IN THE COURT OF APPEAL OF NEW ZEALAND

CA436/2012
[2014] NZCA 628

BETWEEN	PROPRIETORS OF WAKATŪ First Appellant	
	RORE PAT STAFFORD Second Appellant	
	RORE PAT STAFFORD, PAUL TE POA KARORO MORGAN, WAARI WARD-HOLMES AND JAMES DARGAVILLE WHEELER AS TRUSTEES OF TE KĀHUI NGAHURU TRUST Third Appellants	
AND	ATTORNEY-GENERAL Respondent	
AND	NGĀTI RĀRUA IWI TRUST AND NGĀTI KŌATA TRUST Interveners	

Hearing:	31 March to 3 April 2014 (further submissions received 16 September 2014)
Court:	Ellen France, Harrison and French JJ
Counsel:	A R Galbraith QC, K S Feint and K C Johnston for Appellants D J Goddard QC, J R Gough and J M Prebble for Respondent T J Castle for Interveners Ngāti Rārua Iwi Trust and Ngāti Kōata Trust
Judgment:	19 December 2014 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. We make a declaration that Mr Stafford has standing to bring this proceeding.

B The appeal is otherwise dismissed.

C The appellants must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

REASONS

Ellen France J [1]
Harrison and French JJ [202]

ELLEN FRANCE J

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Introduction

[1] In 1839 Colonel William Wakefield of the New Zealand Company arrived in New Zealand. Later that year he entered into deeds with Ngāti Toa chiefs at Kāpiti and with Te Ātiawa chiefs at Queen Charlotte Sound to acquire, on similar terms, their interests in about 20 million acres of land in the southern North Island and

northern South Island (Te Tau Ihu o Te Waka a Māui) including areas that later became the Nelson settlement.

[2] Reflecting the New Zealand Company's instructions to Colonel Wakefield, both deeds included a promise to reserve to the chiefs, their tribes and families a "portion of the land ceded by them, suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes, and families" and to hold that land "in trust by them for the future benefit of the said chiefs, their families, tribes, and successors, for ever".

[3] There were various exchanges between the Imperial Government and the New Zealand Company. Matters culminated in the enactment of the Land Claims Ordinance 1841 4 Vict 2. That Ordinance confirmed the Crown's right of pre-emption, that is, that all titles to land in New Zealand, other than aboriginal or customary titles, would be null and void unless allowed by the Crown. The Ordinance also provided for the recognition, after investigation by Commissioners, of claims to land that had been acquired, before the arrival of the Crown right of pre-emption, from chiefs or other aboriginal inhabitants on equitable terms.

[4] An inquiry into the relevant land claims was duly undertaken by Commissioner William Spain. Commissioner Spain reported that the New Zealand Company was entitled to a Crown grant of 151,000 acres of land being in the several districts of the settlement of Nelson and surrounding areas. Commissioner Spain stated that this was "saving and always excepting" the pā, burial grounds and cultivation areas of Māori, the "entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres" awarded to the Company. The Crown grant of 1845 provided for a grant of 151,000 acres of land in the northern part of Te Tau Ihu to the New Zealand Company "[s]aving and always excepted" the pā, burial places and cultivation grounds of Māori, the "entire quantity of land so reserved for the Natives being one-tenth of 151,000 acres" granted to the Company.

[5] As matters transpired, one tenth of the 151,000 acres granted to the Company was not reserved. The history of the land that did become part of what are known as

the Nelson Tenths or Tenths Reserves is itself a history of neglect of the interests of Māori. The remnants of the Nelson Tenths ultimately vested in the first appellant, the Wakatū Incorporation (Wakatū) in 1977.[1] Mr Rore Pat Stafford, the second appellant, is a kaumātua of Ngāti Rārua and Ngāti Tama descent. The third appellant, Te Kāhui Ngahuru Trust, was established in 2010 by Mr Stafford as settlor for the purpose of representing the beneficiaries of trusts claimed over the Nelson Tenths and facilitating the pursuit and resolution of the beneficiaries' claims against the Crown arising out of issues associated with the Nelson Tenths.

[6] This appeal relates specifically to land in what is now known as Nelson itself and the broader areas of Tasman and Golden Bays, in western Te Tau Ihu. There the Company and the Crown dealt with Ngāti Kōata, Ngāti Rārua, Ngāti Tama and Te Ātiawa.

[7] In the High Court, the Ngāti Kōata, Ngāti Rārua, Ngāti Tama, Ngāti Apa and Ngāti Kuia Trusts were each separately granted intervener status with respect to questions of standing and representation, relief, and the interrelated issues of the nature of the Crown's obligations in the 1840s and to whom such obligations were owed.[2] Before this Court, the Ngāti Kōata and Ngāti Rārua Trusts maintained their intervener status and participated in the hearing.

[8] The appellants say that the circumstances of the relationship created by the 1845 Crown grant give rise to private trust and equitable obligations and that there have been breaches of those obligations which they can enforce. In the High Court, Clifford J rejected the claims concluding there was no express trust and that the appellants did not have standing to bring the claim for a fiduciary duty.[3]

[9] The appellants appeal.[4] The Crown supports the judgment on other grounds. The interveners support the conclusion that the appellants have no standing.

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1 Wakatu Incorporation Order 1977.

2 *Wakatu Incorporation v Attorney-General* HC Wellington CIV-2010-442-181, 2 February 2011 (Minute of Clifford J) at [2].

3 *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 [*Wakatū*].

4 The appellants' application for leave to appeal directly to the Supreme Court was declined by that Court: *Proprietors of Wakatu v Attorney-General* [2012] NZSC 102, (2012) 21 PRNZ 182.

The issues

[10] The central issue on appeal is whether the Judge was wrong to conclude that the Crown did not owe any private trust or equitable obligations to the appellants. There are associated issues about the standing of the appellants to bring these claims and as to whether any claim is barred by the Limitation Act 1950 and/or laches. The issues raised by the appeal can be dealt with by considering the following questions:

(a) Do the appellants have standing?

(b) What is the effect of legislation settling the historical claims of local iwi in relation to the Nelson Tenths?

(c) Was there a fiduciary duty?

(d) Were the three certainties required to establish an express trust present?

(e) Was the Judge correct to dismiss the claim of a resulting trust?

(f) Was the Judge correct to reject the claim based on a constructive trust?

(g) Did the Crown breach any legally enforceable obligations it owed or might have owed?

(h) Are the claims barred because of limitation and/or laches?

[11] I deal with each issue in turn.

Standing

[12] The appellants challenge the findings that they had no standing to bring claims of breach of fiduciary duty and, aside from Mr Stafford, of breach of trust. I deal first with the position of Wakatū.

[13] The Wakatū Incorporation was established by the Wakatu Incorporation Order 1977. Its establishment followed a recommendation from the Commission of Inquiry into Māori Reserved Land (the Sheehan Commission) in 1975.[5] The Commission recommended that control of the land be returned to the Māori owners. The owners agreed to the establishment of a Māori incorporation to administer and manage what remained of the Tenths and occupation reserves in Nelson, Motueka and Golden Bay.[6] The Wakatu Incorporation Order provided that the beneficial owners of the land in the schedule to the Order, being reserved land within the meaning of the Maori Reserved Land Act 1955, were constituted a Māori incorporation.[7] The objects of the Incorporation were twofold, namely, to receive from the Māori Trustee all land transferrable by him to the Incorporation in accordance with the relevant provisions of the Maori Reserved Land Act and to "use, manage, and administer any land or interest in land for the time being vested in or owned by the Incorporation".[8] Accordingly, on the incorporation of Wakatū, the Māori Trustee's control and oversight of the Tenths Reserves was revoked. The Incorporation is now governed by Te Ture Whenua Maori Act 1993.

[14] As Paul Morgan, Chairman of Wakatū, explains most of the current owners of the remaining Tenths Reserves, that is those owners in the Incorporation, whakapapa back to the tūpuna or ancestors who lived in western Te Tau Ihu in 1841 and who were identified by the Native Land Court as beneficially interested in the Tenths Reserves in 1893.[9] As described in the appellants' written submissions, the Native Land Court undertook an inquiry first identifying the four hapū entitled to the customary ownership of the land at the time of the sale to the New Zealand Company. The Court then allocated shares to the individual members of those hapū who held ahi kā. These were the 254 tūpuna named in the original lists.

[15] There is a small group of owners represented by Wakatū who do not descend from the original owners. Mr Morgan explains that this is mainly because legislation

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5 Bartholomew Sheehan, Rolland O'Regan and Georgina Te Heuheu "Report of Commission of Inquiry into Maori Reserved Land" [1975] IV AJHR H3.

6 See the discussion in Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 2 at [9.7.1].

7 Clause 3(1).

8 Clause 3(2).

9 *New Zealand Company Tenths* (1893) 3 Nelson MB 153.

had allowed previous owners to gift or bequest their shares to Pākehā and to those who did not whakapapa to the land.

[16] In the context of the claims based on a private law trust, the problem for Wakatū in terms of standing is, as the Crown submits, that a stranger to a trust cannot bring a claim to enforce the trust.[10] The appellants rely on the fact that under s 250 of Te Ture Whenua Maori Act, on the making of an order incorporating the owners of land, an incorporation holds the land and other assets on trust for the incorporated owners in proportion to their several interests in the land. The vesting does not affect the beneficial interests in the land which remain vested in the several owners.[11] However, whilst Wakatū has as its members a number of persons who are beneficiaries and so not strangers to the purported trust, it is a separate legal entity that does not itself possess the requisite standing. For similar reasons, I also reject Wakatū's argument that, as successor trustee it can sue its predecessor (the Crown) for breach of trust.[12] The two trusts are not the same. Rather, on analysis, the claim is really one that Wakatū should be a trustee of a bigger pool of assets.

[17] As to the claim of fiduciary duty, as the claim is advanced, any equitable duty owed would be to the collective, customary, owners. The first issue raised in relation to Wakatū's standing to bring the claim based on fiduciary duty is therefore whether Clifford J was right that none of the appellants represent those customary interests.[13] Secondly, there is an issue about whether a more relaxed approach should be taken to standing in this case. Finally, there is a question whether a distinction can be drawn between those who may ultimately be entitled to relief and interests sufficient to establish standing.

[18] On the first issue, there is a clear difference between Wakatū and the interveners about the place of the iwi trusts and that of hapū and whānau. Wakatū's

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10 *Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne* (1991) 7 ANZ Insurance Cases ¶61-201 (VSCFC) at 78,320; see also Graham Virgo *The Principles of Equity and Trusts* (Oxford University Press, Oxford, 2012) at [18.1.3]; and Robert Chambers "Liability" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 1 at 4.

11 Sections 250(2) and 250(4).

12 See the discussion by Brooking J for the Full Court of the Supreme Court of Victoria in *Occidental Life Insurance*, above n 10, at 78,320; see also American Law Institute *Restatement of the Law: Trusts* (3rd ed, St Paul, Minnesota, 2012) § 94; and American Law Institute *Restatement of the Law: Trusts* (2nd ed, St Paul, Minnesota, 1959) § 200.

13 At [312]–[313], [315] and [316].

approach is that Māori customary law (tikanga Māori) recognises that mana whenua rights generally reside at hapū level. The appellants characterise the idea of iwi as being representative of the collective customary groups as a "modern construct".[14]

[19] The interveners say that they have all of the relevant customary interests in the ancestral lands which are the subject of this case. They support the approach taken by the High Court Judge to standing and rely on the findings of the Waitangi Tribunal as to their customary interests in lands in the northern South Island.[15] Ngāti Kōata and Ngāti Rārua's position is summarised as follows in their written submissions:

> … the appellants do not have standing to bring what is an Iwi historical claim in this form of proceeding; and the appellants do not have the approval or consent of Ngati Koata or Ngati Rarua to represent the Iwi in what Ngati Koata and Ngati Rarua claim are their respective Iwi historical claims.
>
> … relief available upon the proceeding can only be granted to those who have the standing to prosecute the claims – in this case – those who have the customary interests in the ancestral lands the subject of the claims, i.e. Iwi, including the Iwi Interveners.
>
> … at the very least the nature of the Crown's obligation in the 1840s extended to Treaty obligations; and such Treaty obligations were owed, in respect of the ancestral lands including the Nelson and Motueka Tenths, to Iwi. The nature of the Crown's obligations in the 1840s may extend beyond the Crown's obligations to Iwi under the Treaty. Whatever the nature of additional Crown obligations which the facts of this case may permit, it is Ngati Koata's and Ngati Rarua's position that those Crown obligations are owed to them as Iwi, not to the appellants.

[20] On this aspect, Clifford J said that Wakatū was not "itself a customary, collective group, albeit that many, but not all, of its members are persons who do belong to the relevant customary, collective groups".[16] The Judge acknowledged the dispute between Wakatū and the interveners as to who are the relevant customary,

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[14] In Wai 785, above n 6, at [9.7.3(1)], the Waitangi Tribunal acknowledged there was a strong case for the Crown's desire to negotiate directly with iwi, but said it was necessary to acknowledge the Wakatū Incorporation [Wakatū]'s role in supporting claims to the Tribunal. The Tribunal said that Crown actions that have directly affected the shareholders of Wakatū since 1977 would need to be, and would appropriately be, resolved between the Crown and Wakatū. Historical matters prior to the Incorporation would need to be resolved with iwi. See also Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 41 at [3.3.1], [3.3.2] and [3.3.5].

[15] See Wai 785, above n 6, at 921.

[16] At [312].

collective groups. The Judge did not see himself as well qualified to resolve these differences. Clifford J stated:[17]

> Based on the evidence I heard, my sense is that even if the plaintiffs are correct in that mana whenua or ahi kā rights are particularised from location to location in whānau and hapu groupings, that nevertheless those groupings enjoy and exercise those rights as part of a larger collective, which in the 19th century and now is properly referred to as the iwi represented by the Interveners. Be that as it may, what is clear to me is that as a matter of private law Wakatū simply does not represent those interests: rather it is an incorporation comprising individuals in their capacity as holders of individualised property rights, even though those rights do derive originally from membership of customary groups. But in my view Wakatū does not represent those customary groups.

[21] Like the Judge, I do not see myself as in a position to resolve questions about to whom the Crown's obligations were owed in this case. But it is clear that there is a group who do have claims who are not represented by Wakatū.

