hearing on the Crown application taking status and wanting to have a whole lot of other tribal groups joined into the proceeding. That hearing got adjourned because of a bomb scare and we had to go back up to Hamilton to restart and at that stage the issue of a representation order was raised and in my submission the Crown accepted that that was the appropriate way to go forward. But it was tied up with the form of relief so that there was then an adjournment for the purpose of the form of relief to be sharpened up and it was after the amended statement of claim, and I'm not sure that it was the fifth, which is before the Court, or whether it was the fourth, amended statement of claim was then

filed. The relief hasn't changed since then but it was at that stage there was then a teleconference and the minute then issued making the representation order but it came against a history of oral debate on the second day of the hearing. So that although the minute, provided the minute, it's a little bit in –

ELIAS CJ:

Was the order made by Harrison J?

MR MILLARD QC:

By Associate Judge Faire.

ELIAS CJ:

Right, thank you.

BLANCHARD J:

I noticed looking at the Harrison J judgment he's actually made a decision that the representatives lacked standing to bring the claim and looking at the Court of Appeal they say they heard extensive argument, they had some reservations about his views, but they didn't decide that issue.

MR MILLARD QC:

Exactly.

BLANCHARD J:

So you're presumably appealing against the continuing decision that the representatives lacked standing.

MR MILLARD QC:

Yes.

ELIAS CJ:

Well that probably does have to be determined first, doesn't it?

BLANCHARD J:

Yes, I've been thinking that the standing question had gone the other way so that yes that would have to be determined –

MR MILLARD QC:

Yes.

BLANCHARD J:

– before we could get to section 14.

MR MILLARD QC:

Yes I would accept that that was –

ELIAS CJ:

Well in which case, it's a little surprising you don't have this representation order if that's the basis on which matters proceeded to trial.

MR MILLARD QC:

There were several strands to it. One was that the declaration sought, which is on page 20 of the statement of claim, and incidentally it is to the extent that the Crown claimed ownership of the riverbed which rather was, in a sense a pre-emptive move against arguments about somebody else owning the bed. Then the Crown holds it on constructive trust for the Pouakani people being all the persons accepted by the Māori Land Court as being descended from the original owners so that – that was certainly, the intention was that that issue should be parked and put over to the Māori Land Court. There was also an argument based on the deed of mandate which the Crown accepted and is expressly referred to in the Pouakani Settlement Act, which deed of mandate expressly conferred power on the trustees who – the surviving ones were named as plaintiffs, to prosecute a claim to the bed of the Waikato River and although Harrison J sort of says, oh, but that was for the purposes of settlement and not for the purposes of litigation that it has to be, in our submission, that if you've got it for one purpose then you don't settle unless there's also the power to bring litigation as well.

ELIAS CJ:

How did Harrison J get around the representation order and the deferral of succession? He simply says there's no evidence that they succeeded, but that's on the view that you're putting to us, misconceived because the representation order was to defer the succession question.

MR MILLARD QC:

In essence yes.

ELIAS CJ:

Where's his reasoning on this?

MR MILLARD QC:

In the very early stages of the judgment, yes beginning of paragraph 42 on page 85 and at paragraph 57 he says, "A representation order under rule 78 cannot confer status to bring a claim where a right does not exist independently…designed to facilitate efficiency and minimise duplication of litigation." And in my submission that is an unduly narrow approach and if you think about it, it would seem an odd result that if we are correct that the Crown holds the land on trust, that before you can even bring a representative action with a mechanism for determining who the exact owners are, you have to prove who the exact owners are, or at least some of them.

BLANCHARD J:

Well it is something that, if the Crown continues to adopt that posture, you're going to have to argue.

MR MILLARD QC:

Indeed but in my submission there clearly are arguments that can be brought and therefore that should not be a ground for disallowing leave. It was suggested that this is not a Treaty claim and some reference was made to the Pouakani Report but if you look at Pouakani Report what the Tribunal was there saying was that the Pouakani name was not a tribal name. It wasn't

saying that it wasn't a tribal claim. It's certainly not an iwi claim but there are for hapu and this is, this land is sort of in the border between three large iwi groupings, Tuwharetoa, Maniapoto and Raukawa so it sort of, their allegiances go three ways and one –

ELIAS CJ:

In any event I don't quite understand that since the Treaty does confer rights on individual Māori and so too does the Treaty of Waitangi Act –

MR MILLARD QC:

Yes, yes.

ELIAS CJ:

– in terms of claims to the Waitangi Tribunal so I'm not sure really where that all goes.

MR MILLARD QC:

Well certainly we say if you look at article 2 it refers to the peoples of New Zealand and if they have to – which must be – as well as referring to the Chiefs and it very clearly there is a Treaty issue under section 14 because of the – if the Crown's argument is correct it cuts right across a whole lot of Treaty claims or rights guaranteed by the Treaty and of course the claim when we get down to the dealings around the sale to the Crown, we certainly rely on the Treaty to inform and illuminate those rights.

ELIAS CJ:

Sorry, this is probably totally irrelevant, but Pouakani C3, the one that was vested in one owner only, was that a Chief that that went to, was that a Rangatira?

MR MILLARD QC:

I think I'm correct in saying it was a female and the speculation was that it was, because it had to be sold to cover the – to defray some of the expenses, it was put in the name of –

ELIAS CJ:

Ah.

MR MILLARD QC:

That was certainly the –

McGRATH J:

A strategic move?

MR MILLARD QC:

Yes.

ELIAS CJ:

Thank you.

MR MILLARD QC:

Unless there's anything else?

ELIAS CJ:

No, thank you. We'll take some time to consider our decision in this matter because, in particular, I think we will need to consider what we've been told about the representation order and if counsel can get a copy of that before us, and indeed the application on which it was based, the Crown application, that would be helpful.

COURT ADJOURNS: 12.28 PM