[22] As to whether a more relaxed approach should be taken to standing in this case, the appellants emphasise that standing is a matter within the court's control. They draw on the idea of "public interest" standing as illustrated by the decision of the Supreme Court of Canada in *Manitoba Métis Federation Inc v Canada (Attorney-General)*.[18] In delivering the judgment for the majority, McLachlin CJ and Karakatsanis J said that the presence of other claimants did not necessarily preclude public interest standing. Rather, the question was whether the "public interest plaintiff will bring any particular useful or distinct perspective to the resolution of the issue at hand".[19] Further, it was said that the requirements for public interest standing should be addressed in a flexible and generous manner and considered in light of the underlying purposes of setting limits on standing.[20]

[23] A relaxed approach to standing is evident in legal contexts that are amenable to testing matters engaging public or national interests, such as declaratory relief and

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17 At [313].
18 *Manitoba Métis Federation Inc v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623.
19 At [43].
20 At [43]; see also *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607 where the Supreme Court of Canada said the court had a discretion to recognise public interest standing.

judicial review.[21] For example, in the text on declaratory relief *Zamir and Woolf: The Declaratory Judgment*, the authors discuss the more flexible approach to standing taken in cases like *Re S (Hospital Patient: Court's Jurisdiction*).[22] The plaintiff had been looking after S, a friend, and resisted removal of S to Norway by S's wife and son after S suffered an incapacitating stroke. Sir Thomas Bingham MR said that "to insist on demonstration of a specific legal right in this sensitive and socially important area of the law is in my view to confine the inherent jurisdiction of the court within an inappropriate straitjacket".[23] But there is a distinction between cases of this kind and those involving purely private individuals or claims, as was recognised by McKerracher J of the Federal Court of Australia in another recent (extrajudicial) discussion of declaratory relief.[24]

[24] Wakatū's claim is one based on private law and on specific, private law rights. The claim, albeit arising in the context of the Treaty of Waitangi and relying on it in a general contextual way, is not based on the Treaty. The fiduciary duty alleged is private in character and to seek its enforcement, there has to be an interest in the duty allegedly breached. In this context, the rationale for the various rules about standing are applicable. That rationale is helpfully discussed in *Zamir and Woolf*. Apart from the concerns, not present in this case, about vexatious or litigious persons, the authors note the standing requirements have other advantages. They list the following:[25]

> They assist in achieving a situation where a case is presented by a litigant who, because he has a real interest in the outcome … will do his best to ensure that all the arguments in favour of granting the remedy which he seeks are deployed before the court. They also tend to ensure that the courts do not exceed their correct role of only determining issues which are justiciable.

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21 See Andrew Beck *Principles of Civil Procedure* (3rd ed, Brookers, Wellington, 2012) at [3.2]; and Jonathan Auburn, Jonathan Moffett and Andrew Sharland *Judicial Review: Principles and Procedure* (Oxford University Press, Oxford, 2013) at [24.16].

22 Lord Woolf and Jeremy Woolf *Zamir and Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [5–21]; *Re S (Hospital Patient: Court's Jurisdiction*) [1996] Fam 1 (CA).

23 At 19.

24 Neil McKerracher "Commentary on the Chapters of Chief Justice Martin, Justice French and Justice Heenan" in Kanaga Dharmananda and Anthony Papamatheos (eds) *Perspectives on Declaratory Relief* (Federation Press, Sydney, 2009) 89 at 90; see also Beck, above n 21, at [3.2.1].

25 At [5–02] (footnote omitted).

The authors of *De Smith's Judicial Review*, listing factors commonly cited in support of a restricted approach to standing, add:[26]

> … as a matter of prudence, the courts should reserve their power to interfere with the workings of public authorities to those occasions where there is a claim before them by someone who has been adversely affected by the unlawful conduct of which complaint is made.

[25] The final question is whether a distinction can be made between relief and standing. The Supreme Court decision in *Paki v Attorney-General* made this distinction.[27] In the High Court, Harrison J had concluded that the plaintiffs did not have standing.[28] Giving the reasons of the majority in the Supreme Court, Elias CJ said:

> [12] In the course of the hearing of the appeal, the Solicitor-General withdrew the Crown objection to the standing of the appellants to bring the claim. It is accepted that the Crown concern is not properly with standing to bring the representative claim but with identification of those who would succeed to the original owners for the purposes of any remedy by way of constructive trust. (If such inquiry is eventually necessary it may be referred to the Maori Appellate Court under s 61 of Te Ture Whenua Maori Act 1993, which permits the High Court to refer to that expert body questions of fact relating to the interests or rights of Maori in any land.) This Court therefore proceeds on the basis that the High Court was wrong on the question of standing (a matter not formally resolved by the Court of Appeal) although the concession of the Solicitor-General makes it unnecessary to provide further reasons.

[26] I do not consider the same distinction can be drawn here. The issue of standing is not a technical one in this case given the different positions taken by Wakatū and the interveners. Reflecting their position, the interveners pursued and have now achieved settlement of their historical claims in relation to the Nelson Tenths with the Crown.[29] Nor can the objection be limited to an argument about the ultimate beneficiary. Accordingly, I agree with Clifford J that Wakatū has no standing.

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[26] Lord Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [2–004].

[27] *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277.

[28] *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [58].

[29] Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 [the Settlement Act].

[27] The position of the third appellant, the Trust, equates to that of Wakatū in relation to standing. Clifford J put it in this way:[30]

> … merely by creating a trust a settlor cannot vest in that trust property that is not the settlor's to vest. Therefore the third [appellants] could not say that part of the property they held on trust comprised the property, that is the chose in action, that is the right to bring these claims against the Crown.

[28] The beneficiaries of the Trust are the direct descendants of the 254 tūpuna. Mr Morgan says the Trust was established because the people "wanted to find a way to reintegrate all the whānau and people who had been excluded by the Crown over the years back into our whānau whanui". He states that the intention is that any redress secured in relation to the Tenths would be "for the benefit of all the direct descendants of the 254 tūpuna". However, for the reasons discussed above, I agree with Clifford J that the Trust does not have standing.

[29] Finally, I turn to Mr Stafford. Clifford J said he did have standing in respect of the breach of private trust claims as a member of the appropriate beneficiary group. However, in relation to the fiduciary duty claim, the Judge found Mr Stafford had no standing because there was no evidence that Mr Stafford represented the relevant customary groups in the proceeding. No application for representative status had been made.

[30] I see Mr Stafford as being in a different position from the other appellants. He can be seen as having standing as the rangatira of the collective or at least of part of the collective. As the Waitangi Tribunal has noted, Mr Stafford was one of the two who lodged the initial claim to the Tribunal in relation to the Nelson Tenths, Wai 56.[31] In his evidence to the Tribunal, Mr Stafford said that claim was not lodged on behalf of Wakatū "as such but on behalf of the descendants of all the original owners".[32] Because of the customary authority associated with his status, I do not consider it was necessary for Mr Stafford to obtain a representative order before he could assert that authority in the proceeding. As the appellants submit, consistently

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30 At [315].

31 Wai 785, above n 6, at 935. The Wai 56 claim was consolidated with several others under the administrative claim number Wai 785: Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at [1.3.2].

32 At 935.

with the customary position of a rangatira acting on behalf of a tribe, history provides other examples of litigation taken in the name of the chief.[33] Accordingly, I take a different view from Clifford J on this matter. Mr Stafford has standing. Because that is the view of us all, the appeal is allowed in part to the limited extent that we make a declaration that Mr Stafford has standing to bring this proceeding.

Effect of the Settlement legislation

[31] It is appropriate at this point to address the issues arising from the submissions we received after the hearing on the effect of the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 (the Settlement Act). The Settlement Act came into force on 23 April 2014.

[32] The Settlement Act gives effect to various deeds of settlement settling the historical claims of Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui.

[33] Section 25 of the Settlement Act is the critical provision for present purposes. The section provides that the historical claims are settled and the Crown is discharged from obligations in relation to those claims.[34] Further, the courts cease to have jurisdiction in relation to the historical claims.[35] But the section also preserves the present proceeding, the present appeal and any appeal from this Court to the Supreme Court.[36]

[34] The "historical claims" are those defined in s 24 and include claims founded on a right arising from the Treaty of Waitangi or its principles or from fiduciary duty.[37] The historical claims specifically include the Wai 56 claim before the Waitangi Tribunal as it relates to each of the iwi.[38] As I have noted, that claim deals with grievances relating to the Nelson Tenths.

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33 For example *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107 (SC); aff'd [1939] NZLR 114 (CA); aff'd [1941] NZLR 590 (PC).
34 Subsections (1) and (2).
35 Subsection (4).
36 Subsection (6).
37 Subsections (2)(a)(i) and (2)(a)(iv).
38 Subsections (3)(b)(i), (4)(b)(i), (5)(b)(i) and (6)(b)(i).

[35] The focus is on the interrelationship between ss 25(6) and 25(7). Section 25(6) provides that the previous subsections, subss (1)–(5) (final settlement and ouster of the courts' jurisdiction), do not affect:

> (a) the ability of a plaintiff to pursue the appeal filed in [this Court] as CA 436/2012 [the present appeal]; or
>
> (b) the abilility of any person to pursue an appeal from a decision of [this Court]; or
>
> (c) the ability of a plaintiff to obtain any relief claimed in the Wakatū proceedings to which the plaintiff is entitled.

[36] A "plaintiff" is defined as a plaintiff named in the Wakatū proceedings, namely, those filed in the High Court as CIV-2010-442-181.[39]

[37] Section 25(7) provides as follows:

> To avoid doubt, subsection (6) does not preserve any claim by or on behalf of a person who is not a plaintiff.

[38] I agree with Clifford J, who recently considered the interrelationship of these two subsections in the context of caveats lodged against land in Nelson, that the resulting question of statutory interpretation is "not straightforward".[40] That said, I consider it is clear the legislature sought to achieve the following: first, to allow the present appeal to be dealt with along with any appeal to the Supreme Court; and secondly, to allow those who wanted to settle their claims to do so unaffected by the pursuit of the present appeal.[41]

[39] I consider it follows from the first objective that the Crown cannot be right that the Settlement Act bars any claim in this case against the Crown for breach of trust in respect of express trusts. Nor can it be right that the Settlement Act bars the appellants' claims based on breach of fiduciary duties owed to the customary owners. The distinction the Crown seeks to draw is between the claims to which the appellants are themselves entitled and those advanced on behalf of persons who are

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39 Section 25(8).

40 *Proprietors of Wakatū v Attorney-General* [2014] NZHC 1785 at [58]. Wakatū in that case successfully sought orders that caveats not lapse on properties that would otherwise be transferred to local iwi under the Settlement Act.

41 Counsel for the interveners advised he was not instructed to make submissions on the effect of the Settlement Act.

not named plaintiffs. Because the claims being pursued by the named plaintiffs were in large part for customary groups that had agreed to settle their historical claims, it was said, the claims could not proceed.

[40] However, the appellants must be entitled in terms of s 25(6)(c) to obtain the relief they seek in the Wakatū proceedings, if it is found to be available to them. The fact there is a reference to the specific "CA" file number of the appeal suggests the legislature was aware of the particular nature of the claim. In specifically preserving the ability to obtain the relief sought, the legislature cannot at the same time have cut down the appellants' claims in the way the Crown submits. For example, the relief sought includes a declaration that the Crown was obliged to reserve and hold on trust 15,100 acres in addition to occupation reserves and one tenth of any further land acquired by the New Zealand Company for the Nelson settlement and that it failed to do so. In any event, Mr Stafford would be entitled to this relief on his own account.

[41] I do not consider my approach is inconsistent with the legislative history. Clifford J in the recent caveat proceeding set out the relevant extract from the report of the select committee considering the Bill which recorded advice from the Office of Treaty Settlements, in consultation with the Crown Law Office, as follows:[42]

> The current orthodox position is that the Treaty of Waitangi does not give rise to directly enforceable legal obligations without specific statutory authority. In the Wakatū proceedings the claims are based around the same factual grievances that are the subject of the settlement, but primarily raise private law claims based in trust and fiduciary duty, not based on the Treaty breach. The ability to prosecute certain private law claims raised in Wakatū may be impacted by extinguishment provisions of the Tainui Taranaki Treaty settlements and their extingishment clause, unless expressly preserved. Crown Law advice was sought on this matter and ultimately, it was considered … improper to obstruct final determination in the appellate courts. Legislative drafting was developed to specifically apply a preservation clause only to the current litigation and specific parties to that litigation.

[42] At [52]; Te Tau Ihu Claims Settlement Bill 2013 (123-2) (select committee report) at 3.

A fiduciary duty?

[42] Whether or not the Crown owed obligations to the appellants as a fiduciary was the central focus of the argument before us. I first summarise the Judge's findings on this topic before analysing the case for the imposition of fiduciary duties.

The approach in the High Court

[43] Clifford J considered that up until 1845 the Crown was involved in a balancing of interests inconsistent with a duty of utmost loyalty to Māori.[43] The Judge saw the period between 1845 and 1856 as the period during which the argument for a fiduciary duty was strongest.[44] After the enactment of the New Zealand Native Reserves Act 1856 the Judge considered that any fiduciary duty would have to be found in the provisions of that legislation, a position now accepted by the appellants.

[44] Once the reserves had been recognised, Clifford J said, it could be argued that the need for the Crown to "balance" competing interests had ceased.[45] No one but Māori had an interest in the recognised reserves and there would appear to have been public recognition at the time of the outcome of the section selection process and of the position of local Māori as significant beneficial owners in the new settlement. Accordingly, Clifford J concluded:[46]

> … there is in this timeframe a set of circumstances in existence in the context of which the Crown's strongest argument, namely that to recognise private law duties would be fundamentally incompatible with its role as government, does not have force. But that very time and fact specific argument was not the one which the plaintiffs made, nor one which the Crown responded to. I therefore feel some hesitation in taking it further myself.

[45] Because the Judge concluded there was no standing, he did not need to resolve this question.

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43 *Wakatū*, above n 3, at [301].
44 At [307].
45 At [309].
46 At [310].

The historical narrative

[46] It is helpful at this point to set out the particular aspects of the historical narrative relied on.[47]

The concept of reserves – the early period

[47] The notion of settlement subject to the reservation of lands for Māori had a consistent pedigree. Prior to the arrival of the New Zealand Company ship, the *Tory*, in New Zealand the Company had embraced the concept initially enunciated by Reverend Hawtrey of reserves for Māori. This was seen as part of the process of "civilising" the native people.[48]

[48] Further, as Clifford J records, in their Bill for the Provisional Government of British Settlements in the Islands of New Zealand 1838 (Imp) (the Baring Bill), Francis Baring and Sir George Sinclair set out an early expression of what was then the New Zealand Association's colonising ambitions.[49] Clause 29 of that Bill provided for what became the Company to create reserves of land for natives because it was desirable:

> ... that the former native owners of lands within ceded territories should continue to possess landed property within British settlements, in order that they may preserve in civilized life a relative superiority of condition over the lower orders of inhabitants of the native race.

[49] The clause went on to provide that these lands were to be held on "such trusts" as the commissioners, "with the approbation" of a "Protector of the native inhabitants", directed.

[50] These concepts were reflected in the instructions from the Company to Colonel William Wakefield in 1839. Those instructions canvassed a range of matters

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47 The historical material is set out in more detail by Clifford J and I have drawn on that narrative. I have, however, focused on the parts of the narrative that were given particular attention in argument before us.

48 The ideas are set out in Edward Gibbon Wakefield and John Ward's 1837 treatise, *The British Colonisation of New Zealand, Being an Account of the Principles, Objects and Plans of the New Zealand Association* (London, 1837); see also Mark Hickford *Lords of the Land: Indigenous Property Rights and The Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 67–68.

49 At [88]. The Bill was defeated.

and noted particularly that the danger to which the natives were exposed and which "they cannot well foresee, is that of finding themselves entirely without landed property, and therefore without consideration, in the midst of a society where, through immigration and settlement, land has become a valuable property". The instructions went on to record the concept of the allocation of sections by ballot noting that one tenth of the land would be reserved by the Company:[50]

> … for the chief families of the tribe by whom the land was originally sold, in the same way precisely as if the lots had been purchased on behalf of the natives.

[51] As I have foreshadowed, there were two relevant deeds of purchase; those relating to Kāpiti[51] and Queen Charlotte Sound.[52] The deeds provided for the reservation of "a portion" of the land ceded that was "suitable and sufficient for the residence and proper maintenance of the … chiefs, their tribes and families" and that this portion was to be "held in trust" for them "for [their] future benefit" forever. The Port Nicholson deed and another entered into by Colonel Wakefield in February 1840 acquiring the land for the settlement in New Plymouth expressly provided for the reservation of a tenth for Māori.

[52] In his evidence to a select committee in London in July 1840, Edward Gibbon Wakefield said that the Company was formed "to carry out the plan of colonization without the assistance of the Government". "Under these circumstances", he said, the Company was to be "a commercial one".[53]

[53] Wakefield then explained the ideas behind the reserves of a portion equal to one tenth of all the land the Company acquired for the native families:

> Their object in reserving those lands has been to preserve the native race. They believe that it will be impossible [to achieve that] … unless their chief

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50 Both the priority of choice for the native allotments as well as purchases were to be determined by lot. The instructions recorded: "Wherever a settlement is formed, therefore, the chief native families of the tribe will have every motive for embracing a civilised mode of life." They would have property in the land "intermixed with the property of civilised and industrious settlers, and made really valuable by that circumstance".

51 Dated 25 October 1839.

52 Dated 8 November 1839.

53 This relates to one of the limited factual matters on which the appellants take issue with Clifford J who described the Baring Bill (see above at [48]) as having the Company "acting as government", that is, in a public rather than a private way: at [224]. See also Hickford, above n 48, at 82–85.

> families can be preserved in a state of civilisation in the same relative superiority of position as they before enjoyed in savage life; and with this view the company is desirous of investing them with property. But if it placed the property at once at their disposal, they would sell it for a trifle [and later: to a grog-shop keeper]. It became therefore necessary to create a permanent trust.

[54] The committee was also told about the system of assigning sections. Essentially, each section was numbered and priority of choice determined by lot in England. Wakefield explained the land-orders were not appropriated to particular natives but reserved for the benefit of the principal chiefs, and of their families. He explained that the sections were not yet in trust because the trusts were not yet defined.

[55] In January 1840, Lieutenant-Governor Hobson proclaimed that the Crown would not recognise earlier purchases from Māori that were not confirmed by the Crown and that purchases taking place after the issue of the proclamation would be considered null and void. The Treaty of Waitangi was signed on 6 February 1840.

[56] On 10 October 1840, John Ward on behalf of the directors of the New Zealand Company gave instructions to Edmund Halswell, the Company's "commissioner for the management of the lands reserved for natives in the New Zealand Company's settlements". Those instructions also reflected the idea that the objective of the reserves was to "civilize" the natives. Moreover, there was an explicit decision to move away from the North American concept of separate, large, reservations to a "pepper potting" of sections amongst those sections occupied by settlers.

The 1840 agreement and its aftermath

[57] On 19 November 1840, an agreement was entered into between the Colonial Office and the New Zealand Company. The agreement dealt with a number of matters including the incorporation of the Company by charter and the terms on which the Government would deal with the Company in relation to Crown lands in New Zealand. The agreement recorded that an accountant, James Pennington, would prepare an estimate of expenditure under various heads. The Company would then be entitled to a Crown grant securing four acres of land for every pound spent up to a

maximum of 160,000 acres. The agreement included a denial by the Government of any liability for contracts made by the Company but recorded the understanding that the Company would meet its obligations under the contracts from the lands it received in the Crown grants. The agreement also referred to the fact that there would be reservations for the benefit of Māori created alongside the grant of lands to the Company.

[58] After the 1840 agreement between the Crown and the Company was concluded, Mr Pennington's calculations were that the Company had spent over £132,000 which would entitle it to over 531,000 acres of land in New Zealand. In addition, as Brent Parker (a senior historical researcher at the Crown Law Office) explained in his evidence in the High Court, there was other Company expenditure to be accounted for meaning there could be a further liability to the Company of between 400,000 to 500,000 acres of land. This information was relayed to Governor Hobson in New Zealand and he was asked "to make the necessary assignments of land to the agents of the Company" in furtherance of the agreement.[54]

[59] The next step in the narrative which I should interpolate here is the Government's response to the Company's indication it intended to take land other than in accordance with the 1840 agreement, thereby affecting the native reserves. The New Zealand Company was reminded that it had to comply with the 1840 agreement. George Hope, writing to Joseph Somes on behalf of Lord Stanley, Secretary of State for the Colonies, on 10 January 1843, said that the investigating body examining the Company's purchases had a duty "not to suffer native rights which have been recognized by Her Majesty, to be set aside in favour of any body of settlers, however powerful". As I have foreshadowed, William Spain had been appointed to be a Commissioner investigating and determining titles and claims to land in New Zealand on 20 February 1841.

[60] The Company's prospectus for its second settlement (which was eventually selected to be Nelson) was issued in February 1841.[55] Clause 7 stated that "subject to an arrangement" with the Government, the Company "engages" to add to the

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[54] Brent Parker notes that this appears to mean the Company was no longer bound by the 160,000 acre limit.

[55] The Company obtained its charter of incorporation on 12 February 1841.

201,000 acres offered for sale "a quantity equal to one-tenth thereof" as native reserves so that the total amount of land to be appropriated would be 221,100 acres, with a town of 1,100 acres. Adding the reserves in this way, of course, meant that the reserves in fact comprised one eleventh of the total land to be appropriated, a point to which I return later.

Other developments in the early 1840s

[61] In March 1841, Edmund Halswell arrived in New Zealand. As noted, his instructions from the Company referred to the Company's aim to civilise the Māori race and protect them from the risks of unregulated settlement, and hence determined to reserve one tenth of the land and hold that in trust. After Mr Halswell arrived in New Zealand, in July 1841 the Governor appointed him to the dual roles of Protector of Aborigines of the Southern District of the North Island and the Commissioner for the Management of the Native Reserves.

[62] The ballot for sections in the second settlement took place in London in August 1841. By this point (on 3 May 1841), Governor Hobson had issued a proclamation stating that New Zealand had become a separate colony of Great Britain. Governor Hobson refused to allow the Company to select Lyttleton as the site of the second settlement. After discussions, Blind Bay (Tasman Bay) emerged as a possible option.

[63] Captain Arthur Wakefield met with a number of chiefs aboard his ship at Kaiteriteri late in October 1841. Captain Wakefield led the New Zealand Company expedition to select the site for the second settlement. He chose Wakatū, Nelson, as that site. The chiefs in the area were presented with gifts on account of the Company settling at "Taitap".

[64] As noted earlier, the Land Claims Ordinance of 1841 recognised the Crown's right of pre-emption. It also provided that pre-1840 purchases did not give the purchaser title unless the Crown allowed that to occur. The Ordinance set up a process by which a Commissioner would be appointed to make inquiries in relation

to these pre-1840 purchases. The Governor had power to accept or reject the Commissioner's recommendations.

[65] As Clifford J records, the second settlement (Nelson) settlers began arriving in Nelson from 1 February 1842.[56] Surveying work was underway and, by April, the survey of the Nelson town sections was complete. Selection of these town sections according to the ballot was undertaken. Henry Thompson, who was, amongst other things, the agent of the native reserves at Nelson, exercised the selection rights for the 100 town sections to be reserved for Māori. As Clifford J observed:[57]

> All this … took place before the Company's title to land in the Nelson area had been investigated and approved by the Crown. A considerable gap between legal theory and on the ground "practical" realities can be observed.

[66] An important step in the narrative is provided by a letter of 26 July 1842 from Willoughby Shortland, the Colonial Secretary, to the then Chief Justice in relation to land by then reserved by the Company at Port Nicholson, Nelson and New Plymouth "for the benefit of the natives, chiefly with a view to their preservation, civilization and social enhancement". The land was to be under the supervision of the Chief Justice, the Bishop of New Zealand and the Chief Protector of Aborigines, pending the creation of a statutory trust. Shortland wrote:

> With a view to the most efficient administration of this property for the benefit of the native race, it appears desirable that all the reserves so made, or to be made, by the New Zealand Company ... should be vested in one set of trustees, possessing the confidence of the Government and the New Zealand Company. I am therefore commanded by the Governor to acquaint you, that his Excellency proposes when the reserves made by the Company shall have become legally vested in the Crown, to submit to the Legislative Council a Bill for vesting them ... in three trustees, namely, the Bishop, Chief Justice, and Chief Protector of the Aborigines for the time being, to be applied by them in the establishment of schools for the education of youth among the aborigines, and in furtherance of such other measures as may be most conducive to the spiritual care of the native race, and to their advancement in the scale of social and political existence.
>
> It is intended to provide that the funds arising from the Company's reserves shall be expended in the promotion of these objects in the settlement or district from which they may respectively arise; such an application of these funds, under a board of management so constituted, will, his Excellency has reason to believe, meet with general approval.

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56 *Wakatū*, above n 3, at [111].
57 At [112].

> Until these objects can be carried into effect, under the authority of a legislative enactment, the Governor requests that you will avail yourself of the opportunity afforded by your periodical visits to the Company's settlements, to direct from time to time the disposal of any funds that may have arisen from the reserves, and to collect any information respecting them that may be desirable with reference to the proposed enactments.
>
> The gentlemen who have hitherto had the management of the reserves at Port Nicholson will be directed to give up the trust into your hands, and they will, his Excellency feels assured, give you all the aid and information in their power with a view to its efficient execution.

[67] In September 1842, the Bishop of New Zealand wrote to Henry Thompson and provided him with some interim instructions.

[68] Problems then arose in the development of the Nelson settlement because there were insufficient available lands suitable for cultivation. By 1843 the Company found it did not have access to sufficient land around Nelson to provide the settlers and Māori with the rural sections the Company had originally intended to provide.

[69] It became necessary for the Company to explore for suitable land in the area. The Wairau affray took place on 17 July 1843 following the resumption of Company surveys in the Wairau. Arthur Wakefield and Henry Thompson were among those killed.

[70] The Chief Justice formally resigned the powers conferred on him in mid-July 1843. Shortly afterwards, Bishop Selwyn resigned as a "trustee" on 27 February 1844.

[71] Lord Stanley wrote to Governor FitzRoy on 18 April 1844 stating that the agreement of 1840 should be maintained. He said it seemed "quite plain … that the Government is to reserve for this purpose one-tenth of the Company's lands".

The Spain investigation

[72] Commissioner Spain carried out his investigations under the Land Claims Ordinance. The process he undertook and his reports are discussed in more detail in the judgment of Clifford J.[58] For present purposes I need only note the following.

[73] Commissioner Spain had earlier begun his inquiries with an investigation into the Company's purchases at Wellington. His initial report was dated 12 September 1843. As Clifford J noted, Spain drew an important distinction between: pā, cultivations and burial grounds; and other land.[59] As to the former, his conclusion was that these lands could not be disposed of without clear consent. However, as the Judge said, "Spain was more pragmatic when it came to other lands".[60] Commissioner Spain took the view that such lands were, at the time of Colonel Wakefield's dealing with Māori, of little value. His concern then was that the delays in settling the land issue had unreasonably raised expectations by Māori as to payment. Spain said this:

> But, supposing I were called upon to make a final report of purchase or no purchase, or to separate the sold from the unsold portions of land, in both cases innumerable difficulties would present themselves; and, if the report showed that the purchase, as a whole, was not good, I fear that the natives, with their notions of the increased value of their land by the establishment upon it of the town of Wellington, would never consent to alienate their lands at a fair and reasonable price. The consequence of this would be the total ruin of the settlement, which would fall with equal severity upon the European and the native population; as the land of the latter would, in that case, decrease as rapidly as it had previously risen in value, while its restoration, thus reduced in value, would form but a poor equivalent to them for the advantages they were daily deriving from the European community around them, and of which, under these circumstances, they would be deprived. Had I to separate the parts sold from the parts not sold, there would be the greatest difficulty in ascertaining correctly the boundaries and the quantities of the lands belonging to each division or family, or individual native claimant.

[74] Spain's answer was the fairly pragmatic one, that being to recommend that the Government should "carry into effect the arbitration" commenced by the Company's agent and pay Māori:

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58 At [127]–[147].
59 At [130].
60 At [130].

> … the amount of compensation that I may declare them entitled to receive, after which I could make my final report, recommending that the Crown grants should issue to the New Zealand Company, when the amount of compensation advanced by the Government to the natives had been refunded by that body.

[75] A form of arbitration ensued and, as Clifford J noted, concluded with an agreement that the arbitration would be resolved by the Company paying further compensation to Māori to secure the Crown grant but that pā, cultivations and burial grounds would be excluded from that grant.[61]

[76] Commissioner Spain then dealt with the Nelson area. In his final report of 31 March 1845, Spain first set out the evidence he had heard. His understanding was that conquest, without occupation, did not bestow "title" under tikanga Māori. He also relied on the Company surveys of land acquired and allocated including the town and other so-called "accommodation" sections by then allocated to Māori in the Nelson settlement itself and in the Motueka district.

[77] One Māori witness, Te Iti, had challenged the transaction reflected in the handing over of goods to Māori at Kaiteriteri and other places. Te Iti had not received anything of the amount that had been paid to Te Rauparaha and others. Spain said he was satisfied from all of 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 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.

[78] Spain was "inclined to conclude" that Māori had "not only been amply remunerated for their land by presents … but that they were aware at the time of the nature and satisfied with determination of the transaction to which they had been parties". However, Colonel Wakefield was willing to negotiate a further payment. Spain was content to accommodate that arrangement.

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[61] At [135].

[79] Commissioner Spain's award was as follows:

> … the Directors of the New Zealand Company … are entitled to a Crown Grant of 151,000 acres of land, situate, lying, and being in the several districts of the settlement of Nelson, … which said districts are divided 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 entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby awarded to the said Company; and also excepting any portions of land within any of the lands hereinbefore described, to which private claimants have already or may hereafter provide before the Commissioner of Land Claims a title prior to the purchase of the New Zealand Land Company.

[80] At the time of the hearings conducted by Commissioner Spain, deeds of release were entered into between the New Zealand Company and Māori from Motueka and Wakapuaka and with Te Ātiawa in August 1844. The deeds of release referred to final payment by the Company "for the relinquishment of all our claims to the land mentioned in the deed" at the relevant places, "excepting our pahs, cultivation, burial-places, and wahi rongoa".[62] The deeds of release concluded that the only lands remaining "to us are the places above-named". The Massacre Bay Māori initially refused to sign their deed of release. That was not signed until 23 May 1846.

The 1845 Crown grant and subsequent events

[81] The 1845 Crown grant recorded that Commissioner Spain had examined the New Zealand Company's claims to land and had reported that the Company was entitled to receive a grant of 151,000 acres near Nelson. The grant then provided that:

> … all that allotment or parcel of land and our said territory, said to contain 151,000 acres more or less, situate at or near Wakatu, or Waimea, or Moutere, or Motueka, or Nelson, of which the descriptions and boundaries are as follows:—
>
> … Saving and always excepted as follows:—

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[62] The translation of the deeds of release recorded that it was difficult to give a correct interpretation to the term "wahi rongoa" as there was nothing to indicate the meaning that it was intended to convey. Brent Parker suggested the term means medicine grounds.

> All the pas, or burial places, and grounds actually in cultivation by the Natives, situated within any of the above described lands hereby granted to the New Zealand Company as aforesaid; … and also excepting all the Native reserves marked upon the plan herein indorsed, and coloured green—the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby granted to the said Company; and also excepting any portions of land within any of the lands hereinbefore described, to which private claimants or any private claimant may have already proved or may hereafter prove that they, he, or any of them had a valid claim, prior to the purchase of the New Zealand Company.

[82] The New Zealand Company complained about the 1845 grant and requested that the Governor execute new grants. Of particular relevance, the Company objected to the amounts reserved for Māori. In response, the Secretary of State for the Colonies instructed Governor Grey to inquire into the complaints and to take measures to relieve the Company if he had that power.

[83] As Clifford J noted, Governor Grey subsequently agreed that reservations in the Wairau removed the need for reservations of rural sections in western Te Tau Ihu.[63] Brent Parker agreed that Governor Grey, by 1847, had decided to abandon the Tenths scheme.

[84] The Nelson settlement was reorganised in 1847. This seems to have reflected a lack of sales (only 530 of the allotments available to settlers) and the Company's view that the Nelson settlement could not work because of a lack of suitable land. As I discuss later, the end result was that the number of native reserve town sections was reduced by 47 sections.

[85] Over this time, the Company faced increasing financial difficulties. Arrangements between the Company and the Crown were renegotiated leading to the New Zealand Company Loans Act 1847 (Imp) 10 & 11 Vict c 112. Under that Act, the Company was to act as agent of the Crown in promoting colonisation and the Crown advanced a loan to the Company. At the end of a three year term the Company could give up its undertaking and then all Company land would revert to and become vested as demesne land of the Crown.

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63 At [157].

[86] I next need note the execution of the 1848 Crown grant to the Company by Governor Grey. This covered a much greater expanse of land than the 1845 grant. Clifford J explained that the "historical context" for the incorporation in this grant of land in Tasman and Golden Bays outside the 1845 boundaries without further payment to Māori reflected "the Crown's reassessment of its 'waste lands' policy".[64] The map attached as appendix A shows how much more land was acquired under the 1848 grant, reflecting the Wairau purchase of 1847 and the different regime operating under Governor Grey.[65]

[87] Under the 1848 grant the "pahs, burial places, and Native reserves … more particularly delineated and described upon the plans" were reserved. No reference was made to the reservation of a tenth.

[88] In this context I also refer to s 10 of the Crown Grants Amendment Act 1867 which provided that grants issued prior to 1866 such as the 1845 grant were "void *ab initio* to all intents and purposes".

[89] Finally, as Clifford J said, there is little "clear" evidence about arrangements and responsibilities for administering the reserves in Nelson from 1845–1848.[66] A Board of Management for the Nelson reserves was appointed, apparently on an ad hoc basis, in June 1848.[67] Two schools (one an English school and one for native adults) were established using rents from lands under the control of the Board.[68] The Board was replaced by the Commissioner of Crown Lands in Nelson in July 1853.

[90] In December 1856, three Commissioners of Native Reserves were appointed to the Nelson district under the Native Reserves Act. Administration of the reserves from 1856 onwards was undertaken under this 1856 Act and subsequent legislation.[69]

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64 At [161].
65 This map is taken from Wai 785, above n 31, at 352.
66 At [170].
67 At [171].
68 At [172].
69 See Clifford J's discussion at [173]–[178].

Summary of the key events

[91] To summarise:

(a) The concept of reserves was an important plank of the New Zealand Company's approach.

(b) The 1840 agreement between the Crown and the Company recognised that.

(c) The Land Claims Ordinance and the inquiry undertaken pursuant to it by Commissioner Spain reflected a pragmatic solution to resolve "problems on the ground" whilst recognising Māori interests.

(d) Deeds of release were entered into in 1844 and the 1845 Crown grant was prepared.

(e) But, by 1847, the Tenths/reserves scheme had been abandoned and the new regime was reflected in the 1848 Crown grant.

Does the Crown owe duties to the appellants as a fiduciary?

[92] At the hearing before us, the appellants relied on a fiduciary duty sui generis in nature but did not claim a duty owed at large. Rather, the appellants say that in this case there is an "express undertaking" that can be "assumed or implied from a particular instrument to represent or protect a specific interest".[70]

[93] The appellants' case is that fiduciary obligations arose out of the particular circumstances of the relationship that was created by the 1845 Crown grant. The circumstances Mr Galbraith QC for the appellants relies on are as follows:

(a) In issue were pre-existing customary rights that were effectively proprietary and only to be lost with free consent or by statute.

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[70] In the words of Harrison J in *Paki*, above n 28, at [116].

(b) The consequences of the 1845 grant meant extinguishment of legal title and that title vested in the Crown in relation to the cultivated lands and reserve lands identified in the grant.

(c) The protective context inherent in the applicable law as discussed in *The Queen (on the prosecution of CH McIntosh) v Symonds* and in *Attorney-General v Ngati Apa*,[71] in the Treaty, in the 1841 Land Claims Ordinance itself and in all of the dealings between the Colonial Office, Colonel Wakefield and the Governor.

(d) The interim period between 1841–1844 where a de facto trust was administered.

[94] The appellants' approach was developed further in submissions the parties were given leave to file after the hearing following the delivery by the Supreme Court of its judgment in *Paki v Attorney-General*.[72] The appellants in their further submissions relied on parts of that judgment indicating that the duty of loyalty that usually characterises fiduciary relationships need not prevent recognition of a sui generis duty owed by the Crown to Māori.[73] The appellants also pointed to discussion in the decision about the relevance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[74]

[95] The Crown response is that no fiduciary duty arises. The Crown's obligations, admittedly breached, were in the nature of public law obligations. The breaches of those obligations have been addressed via the Treaty settlement process. It is further submitted that there are no relevant interactions in the period in question in which the Crown made any promises. There is nothing in the text of the 1845 grant that creates such a duty either expressly or by implication. The Crown also says that the 1845 grant was not legally effective. It was not delivered as is required of a deed. More importantly, it was overtaken by the 1848 grant which encompassed

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71 *The Queen (on the prosecution of CH McIntosh) v Symonds* (1847) NZPCC 387 (SC); *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

72 *Paki v Attorney-General* [2014] NZSC 118.

73 At [150] and [155] per Elias CJ, [186] per McGrath J and [273] and [276] per William Young J.

74 At [158] per Elias CJ and [317] per Glazebrook J; *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

the land within the 1845 grant. Finally, the Crown Grants Amendment Act made it clear that the 1845 grant was void ab initio for all purposes.

Might a fiduciary duty arise?

[96] The question of whether a fiduciary duty in private law may arise in a case such as the present has been the subject of debate[75] but no final resolution.[76]

[97] I do not see a basis to discount the possibility of an enforceable fiduciary duty arising. I can explain my rationale by considering the arguments advanced against this possibility. First, it is said the Treaty relationship is in the nature of a fiduciary relationship but is only analogous to that relationship. Secondly, it is argued that the Crown's responsibilities are in the nature of a political not a legal relationship of trust. Finally, the respondent points to the availability of other remedies, particularly, via the Waitangi Tribunal.

[98] I do not consider these arguments prevent the recognition of a fiduciary duty. However, as I shall develop, I see that duty as one in which the traditional characteristics as outlined in *Chirnside v Fay* are present.[77] While the Treaty is part of the factual context for the recognition of such a duty, it is not the basis for the claim of one. Rather, the basis for the claim is that identified by Dickson J in *Guerin v The Queen* in which the Supreme Court of Canada found the Crown owed an enforceable duty as a fiduciary to an Indian Band.[78] The source of the duty was found in the nature of Indian title and the framework of a statutory scheme set up for disposing of Indian lands which placed upon the Crown an obligation to deal with the land in issue for the benefit of the Indians.[79]

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75 See for example *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [81].

76 *Paki*, above n 72, at [30] and [155]–[162] per Elias CJ, [182]–[197] per McGrath J, [280]–[288] per William Young J and [322] per Glazebrook J.

77 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [72]–[75] and [80].

78 *Guerin v The Queen* [1984] 2 SCR 335.

79 At 376; see also *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 at [12]–[14]; and see the summary of the jurisprudence at [18].

[99] In a passage on which the appellants place reliance, Dickson J described the situations when a fiduciary duty may arise other than in the standard categories of agent, trustee, partner and so on. Dickson J stated:[80]

> … where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

[100] Dickson J saw the existence of the fiduciary obligation as dependent on the nature of the process by which Indian land was surrendered to the Crown.

[101] The facts of *Guerin* involved an Indian Band which had surrendered surplus reserve lands to the Crown for a lease to a golf club. The terms the Crown ultimately obtained in the lease were much less favourable than the Band had approved at surrender meetings. The Court's conclusion was that the Crown could not ignore the oral terms that the Band had understood would be embodied in the lease.

[102] As to the nature of the Crown's responsibilities, the point is simply that the Crown can be involved in relationships or obligations that are legal in nature. It is well accepted that the Crown can be in a position of trust in a legally enforceable sense. AE Currie, in *Crown and Subject*, observes that "[o]lder" cases and commentary were to the effect that the King could not be a trustee.[81] However, referring to a case dating back to 1668, Currie notes that the "contrary opinion … was early maintained, and is now well settled".[82] Further, the authors of *Liability of*

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80 At 384. Alex Frame "The Fiduciary Duties of the Crown to Maori: Will the Canadian Remedy Travel?" (2005) 13 Waikato L Rev 70 at 74 suggests the "critical fact" for the Court in *Guerin* was that the Crown had "mandatorily 'interposed' itself with a statutory discretion to determine what was in the interests of the Indian band".

81 AE Currie *Crown and Subject* (Legal Publications, Wellington, 1953) at 88.

82 At 88 (footnotes omitted) citing *Pawlett v Attorney-General* (1668) Hard 465, 145 ER 550 (Exch) and Joseph Chitty *A Treatise on the Law of the Prerogatives of the Crown* (Joseph Butterworth and Son, London, 1820) at 378. George Stuart Robertson *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (Stevens and Sons, London, 1908) at 482–483 makes the same point. Professor Street noted in his 1953 text that the fact the Crown could be a trustee had been "generally recognised by writers for at least a hundred years": H Street *Governmental Liability: A comparative study* (Cambridge University Press, Cambridge, 1953) at 128.

the Crown note that a petition of right extended to breaches of trust.[83] There is no reason why the Crown should not also be able to take on legally enforceable fiduciary duties and obligations. There may be difficulties in meeting the prerequisites for such a claim but that is not to deny the potential for it exists.

[103] As to the availability of other remedies, I see that as militating against the refashioning of the requirements for a fiduciary duty and, in particular, against removal of the requirement for a duty of loyalty. But I do not see it as telling against the possibility of a duty altogether. It is at this point useful to develop how I would see the nature of the duty in some detail.

[104] The appellants rely, in this respect, on the observations of Elias CJ in *Paki*. The Chief Justice noted that although loyalty is "a usual characteristic of a fiduciary", a fiduciary duty "in the sense in which it has been recognised in respect of indigenous people in New Zealand and in Canada does not seem to depend on a relationship characterised by loyalty".[84] The Chief Justice referred in this context to the circumstances of "the Crown's monopsony on purchases and the explicit instructions given to successive governors".[85] Elias CJ also drew on the UNDRIP as support for this proposition.[86] This approach can be seen as reflecting the unique relationship between the Crown and Māori and, as well, the concept that a fiduciary is "a point on a spectrum of legal notions of responsibility, with 'unconscionablity' and 'good faith' as other points along the same spectrum".[87]

[105] In contrast, William Young J in *Paki* observed that:[88]

> The principles of equity which result in strict scrutiny of fiduciary/beneficiary transactions and, in particular, the requirement of retrospective justification, are a function of the duty of loyalty owed by fiduciaries.

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83 Peter W Hogg, Patrick J Monahan and Wade K Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at 369 citing Glanville L Williams *Crown Proceedings* (Stevens & Sons, London, 1948) at 15.

84 *Paki*, above n 72, at [155]; and see at [186] per McGrath J.

85 At [156] (footnote omitted).

86 At [158].

87 Lorne Sossin "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask L Rev 129 at 138, n 41, summarising Paul D Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) 1.

88 At [281].

[106] The Supreme Court of Canada has discussed the impact of the particular characteristics of governmental responsibilities and functions on the likelihood governments will owe fiduciary duties. In *Alberta v Elder Advocates of Alberta Society*, the Court said those "special" characteristics mean that governments will owe fiduciary duties "only in limited and special circumstances".[89] However, the "unique and historic nature of Crown-Aboriginal relations" was seen as a basis for treating the imposition of a fiduciary duty in cases involving such relations as being in a different class of case.[90]

[107] It is helpful to note McLachlin CJ's discussion for the Court in *Alberta v Elder Advocates* of the three conditions (in addition to the vulnerability arising from the relationship) for the imposition of a fiduciary duty. As to the first requirement, for an undertaking, the Chief Justice said this:

> [48] In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere. It may also be met where the relationship is akin to one where a fiduciary duty has been recognized on private actors. But a general obligation to the public or sectors of the public cannot meet the requirement of an undertaking.

[108] The second requirement, an exclusive duty, is met in respect of aboriginal lands by the special Crown responsibilities owed to the aboriginal section of the population and no other.[91] This approach is consistent with the observations of Elias CJ in *Paki*.

[109] As to the final requirement, a legal or substantial practical interest, McLachlin CJ said that examples of sufficient interests include property rights and interests akin to property rights.[92]

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89 *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [37].

90 At [40].

91 At [49]. Kathy Ring "The Crown as a Fiduciary" in Karen Horsman and Gareth Morley (eds) *Government Liability: Law and Practice* (looseleaf ed, Canada Law Book) at [10.90] notes the courts are "more variable" in their approach to the requirements of a fiduciary duty in aboriginal cases "particularly on matters such as … the effect of a finding of conflicting interests".

92 At [51].

[110] The approach of the Supreme Court of Canada in *Manitoba Métis* is noteworthy for the Court's rejection of a fiduciary duty and the characterisation of the duties arising as a solemn constitutional obligation to the Métis people aimed at reconciling their interests with Crown sovereignty, which engaged "the honour of the Crown".[93]

[111] To explain the factual context of that observation, I note that, after confederation, the first Government of Canada set in train a policy to bring the western territories within the boundaries of Canada and open them up to settlement. As part of a response to resistance from the French-speaking Roman Catholic Métis, Canada agreed to grant 1.4 million acres of land to the Métis children and to recognise existing landholdings. These moves were implemented by the Manitoba Act SC 1870 c 3, but various problems followed including the acquisition of the Métis children's yet-to-be-granted interests in the lands by speculators. In the decades after the 1880s, the position of the Métis deteriorated.

[112] The Court found the honour of the Crown required the Government to act with diligence in pursuit of the fulfilment of the promise.[94] On the findings of the trial Judge, the Crown did not do so and the obligation to the Métis remained largely unfulfilled. A declaration was granted that the Crown had failed to implement the relevant provision of the Manitoba Act as required by the honour of the Crown.

[113] In rejecting the claim there was a fiduciary duty, the Court said that the relationship between the Métis and the Crown, "viewed generally", is fiduciary in nature.[95] But, not all dealings between the parties in a fiduciary relationship are subject to fiduciary obligations. Relying on *Haida Nation v British Columbia (Minister of Forests)* and *Wewaykum Indian Band v Canada*, the Court said that "[i]n the Aboriginal context, a fiduciary duty may arise as a result of the 'Crown [assuming] discretionary control over specific Aboriginal interests'".[96] The Court

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93 *Manitoba Métis*, above n 18, at [9].
94 At [83].
95 At [48].
96 At [49]; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 at [18]; *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [83].

also said that a fiduciary duty may arise from an undertaking where the three conditions set out in *Alberta v Elder Advocates* are met.[97]

[114] The issue in the *Manitoba Métis* case was whether the Métis as a collective had a "specific or cognizable Aboriginal interest" in the land in issue.[98] The Court's conclusion was that they did not. The words of the statute did not establish pre-existing aboriginal title held by the Métis. The trial Judge had found as a matter of fact that the Métis had no communal aboriginal interest in the land. There was therefore no fiduciary duty. Nor was there any undertaking by the Crown. On this, the Court said that while the provision in the Manitoba Act showed an intention to benefit the Métis children:[99]

> … it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the [statutory] discretion … to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.

[115] Returning to the New Zealand context, if there was no other remedy available for those in the position of the current appellants, that omission may well support a more flexible approach to fiduciary duty and the requirement of a duty of loyalty. But, as the present case demonstrates, there are avenues of redress available and, moreover, they have borne fruit in the settlement that has been reached. In the circumstances, I treat the claim for fiduciary duty as one that needs to demonstrate loyalty as that term is traditionally understood.

[116] To be clear, my approach takes as its starting point the joint judgment of Blanchard and Tipping JJ in *Chirnside v Fay*.[100] Their Honours pointed to two situations in which a relationship will be described as fiduciary. The first is where the relationship is inherently fiduciary, for example, the relationship of solicitor and client or of trustee and beneficiary. The second situation depends "upon an examination of whether [the] particular aspects [of a relationship] justify it being so

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97 At [50].
98 At [51]–[53] citing *Guerin*, above n 78, at 384.
99 At [62].
100 *Chirnside v Fay*, above n 77, at [72]–[75] and [80].

classified".[101] There is "[n]o single formula or test",[102] but, as William Young J observed in *Paki*,[103] the following excerpt from the judgment of Millett LJ in *Bristol and West Building Society v Mothew* is relevant:[104]

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.

[117] In order to comprise a fiduciary duty of this second kind, the undertaking need not be express but can be implicit from the circumstances.[105]

[118] Accordingly, I proceed on the basis a fiduciary duty may arise in a case such as the present. That duty is not one based on the Treaty but, rather, on the traditional fiduciary duty that may arise in circumstances where there is a duty of loyalty and an undertaking assumed in or implied from the instruments and circumstances relied on by claimants to protect their specific interests.[106]

[119] I acknowledge this, more limited, approach would mean there will be difficulties in establishing the duty exists. As in this case, there will also be difficulties in terms of standing and of limitation. Those sorts of concerns lay behind the suggestion made by this Court in *Paki v Attorney-General* that the "most obvious candidate" for jurisprudential development in the area of Crown-Māori relations "would lie in the area of relational duties of good faith, at least in particular transactional contexts".[107]

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101 At [75].
102 At [75].
103 *Paki*, above n 72, at [269].
104 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18.
105 *Chirnside v Fay*, above n 77, at [85] per Blanchard and Tipping JJ.
106 Lionel Smith "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608 at 609–612 discusses the requirement of loyalty; and see Frame, above n 80, at 76–77. Paul D Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977) at [467] states that a fiduciary is someone who undertakes to act "for or on behalf of another in some particular matter or matters"; the undertaking may be of "a general character" or it may be "specific and limited": at [467]. In *Wewaykum*, above n 96, at [81], Binnie J for the Court made the point that "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests"; see also at [83] and [86]; and see David E Elliott "Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown" (2003) 29 Queen's LJ 1 at 27; Frame, above n 80, at 79; and EW Thomas "The Treaty of Waitangi" [2009] NZLJ 277 at 279.
107 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [106].

[120] The appellants' claim included a cause of action based on these observations in *Paki*. That claim was rejected by Clifford J on the basis such a duty did not presently exist in New Zealand law and could not be applied retrospectively.[108] However, at the hearing before us, the appellants did not wish to advance their claim on this basis. In their submissions filed after delivery of the judgment of the Supreme Court in *Paki*, the appellants referred to the "indication" in *Paki* that there is scope for the Crown to owe relational duties of good faith.[109] It may well be that a relational duty of good faith is an avenue for doctrinal development in this area to fill any gaps in the Waitangi Tribunal and Treaty settlement processes. As Hammond J observed in this Court in *Paki*, one of the concerns is that the jurisprudence in this area be "that of New Zealand: the solution lies within this country".[110] However, as we did not hear argument on this aspect, I say no more about the prospect.

Application of these principles to the present case

[121] I turn then to consider whether a fiduciary duty exists here. The appellants point to the various dealings between the Government and the New Zealand Company culminating in the 1840 agreement and the Crown's subsequent actions in enacting the Land Claims Ordinance in 1841 as showing that the Crown was cognisant of and agreed to ensure in the future that a tenth would be reserved. That process culminated in the 1845 grant. In other words, the Crown by this process took on a specific obligation to deal with the property in a way that protected Māori interests.

[122] On this approach, the Crown was not just balancing Māori interests as against a range of other interests. That is because, at a point in time, the Crown decided to recognise the clear interests of Māori in their lands and occupation sites. Further, the Crown always purported to accept that obligation. Hence, the New Zealand Company is reminded of the need to comply with the 1840 agreement and the terms of the 1845 grant reflect the arrangement. Even if, in theory, there was a balancing exercise, the Crown saw this obligation as one it had to deliver on.

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108 *Wakatū*, above n 3, at [266].
109 Citing *Paki*, above n 72, at [187] per McGrath J and [257] per William Young J.
110 At [116].

[123] However, on an examination of the relevant instruments, I reject this argument. I consider the arrangements made reflected agreements of a political nature which were to be realised in legislation. I also consider that, over the relevant period, the Crown was balancing the various interests so the duty of loyalty was not established.

[124] The initial instructions from the New Zealand Company to Colonel William Wakefield in 1839 made it plain the concept of reserves had emerged from an intended legislative enactment extending to every purchase of land from natives, and stated as follows:

> … you will take care to mention in every *booka-booka*, or contract for land, that a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe.

[125] The key provisions of the 1840 agreement with the Colonial Office for these purposes are cls 12 and 13. Clause 12 recorded that the Government denied any liability for any contracts made by the Company to sell land to the settlers, but that it was understood the Company would meet its obligations under the contracts from the lands it received in the Crown grants.

[126] Clause 13 reads in full as follows:

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government, in fulfilment of, and according to the tenor of, such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives.

[127] On its face, the agreement does not create any new or specific obligations but rather refers to existing arrangements. Further, at this point in time, Mr Pennington was still to undertake his calculation to determine the Company's expenditure and therefore entitlement in terms of a Crown grant.

[128] Next, it is necessary to consider the 1841 Land Claims Ordinance and the role of the Spain investigation. Clifford J put it accurately when he said that under

the processes of the Land Claims Ordinance, the Crown was involved in a balancing of interests; those of Māori as against those who argued they had "equitably" acquired land from Māori, and the population more generally.[111] Therefore, Clifford J said:[112]

> … I do not see how it is possible to recognise (or impose) the duty that the Crown, when exercising its pre-emptive right to acquire customary land, had to act with utmost loyalty to Māori, given that the Crown was involved in an exercise which fundamentally involved the balancing of competing interests.

[129] As to Commissioner Spain, the Judge aptly observed that he, too, was "mediating competing interests".[113]

[130] As I have noted, Spain was inclined to conclude Māori had been amply remunerated and were aware of the transaction to which they were parties, but he accommodated Colonel Wakefield's willingness to negotiate a further payment. Clifford J cites this part of his report:[114]

> 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 [the Chief Protector of the Aborigines], 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 respectfully executed the necessary receipts in my presence.

[131] The letter of 26 July 1842 from the Colonial Secretary to the Chief Justice, which I have set out above, also anticipated legislative enactment of the reserves scheme. The appellants rely on the reference in the letter to the need for directions as to the disposal of funds from the reserves. That does not, however, detract from the notion legislation was envisaged to realise the trust. Rather, provision was being made pending creation of the statutory trusts.[115]

[132] Later, on 6 September 1842, the Bishop of New Zealand wrote to Mr Thompson noting that the Governor proposed, when the reserves had become

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111 At [301].
112 At [301].
113 At [302].
114 At [145].
115 The point made by Clifford J at [122(c)].

vested in the Crown, "to submit to the Legislative Council a Bill for vesting them in three trustees". Up until this point, it seems clear the concept of a reserve was understood but its exact nature and implementation was not clear.

[133] Even by August 1843, a notation by the Attorney-General, William Swainson, following the resignation of the Chief Justice as a trustee, suggests any trust was not in effect. That notation is dated 5 August 1843 and refers to the fact that it is "only a proposed trust as yet", and that it had not been "legally formed". Accordingly, Swainson said that the other trustees were to be informed that a successor to the Chief Justice was at that time unnecessary.

[134] The Legislative Council in fact passed the Native Trust Ordinance 1844 7 Vict 9 appointing a board of trustees for "the Management of Property to be set apart for the Education and Advancement of the Native Race". This Ordinance did not come into force because it was not confirmed in the *New Zealand Gazette* as required by its terms.[116] Moreover, this Ordinance would have applied to "the Native Race" generally, not to Māori in a particular location.

[135] The 1845 grant itself does not contain any undertaking but, rather, simply omits the reserves from the grant. Nor does it alter the Crown's intentions in relation to the reserves, namely, to enact appropriate legislation.

[136] I should at this point address the effect and validity of the 1845 Crown grant. The respondent contends that the grant was never delivered and therefore, as a deed, never took effect.

[137] The respondent says the 1845 grant had to meet the usual, formal, requirements of being sealed and delivered before it could have any legal force.[117]

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116 Clause 28.

117 *Goddard's Case* (1584) 2 Co Rep 4b at 5a; *Longman v Viscount Chelsea* (1989) 58 P & CR 189 (CA) at 195; Edmond Gibson Atherley *The Touchstone of Common Assurances being a Plain and Familiar Treatise on Conveyancing by William Sheppard* (8th ed, Samuel Brooke, London, 1826) [*Sheppard's Touchstone*] at 50; Robert JA Morrison and Hugh J Goolden *A Treatise on Deeds by Robert F Norton* (2nd ed, Sweet & Maxwell, London, 1928) [*Norton on Deeds*] at 3; *Halsbury's Laws of England* (5th ed, 2012, online ed) vol 32 Deeds and Other Instruments at [201]. There was some discussion at the hearing before us about whether a signature was also formally required. Mr Goddard QC for the respondent acknowledged that this was not necessarily essential; see *Norton on Deeds* at 7.

The respondent says it appears the Crown intended to be bound only once the deed had been taken out of Crown custody and, after the grant was not collected within three months, upon payment of the late fee.[118] Neither of those prerequisites was met. Governor FitzRoy's despatch to Lord Stanley of 26 August 1845 advised that the principal agent of the New Zealand Company had "declined to take up the deeds of grant for those portions of the New Zealand Company's purchases of land" for Nelson and Port Nicholson concerning which "Crown grants have been prepared".

[138] I consider there is merit in the respondent's argument on this point.[119] The appellants rely on *Re Bradley Brothers' Application* for the proposition that delivery of the 1845 grant was not required for it to have legal effect.[120] This Court held that the grants became operative from the date the Governor's signature was affixed even though the fees for their collection remained unpaid for a number of years. However, that decision turned on the applicable statutory context.[121] In the absence in this present case of a similar statutory provision, it appears the requirement of delivery was in place.[122]

[139] However, I do not consider it is necessary to finally resolve this issue. That is because I accept the submission for the appellants that even if not validly delivered, the grant could still crystallise the arrangements or, to put it another way, comprise the necessary promise or undertaking to support a fiduciary duty.[123]

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118 The terminology of the *Gazette* notice of 2 August 1845 states that the relevant deeds of grant were "now lying at this Office ready for delivery", and notification is then given of the potential for a late fee to apply. The notice also states that grants may be "delivered" to a grantee's agent "where it is impossible for the Grantee to attend in person to receive his Deed". Clause 1 of the Crown Grants Ordinance 1845 8 Vict 3 also referred to Crown grants in the custody of the Colonial Secretary as being "ready for delivery". And, where three months passes, it stated the late fee must be paid "before the delivery of any such grant".

119 I accept the formal requirements for effecting a deed apply to Crown grants. That appears to be the basis on which this Court proceeded in *Re Bradley Brothers' Application* [1920] NZLR 339 (CA) at 352–353. See also *Norton on Deeds*, above n 117, at 133.

120 *Re Bradley Brothers' Application*, above n 119.

121 At 352–353; s 5 of the Crown Grants Act 1866 deemed the date of signature by the Governor as the date of issue of the grant.

122 Crown Grants Ordinance, cl 1; see also the Conveyancing Ordinance 1842 5 Vict 10, cl 3; and *Re Goile, ex parte Steelbuild Agencies Ltd* [1963] NZLR 672 (CA) at 682.

123 Clifford J was of the same view in relation to the claim for an express trust: at [243].

[140] There is, though, a further difficulty and that arises because of the 1848 grant and the provision in the 1867 Crown Grants Amendment Act that the 1845 grant is void ab initio for all purposes.

[141] The 1848 Crown grant stated that the New Zealand Company was entitled to receive the specified land. There was an exception for "all the pahs, burial places, and Native reserves" within the block of land granted to the Company. These areas were defined on attached plans. As the respondent submits, these areas were included within the grant and became demesne lands of the Crown. Lands not excepted or reserved were intended to go to the Company. Accordingly, customary title interests not consistent with the freehold interest conferred by the grant were extinguished from that point.

[142] Section 10 of the Crown Grants Amendment Act provided:[124]

> Be it enacted and it is hereby declared and provided that every grant purporting to have been cancelled under the authority of any Governor of New Zealand and every grant whether formally cancelled or not of the land comprised in which a new grant has been duly issued by any such Governor and recorded in the proper office for the record of the same (but in both cases prior to the passing of the said Act) *shall be deemed to be and to have been absolutely void ab initio to all intents and purposes whatever*. And no grant issued in lieu of such previous grant shall be void or voidable or liable to be set aside on the ground of the prior issue or existence of such previous grant in any court or by any process of law whatever.

[143] I do not see this as an insurmountable obstacle to a fiduciary duty if the appellants had shown there was a duty as at 1845. As noted, I would not necessarily see the existence of any duty as turning on the precise legal validity of the grant. However, for the reasons I have explained, I do not consider the various instruments relied on up to that point comprise the necessary undertaking either on their face or because of the context, that is, the intention to enact legislation. Further, as I have discussed, the loyalty requirement is not met.

[144] Both parties agree that from the enactment of the Native Reserves Act in 1856, the appellants could no longer have a fiduciary claim.

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[124] Emphasis added.

[145] I agree with Clifford J that the strongest argument for the appellants relates to the period from 1845 to 1856. By then some of the reserves were identified and there were varying steps taken to try to protect the reserves. In other words, arguably by then the Crown had taken on board obligations owed solely to Māori. However, the difficulty is that even over this period there is no clear-cut position. Clifford J referred to the difficulty of reconciling the factual realities, that is, the "very imperfect and incomplete arrangements" relating to reserves, with the concept of there being in existence a fiduciary duty owed by the Crown to Māori with respect to the administration of the reserves.[125] That was because:[126]

> … the whole process of administering native reserves did, in the situation that existed at that time, in fact involve the consideration of the competing interests of the settlers of the Nelson area.

[146] Matters were still in a state of flux over this period and the Government was looking to put a structure in place in the future. As I have indicated, the conception was that this structure would be the subject of legislation as, indeed, it was in 1856. Against this state of flux, the appellants have not shown that they were owed a fiduciary duty.

Express trust

[147] In order to create a valid express trust, the three "certainties" must be satisfied, namely, certainty of intention, subject matter and objects. There is no dispute about the applicable principles.[127] I turn therefore to consider each of the three certainties. I do so briefly because, as I have said, the focus of the argument before us was on fiduciary duty.

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125 At [308].

126 At [308].

127 Andrew S Butler "Creation of an Express Trust" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 69 summarises the principles noting, first, that no particular form or words are required: at [4.2.2]. Secondly, the requirement for certainty of subject matter means there must be certainty "as to what property is to be subject to the trust obligation; and certainty as to the extent of the beneficial interest of each beneficiary": at [4.2.3]. Certainty of objects requires "clearly identifiable beneficiaries who are entitled to the trust property": at [4.2.4(1)].

Certainty of intention

[148] Clifford J concluded that the terms of the 1845 Crown grant did not provide certainty of intention. His Honour rejected the argument that by cl 13 of the 1840 agreement the Crown stepped into the shoes of the Company and assumed a private law obligation. Rather, the 1840 agreement was a political compact.[128]

[149] The appellants challenge the notion of a "political" or higher trust. They further say that the Crown did not operate on the basis it held the land that was to be set aside as reserves absolutely, reflecting a disjunct between the legal and the beneficial interests. The latter should be recognised.

[150] The respondent says the Crown's responsibilities are obligations under the Treaty of Waitangi and matters of public law or governmental obligation. Mr Goddard QC for the respondent also referred to *Regina v Fitzherbert* in which this Court rejected a claim that reserves originating in the New Zealand Company's plans for its settlements were subsequently held on trust.[129] The Court observed that the assent of Her Majesty would be required to bring a trust for purposes other than those referred to in the Royal Charter 1840 or in the Royal Instructions 1840 (cl 43) into existence.[130] Mr Goddard says that, although obiter, the case supports the proposition that it is necessary for someone in authority to declare a trust and there was, in fact, no one in New Zealand with the authority to do so.

[151] As Clifford J and the commentators referred to above noted, the Crown can act as trustee if it chooses to do so.[131] Nonetheless, there has been something of a

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128 At [215]. Clifford J noted that both Professor David Williams, who gave evidence for the appellants, and Dr Ashley Gould, one of the respondent's witnesses, agreed that the 1840 agreement "was essentially a political compact": at [101].

129 *Regina v Fitzherbert* (1872) 2 NZCAR 143.

130 At 168–169.

131 *Wakatū*, above n 3, at [214]; see above at [102], nn 81–83.

reluctance to find the Crown is a trustee. The high water mark case of this position is *Tito v Waddell (No 2)*.[132] In that case, Megarry VC stated:[133]

> When it is alleged that the Crown is a trustee, an element which is of especial importance consists of the governmental powers and obligations of the Crown; for these readily provide an explanation which is an alternative to a trust. If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that the Crown holds on a true trust for those others. Another explanation can be that, without holding the property on a true trust, the Crown is nevertheless administering that property in the exercise of the Crown's governmental functions. This latter possible explanation, which does not exist in the case of an ordinary individual, makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust.

[152] The appellants submit *Tito v Waddell* has to be seen in the context of its rather unusual facts (licences granted to a British company to occupy and mine phosphate on a Pacific island inhabited by the Banabans) and is, in any event, anachronistic. For these reasons, the appellants observe, *Tito v Waddell* was not followed in Canada.[134]

[153] The approach in *Tito v Waddell* has been criticised.[135] However, whatever the position in relation to that case, as I read the judgment under appeal, *Tito v Waddell* has not been determinative. Rather, the Judge has made a factual finding based on his assessment of the various instruments and the context. Essentially for the reasons given in my discussion of the fiduciary duty argument, I agree with the conclusion reached by the Judge on the facts. The requisite certainty of intention was absent.

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132 *Tito v Waddell (No 2)* [1977] Ch 106 (Ch); see also *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619 (HL) at 630; *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56 (PC) at 72–73; *Wellington Harness Racing Club Inc v Hutt City Council* [2004] 1 NZLR 82 (HC) at [58]–[63]; and *New Plymouth District Council v Waitara Leaseholders Assoc Inc* [2007] NZCA 80 at [40]–[45].

133 At 211. Elliot, above n 106, at 9, n 24 suggests that the Crown's "unique" responsibilities to the public at large, "including the task of managing the public's property for the common good", may be the basis of the approach in *Tito v Waddell*.

134 *Guerin*, above n 78, at 378–379 and 385; and *Wewaykum*, above n 96, at [74]–[75].

135 See for example *Paki*, above n 72, at [42], n 76 per Elias CJ who states: "Political trust theory denied remedies at law to native people for protection of their property following assumption of sovereignty by a colonial power and made their observance a matter for the sovereign power." See also Michael Chapman "*Tito v Waddell (No 2)*: A Colonial Relic?" [2013] LAWASIA J 91.

Certainty of subject matter

[154] As to certainty of subject matter, the Judge held there was sufficient certainty in respect of the Tenths Reserves specifically delineated in the Crown grants of 1845 and 1848.[136] However, no certainty of subject matter was attained in relation to the one tenth of the rural 150 acre sections that were not completely surveyed, and were not identified and allocated. For the same reason, there could be no subject matter certainty in relation to what the parties referred to as the "Uplift", as this was "an area of land that was never defined".[137] The "Uplift" arose out of what the appellants said was an increase in size of the settlement of Nelson which should have led to a correlative increase in the size of the Tenths.

[155] The appellants appeal against Clifford J's finding that there was no certainty of subject matter in relation to the rural sections. They say that identifiable (in contrast to identified) trust property can be sufficiently certain trust subject matter. The appellants point out that the rural section entitlement was for a defined acreage (10,000 acres) within defined boundaries (the 151,000 acre area defined on the plan annexed to the 1845 Crown grant). In addition, there was a mechanism for selecting the property (the Company's ballot scheme).

[156] The Crown response is that if the property has not been ascertained, a trust does not come into existence until it is ascertained. There may be a contractual obligation to undertake the steps to establish the trust but until then, there is no trust and the remedy is a contractual one, not breach of trust.

[157] The appellants rely on *Hunter v Moss* as authority for the proposition there is sufficient certainty of subject matter.[138] However, assuming for these purposes that it is good law in New Zealand,[139] the case is distinguishable. *Hunter v Moss* involved shares. The defendant challenged the finding that a trust applied to 50 of his 950 shares on the basis there was not certainty of subject matter. The trust related to five per cent of a company's issued share capital. However, all of the

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136 At [246].
137 At [246].
138 *Hunter v Moss* [1994] 1 WLR 452 (CA).
139 It has not been accepted in Australia: Butler, above n 127, at [4.2.3(1)(c)] refers to *Re Harvard Securities Ltd (in liq); Holland v Newbury* [1997] 2 BCLC 369 (Ch).

shares were identical in one class and the defendant held more than 50 shares. In these circumstances, it is perhaps not surprising that the Court concluded it was not necessary to identify any particular 50 shares.

[158] The present case, involving interests in land, is in a different category. The reasoning adopted by the Privy Council in *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* is applicable here.[140] That case arose out of dealings with gold bullion. The purchasers mistakenly thought they were buying actual gold bullion and that Goldcorp Exchange Ltd was storing it. There was, however, one mass of gold and Goldcorp had sold more than existed. Ownership did not attach to any particular bullion, which could of course vary from one item to another. In the circumstances there was no trust.

[159] The Privy Council endorsed the reasoning of Oliver J in *Re London Wine Co (Shippers) Ltd*.[141] In that case, Oliver J gave as an example a farmer who declared himself as trustee of two sheep, without identifying them. The Judge said it was "immaterial" in terms of certainty of subject matter that at the time the farmer had a flock of sheep out of which the interest could be satisfied.[142] The same principle applies here. One section of land is distinguishable from another and here, the rural sections have simply not been identified. Accordingly, I agree with Clifford J that there was no certainty of subject matter in relation to the rural sections.

[160] In its memorandum supporting the judgment on other grounds, the respondent says that the requirement for certainty was not met in relation to the land identified in the 1845 and/or 1848 Crown grant.

[161] This was not a point developed in any detail in the oral argument. In the written submissions, the Crown submits that the suburban sections were affected by certain land exchanges in 1844. It is not apparent to me that the sections were not identified or identifiable. I see no reason to take a different view on this aspect from that of the Judge.

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140 *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 (PC).
141 At 401; *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 (Ch).
142 At 137.

Certainty of objects

[162] As to certainty of objects, Clifford J said that as the case was put, the trust for endowment purposes "was for the benefit of those people by or on whose behalf land had been sold, and their descendents".[143] On this basis, the class of persons said to be the beneficiaries of that trust would be identifiable. By 1842, the instructions sent by the Colonial Secretary to the Chief Justice and others, Clifford J said, "reasonably clearly expressed the type of benefits which Māori had … anticipated might accrue to them from the arrival of the colonists".[144] The benefits were also clearly expressed in the 1856 legislation and in cl 5 of the Native Trust Ordinance of 1844, although as noted the latter never came into effect.

[163] The Crown in its notice supporting the judgment on other grounds states that the requirements for certainty of objects was not met. This was a point also not developed in any detail in the oral argument. The written submissions for the respondent pose various questions such as "who are the beneficiaries?" and "[w]hat are their entitlements?". Again, I see no reason to depart from the Judge's approach.

[164] I note at this point that my overall conclusion on the trust claim means I do not need to deal with the respondent's submission that a discretionary trust of the type contended for would be inconsistent with the rule against perpetuities.

Resulting trust

[165] The appellants argued in the High Court that if the claimed endowment trust in perpetuity failed, a resulting trust would arise in favour of the original Māori owners. This was based on the general principle that where an express trust fails for uncertainty, the property results back to the settlor or transferor.[145]

[166] Clifford J disposed of this argument shortly.[146] He said it was not possible to conceptualise the purported transactions as transfers either by Māori to the

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143 At [247].
144 At [247].
145 Jessica Palmer "Resulting Trusts" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 307 at [12.4.1].
146 At [252]–[254].

New Zealand Company or by the Company to the Crown, whether on the basis the property would be held on trust or otherwise. The Judge gave a number of reasons for this, including the fact that the law "did not recognise or allow a transfer by Māori" to the Company.[147] So there could be no "resulting" of that property back to Māori. Further, Clifford J did not see how the resulting trust doctrine could apply given his finding that the Crown did not intend to create an express trust.

[167] In their written submissions, the appellants contend the focus should be on the intention of the transferor, Māori. They say the transfers to the New Zealand Company were in fact transfers and the 1845 Crown grant merely recognised the validity of these for conveyancing purposes.

[168] This aspect was not pursued by the appellants in oral argument. I need only record I agree, for the reasons given by Clifford J, that no resulting trust can arise in this case. There was no "transfer" of the land from Māori to the Company or by the Company to the Crown. Rather, the Crown held the land (subject to customary title) and vested title in the Company excepting the Tenths.

Constructive trust

[169] In their written submissions, the appellants maintain the argument that, given the clear record of the Crown's intentions, the Crown's assertion of unencumbered title affects its honour, or conscience. Clifford J rejected this argument essentially on the basis it required what were political arrangements to be characterised in private law terms.[148] Moreover, the Judge considered that acts and omissions of concern to the appellants were "best … analysed by reference to [the] claim of breach of fiduciary duty".[149]

[170] I agree with Clifford J and, in any event, the appellants in oral argument focused on the claim of breach of fiduciary duty.

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147 At [254].
148 At [260].
149 At [261].

Breaches

[171] Because of his findings on standing, Clifford J did not deal with the questions of breaches or of limitation or laches. The approach we should take to the question of breaches was the subject of some discussion at the hearing. The appellants' preference was that if we were satisfied there were some real issues of breach that were not dealt with in the High Court we should make a declaration but send the matter back to the High Court for consideration of specific breaches. The respondent's position was that both duty and breach were in issue and had been in the High Court and so we should deal with the question of breaches. However, Mr Goddard accepted that if the Court formed the view that no private law duty was owed by the Crown, the Court "could perhaps leave the question of breach unresolved" as did the High Court.

[172] Reflecting the appellants' position on this topic, it is fair to say that their submissions did not canvass the question of breaches in any detail. Given the limited argument and the, understandable, lack of any findings as to breaches in the High Court I do not consider this Court is at all well placed to deal with this, intensely factual, question. Further, given the conclusion that there was no undertaking or promise of the sort necessary to found a fiduciary duty or an express trust, it is very difficult to address the question of breach. That would require, for example, clarity as to the terms of any trust.

[173] On the other hand, as the respondent submits, this is not a case that has proceeded on the basis of a split trial. There is a potential for something of a procedural muddle if we do not address the question of breach. In these circumstances, the best that can be done is to indicate which if any of the Judge's factual findings provide a basis to establish breaches of fiduciary duty as pleaded, on the assumption that a duty crystallised in 1845.

[174] I focus on three aspects.[150] The first aspect is the allegation that the "Crown breached its fiduciary obligations … by failing to ensure that one-tenth of the NZ Company's Nelson Settlement, together with Occupation Reserves, were reserved for the Tenths' Owners". The particulars of this breach include the allegation that the Crown did not implement the terms of the Spain award, allocating only 3,953 acres, creating a shortfall. The second aspect I refer to is the allegation that the Crown failed "to ensure that pā, burial grounds and cultivations, including Te Maatu [the Big Wood], were separately reserved as Occupation Reserves". Associated with this is the claim that the Crown reduced the reserves by removing sections from the estate, for example by redesignating them as occupation reserves without replacing them. Finally, I refer to the allegation that:

> The Nelson Settlement ended up amounting to 172,000 acres. On the principle that the Tenths' Owners were entitled to reserves amounting to one-tenth of the land acquired by the NZ Company for the Nelson Settlement, the Tenths Reserves entitlement should have increased proportionately and included the Uplift … .

[175] The relevant aspects of Clifford J's judgment refer to what the Judge says emerges from the Spain report and the 1845 grant. The Judge says that those documents "fairly clearly delineate" the land in the Nelson settlement area that was not to be granted to the Company.[151] The Judge's interpretation of the documents was that the delineation was, first, to exclude "[a]ll the pas, burial places, and grounds actually in cultivation".[152] The Judge said:[153]

> Such areas were to be excluded from the land granted to the Company, and moreover were therefore not to constitute part of the "reserved" lands. … Neither, therefore, could they constitute a reservation from the land thus acquired to be granted to the Company. Those reserved lands were not then or ever subsequently separately surveyed as such which gave rise to much subsequent uncertainty and difficulty.

[176] The respondent says there is an inconsistency between what Clifford J says in this excerpt about the treatment of pā, burial grounds and cultivations and an earlier

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150 The appellants provided a one page summary of the alleged breaches and that is summarised in the table set out as appendix B to this judgment. Their summary included a reference to two matters occurring after 1856. It is agreed, as I have noted, that no claim for fiduciary duty can arise after 1856.

151 At [151].

152 At [151(a)].

153 At [151(a)].

observation by the Judge about the Spain award. In the earlier passage, Clifford J notes that Spain appeared "to sanction lands under cultivation in the Big Wood … being provided for as Tenths Reserves".[154] However, the Judge went on to explain that it may be Spain had concluded the land was freely sold and so it was appropriate that it be reserved. There is not necessarily any inconsistency.

[177] Secondly, the Judge said that also excepted from the grant were the reserves "coloured green", the "entire quantity of those reserves totalling one-tenth of the 151,000 acres first identified".[155]

[178] Whether the reserves were of one tenth of the New Zealand Company's total land, leaving the Company with nine tenths, or whether it referred to a quantity of land equal to one tenth of the Company's land in reserve for Māori on top of the Company's land, is disputed. The Company's 1841 prospectus, as I have noted above,[156] on its face envisages reserves being additional to the Company's land. Hence, the Waitangi Tribunal says of the prospectus that, by the time it was issued, the Tenths approach had been "reduced" to elevenths.[157] Further, the selection of sections in 1842 proceeded on the basis that the reserves were additional to the Company's land. That is apparent from the fact there were 100 section allotments for Māori reserves on top of the 1,000 allotments for settlers.[158]

[179] By contrast, the 1845 grant itself supports the "full one tenth" concept. The evidence from Professor David Williams and Brent Parker in the High Court was to the effect that Spain's award and the 1845 Crown grant reflected one tenth being reserved from the Company's land allocation. The Waitangi Tribunal's report is to the same effect.[159] There is some support for that in the wording of the grant and in the attached plans.

[180] However, as the evidence before the High Court indicated, the demarcation of 151,000 acres on the map is only approximate as it included land that had not

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154 At [147], n 32.
155 At [151(b)].
156 At [60].
157 Wai 785, above n 6, at 794.
158 See *Wakatū*, above n 3, at [112] and [117].
159 At 799.

already been surveyed. The maps do not clearly show an exact tenth or an eleventh. Meanwhile, the Company's stance remained consistent. Hence, as I have said earlier, the Company objected to the 1845 grant because it allocated one tenth from its land as reserves instead of additional land equal to one tenth (the one eleventh).

[181] Finally, the 1847–1848 reduction of Nelson town appears to have occurred on the "one eleventh" basis. Clifford J records that when the town allotments were reduced from 1,000 to 530 sections, the reserves were proportionally reduced from 100 to 53 sections.[160]

[182] The clearest way to see that the proportionate reduction in reserves occurred in relation to 100 extra sections on top of the 1,000 sections is to note that the reduction is occasioned by the fact that only 530 sections had sold to settlers. That is apparent from the evidence of Professor Williams and Brent Parker.[161]

[183] Against this background, Clifford J concluded:

> [152] I therefore do not accept the Crown's argument that, properly interpreted, Spain's recommendation and the 1845 Grant provided for what in fact happened, namely that significant occupied and cultivated areas were not entirely excluded from the land granted but rather were included within the Tenths Reserves.
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> [153] Thirdly, the areas coloured green did not, as the wording of the second exception suggests, total 15,100 acres, but rather the 5,100 acres then already comprised by the town (Nelson) and accommodation (Moutere and Motueka) reserve sections shown on the relevant maps. So, at that point, the 5,100 acres of the Nelson Tenths Reserves are – at least in terms of relevant survey maps – clearly delineated. The balance of 10,000 acres was never, in fact, reserved at all … .

[184] Clifford J then went on to explain why the balance of 10,000 acres was not ever reserved. Governor Grey was asked to enquire into the Company's concerns over the 1845 grant and to do what could be done to provide relief to the Company. The outcome was the conclusion that the reservations in the Wairau removed the need for reservations of rural sections in western Te Tau Ihu. The Tenths scheme was abandoned by 1847.

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160 At [158].

161 Again, this also seems to be the understanding of the Waitangi Tribunal although that is not conclusive: at 800.

[185] The Nelson settlement was reorganised that year and into 1848. It was at this point that the number of settler allotments was reduced from 1,000 to 530. Clifford J said that this reorganisation was "best understood as a rationalisation of the allocation of Nelson town sections to reflect the numbers actually sold to settlers".[162] The Judge continued:[163]

> It was proposed by the settlers, and agreed by the Government, that the number of one acre town sections in the Nelson Tenths Reserves was to be reduced proportionally, from 100 to 53. That is, the allocation of town sections for the Nelson Tenths Reserves was reduced to one-tenth of the allotments actually on-sold to settlers, as opposed to one-tenth of the land granted to the New Zealand Company. … [However,] the "reduction" was but a temporary phase in the development of Nelson, whilst the loss to the Nelson Tenths Reserves was permanent. There was no equivalent adjustment to the suburban, or accommodation, sections that had been allocated as reserves.

[186] It was over this period that the financial difficulties for the New Zealand Company increased, as did pressure for land from settlers. In 1847 the Company and the Crown renegotiated their arrangements. This led to the enactment by the Imperial Parliament of the New Zealand Company Loans Act I have referred to above. The Company was thereby empowered to act as agent of the Crown in promoting the colonisation of New Zealand and the Crown was to advance a loan to the Company.

[187] The 1848 Crown grant followed including, as I have noted, additional land in Tasman and Golden Bays which had been outside the boundaries of the 1845 Crown grant, but absent any further payment being made to Māori.

[188] The Company was, by 1850, bankrupt and in July 1850 the Crown was advised by the Company that it had discontinued its operations. The Crown took control of the Company's assets and took on responsibilities for the Company's obligations. In 1851 the balance of the Company land that was the subject of the 1848 Crown grant (land that had not been sold or contracted to be sold or otherwise disposed of) reverted to and became vested in the Crown as part of the demesne land

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[162] At [158].
[163] At [158].

of the Crown, that is, as Clifford J said, "lands owned by the Crown free … of customary title claims but not yet granted to or vested in any other person".[164]

[189] The Crown then had to sort out the situation the Company had left regarding land "owned" by settlers who had purchased it from the Company. This position arose because the Company had not issued titles to any of its settlers. Many of them held the land they had bought from the Company on Company land orders alone. Clifford J stated that the New Zealand Company's Land Claimants Ordinance 1851 15 Vict 15 was enacted "to provide the necessary mechanism for the Crown to satisfy the claims of those to whom the Company had 'sold' land".[165] The scheme and implementation of that legislation "provided for the issue of scrip to claimants who returned or disowned the land in question".[166]

[190] The Judge's findings suggest the failure to reserve one tenth would be a breach of the duty pleaded, as would the approach taken to pā, burial grounds and cultivations. However, these matters would need further consideration in light of, for example, Brent Parker's evidence about the eventual actual size of the Nelson settlement. This latter point relates in particular to the "Uplift" aspect of the claim.

Limitation and laches

[191] The respondent pleaded affirmative defences averring the claims were barred because of excessive delays since the relevant events. The following issues arise from the submissions on this aspect:

(a) Has there been a "continuous breach"?

(b) Are the trust claims statute-barred or do either of the exceptions in ss 21(1)(a) or 21(1)(b) of the Limitation Act apply?[167]

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164 At [164].
165 At [167].
166 At [167].
167 As William Young J said in *Paki*, above n 72, at [293], for practical purposes, the Limitation Act 1950 is the appropriate focus although the statute in force at the time of the relevant events was the Real Property Limitations Act 1833 (UK) 3 & 4 Will IV c 27.

(c) Is the claim for fiduciary duty barred by analogy?

(d) Does the doctrine of laches/excessive delay apply?

[192] I agree with the Chief Justice in *Paki* that it is not possible to address these issues in any useful way without "establishment of the facts giving rise to liability".[168] I accordingly do no more than make these provisional observations. I note that I will consider laches prior to limitation by analogy.

[193] First, for the reasons given by William Young J in *Paki* I do not see merit in the argument made by the appellants that they can rely on what is termed the "continuing violation doctrine",[169] that is, the notion that the Crown remains in continuous breach of its fiduciary obligations in relation to the Tenths.[170] This argument is inconsistent with the way in which the appellants' case has been presented which relies on a specific time frame and specific documents. Further, there is force in the point made in *Wewaykum* that acceptance of this type of continuous breach argument in cases involving indigenous peoples would undermine the purpose of limitation periods.[171]

[194] Secondly, I also see the force of the argument for the respondent that the present claims do not fall within either ss 21(1)(a) or 21(1)(b) of the Limitation Act.[172] Section 21 provides for a six year time bar for claims for breach of trust unless either there is fraud to which the trustee – here purported to be the Crown – is a party or recovery from the Crown of trust property held by the Crown or the proceeds of such property received by the Crown are dealt with for the Crown's own benefit. The issues raised by the application of these two exceptions are however heavily factually dependent and I do not consider the Court should address them. I agree with the respondent, though, that it is not satisfactory for the appellants to seek to rely in this context on difficulties in undertaking a full tracing exercise of all Tenths properties prior to the High Court trial. Discovery was complete prior to trial

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168 *Paki*, above n 72, at [162].

169 See for example *Bodner v Banque Paribas* 114 F Supp 2d 117 (ED NY 2000) at 134.

170 See *Paki*, above n 72, at [301].

171 *Wewaykum*, above n 96, at [135]. This observation is discussed by William Young J in *Paki*, above n 72, at [301], n 468.

172 For completeness, I record Mr Goddard also referred us to s 23 of the Limitation Act dealing with claims against the Crown and in force until 1962.

and the exercise could have been undertaken. In saying this, I acknowledge Mr Ingram's evidence for the appellants does identify some properties that were Tenths but are now in Crown ownership.[173]

[195] Thirdly, the absence or otherwise of prejudice is relevant to whether laches/excessive delay applies. The Supreme Court has expressed caution "about endorsing an unqualified principle concerning mere delay without prejudice".[174] That is because what is required is a "balancing of equities in relation to the broad span of human conduct".[175] I am not convinced that the Crown has shown prejudice arises here. The respondent relies first on evidential prejudice. However, the historical record is in actual fact relatively intact for a case of this kind and, as Clifford J said, the parties were able to present a fairly comprehensive statement of agreed facts.[176] It may be that there are some matters that would ultimately not be able to be resolved but that would simply mean the appellants have not met the onus.[177]

[196] The respondent also says it has altered its position by "establishing and relying upon the Treaty settlement process to resolve the historical grievances of Māori". I accept there are obvious benefits in resolution via this settlement process and it is important not to undermine that. It is clear, however, that Wakatū's position has been preserved by the settlement legislation.[178]

[197] Further, there was evidence before the High Court of disadvantage to the Tenths owners as a result of what occurred to the Tenths. Mr Morgan in his evidence refers to the move of many families to other areas during the 1850s and 1860s because of the lack of land left to support their families. He also states that over the period from 1841 to 1977, when the Crown, the Public Trustee and the Māori Trustee managed the Tenths Reserves on behalf of owners, that "the owners suffered serious economic, cultural and social hardship due to being alienated from their land,

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173 Some, however, like Auckland Point School were in fact appropriated under public works legislation.

174 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [37].

175 At [37].

176 At [297].

177 A point also made by Clifford J: at [297].

178 See Te Tau Ihu Claims Settlement Bill (123-2) (select committee report) at 3; and the Settlement Act, ss 24 (definition of "historical claims") and 25.

either permanently or virtually permanently in the case of the perpetual leases". He said that by the late 19th century "many of our tūpuna were living in extreme poverty, alienated from their lands and traditional resources".[179] It does not seem fair to say that in these circumstances the appellants should have pursued their claims earlier. There were of course attempts to seek to have matters rectified culminating in the Sheehan Commission, so the owners did not sit on their hands. It could be argued that by the time of incorporation of Wakatū the position had changed. However the prospects at that point of a successful claim were fairly bleak.

[198] These same considerations could also be relevant to a consideration of whether the claim for fiduciary duty is barred by analogy.[180] The Crown accepts that the effect of *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd* is that there is no statute bar for this claim.[181] It is also agreed that the principles applicable to determining whether the claim is barred by analogy are those as set out in *Johns v Johns*.[182] This Court said there that "[b]roadly speaking" the basis for implying an analogous time bar is "that the equitable claim is sufficiently analogous to the statute-barred claim to make it inequitable to allow it to proceed".[183] Significantly, this Court also foreshadowed that there might be "policy or other reasons" militating against the case for applying the bar by analogy.[184]

Costs

[199] There is no dispute that costs should follow the event. Nor is there any dispute that for costs purposes the appeal should be treated as complex and that the applicable band is B. Further, there is no suggestion we should not certify for two counsel. The only dispute relates to the submissions for the respondent that there should be a 50 per cent uplift. The uplift is sought on the basis that the daily recovery rate is insufficient to meet the costs associated with the specialised nature

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179 See also Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 3 at [14.20.3].

180 As to the interrelationship between limitation by analogy and laches see *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 544–545.

181 *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd* [1994] 1 NZLR 11 (CA). The Crown reserved its position on this point for any appeal.

182 *Johns v Johns* [2004] 3 NZLR 202 (CA).

183 At [68]; see also at [80]; and see JC Corry *Limitation Act Handbook* (LexisNexis, Wellington, 2011) at [9.1.1].

184 At [81].

and complexity of the proceeding and the cost of obtaining senior counsel with appropriate skills to conduct the case.[185]

[200] We are agreed that there should be no uplift. While the case is complex it raises significant issues on which there is considerable disagreement on a principled level. That factor weighs more heavily in the balance.

Result

[201] For these reasons, the appeal is allowed in part to the limited extent that we make a declaration that Mr Stafford has standing to bring this proceeding. The appeal is otherwise dismissed. We make an order that the appellants must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

HARRISON AND FRENCH JJ

(Given by Harrison J)

Introduction

[202] We agree with Ellen France J that this appeal should be allowed in part regarding Mr Stafford's standing but otherwise dismissed on the grounds set out comprehensively in her judgment. We also agree on costs. However, we wish to add something on the claims for breach of fiduciary duty and a relational duty of good faith. In addition, we will set out our reasons for concluding that the appeal should be dismissed on the further ground of delay or laches.

Fiduciary duty

[203] We take as our starting point the basis on which Wakatū claimed a fiduciary relationship had come into existence.[186] Wakatū pleaded that a fiduciary obligation arose out of the Crown's role as agent in acting for and on behalf of the Tenths owners in creating the Nelson Tenths and occupation reserves. It claimed that the

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185 *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [91]–[92].

186 We will use "Wakatū" throughout this judgment as representative of all three appellants.

Crown undertook to represent or protect the Tenths owners' interest in their pre-existing customary property rights. The undertaking was said to be inherent in the 1845 Crown grant and the Crown's interposition of itself between Māori vendors of land and settler purchasers.

[204] In apparent acceptance of Clifford J's findings in the High Court,[187] Mr Galbraith disclaimed any wider reliance on a duty at large or one deriving from the Treaty of Waitangi. His argument was an orthodox exposition of settled equitable principles. In particular, Mr Galbraith accepted that the question of whether a duty is owed is context specific, depending on the particular facts.

[205] Wakatū's claim must be approached within that framework. It does not require a deviation from or development of settled principles. Nor does it require us to revisit authoritative observations made by this Court and more recently by the Supreme Court in *Paki* in a series of judgments delivered since 1987 about the nature of the relationship between the Crown and Māori in the context of claims emanating from the Treaty.[188] Nor does it require an extensive survey of the case law.

[206] As the Supreme Court confirmed in *Chirnside*, fiduciary relationships can arise in two situations.[189] The predominant one is of a kind where the relationship is recognised as being inherently fiduciary because by its very nature it is characterised by the underlying elements of trust and confidence. Well known examples in this category are relationships between lawyer and client, trustee and beneficiary and so on. Wakatū does not suggest that its relationship with the Crown falls into this category.

[207] The other and less common situation is where the relationship is not inherently fiduciary but an examination of its particular elements justifies a fiduciary

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187 *Wakatū*, above n 3, at [277]–[282].

188 See for example *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 650 (CA) [*Lands case*]; *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31; *Paki*, above n 72, at [152] and [155] per Elias CJ and [183]–[187] and [195] per McGrath J.

189 *Chirnside*, above n 77, at [73]–[75].

classification. Some of the necessarily one-off cases in this category are referred to by William Young J in *Paki*.[190]

[208] Both categories share the defining characteristic of a requirement of absolute or single-minded loyalty owed by the alleged fiduciary to the claimant including a prohibition on the fiduciary from placing itself in a position where its duty and its interests may conflict.[191] Mr Galbraith's argument proceeded on the premise that to succeed Wakatū must prove this element.

[209] However, in the context of relationships with the Crown, the loyalty requirement poses obvious difficulties. The Crown's principal obligation is to all its citizens in whose collective interests the Crown must act. It follows that, in the absence of an express undertaking, implicit acceptance of an absolute duty of loyalty to one group alone would negate an essential element of the Crown's constitutional responsibilities. Such cases will be rare.[192] *Guerin* is an example but that was in a situation where the Crown was not required to balance competing interests but to act exclusively for tribal interests where there was no risk of conflict.[193] By contrast, in exercising its constitutional responsibilities here, the Crown was balancing interests of a truly competing nature, as both Clifford J and Ellen France J have found.

[210] In *Paki*, Elias CJ observed that the recognition of a fiduciary duty owed by the Crown to indigenous people in New Zealand and Canada does not appear to rely on the presence of the particular characteristic of loyalty.[194] In the same case McGrath J left open the possibility of recognising a sui generis fiduciary duty, even where its existence may not be justifiable by applying the general equitable principles developed in private law.[195] We infer that the Judge was using the phrase

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190 At [271].

191 See *Chirnside*, above n 77, at [80]; *Bristol and West Building Society v Mothew*, above n 104, at 18, approved and adopted in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 680 (although not specifically on this point); *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC) at 5–6; *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [67]; and by William Young J in *Paki*, above n 72, at [269].

192 *Alberta v Elder Advocates*, above n 89, at [44] and [48].

193 *Guerin*, above n 78.

194 At [155].

195 At [186].

sui generis to describe a particular factual context, as distinct from the nature of the underlying relationship.[196] McGrath J says:[197]

> … recognition of a duty would not mean that the Treaty is being directly enforced in the domestic courts. Rather, a sui generis fiduciary duty would arise between the Crown and certain Maori, in the circumstances of particular situations, and against the background of the relationship constituted by the Treaty of Waitangi.

[211] With respect, we question how such a relationship could be characterised as fiduciary in the absence of its essential prerequisite, a duty of loyalty. Its uniquely indigenous nature does not seem decisive. Without a requirement of loyalty, the relationship cannot be properly characterised as one of absolute trust and confidence. In particular, its absence would defy equity's requirement of a fiduciary to eschew self-interest when the circumstances require.[198] In *Paki*, William Young J noted that the Court had not been referred to any decision where a fiduciary obligation was found to exist without a duty of loyalty.[199] And the requirement of loyalty is in fact an essential ingredient in the Canadian jurisprudence.[200]

[212] This point serves to highlight what appears to be the real difficulty inherent in Wakatū's claim – of attempting to fashion a remedy for claimed wrongs by straining principles that defy adaptation. This point is illustrated by the decision in *Guerin,* upon which Mr Galbraith based his argument. In *Guerin*, which was the foundation for much of the subsequent jurisprudence on fiduciary obligations in the indigenous context, the Canadian Supreme Court applied settled principles without conceptual difficulty. The Indian Band's claim was truly analogous to a claim for breach of an agency or trust relationship of a type which would traditionally fall within the first of the two categories recognised in *Chirnside*.[201] The relevant statute obliged the Crown on surrender to it of Indian land "to act on behalf of the Indians so as to protect their interests in transactions with third parties".[202] The Crown's undertaking when construed against the nature of Indian title and the history and purpose of the

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196 See *Guerin*, above n 78, at 385 and 387; see also *Paki*, above n 72, at [159] per Elias CJ; *Wewaykum*, above n 96, at [81]; and *Manitoba Métis*, above n 18, at [49].

197 At [186].

198 *Chirnside*, above n 77, at [82].

199 At [283].

200 See for example *Alberta v Elder Advocates*, above n 89, at [43]; *Manitoba Métis*, above n 18, at [62]; and *Guerin*, above n 78, at 388–389.

201 At 387.

202 At 383.

Crown's underlying title could not have been more expressly stated, obliging it to exercise its discretionary powers with absolute loyalty to the Band's interests when dealing with third parties.

[213] In this respect we endorse Clifford J's conclusion that, in claiming the Crown agreed to act as a fiduciary in a private law capacity from 1840 onwards by assuming the New Zealand Company's role and conscience as trustee relating to the creation and management of the Tenths Reserves, Wakatū was simply recasting or restating the essential elements of its claim for an express private trust.[203]

[214] *Guerin* also serves to illustrate why a claim for breach of fiduciary duty is unsuited to the facts of this case. In *Guerin* the Indian Band sought and was granted the remedy of restitutionary damages. Here Wakatū seeks a declaration that the Crown acted in breach of its duties as a fiduciary to protect the legal and customary rights of the whānau/hapū with mana whenua in the relevant land in acquiring their land, in implementing the terms of the Spain award in the 1845 Crown grant, and in administering the Nelson Tenths Reserves. It is argued that a declaration will guide the parties to identify all the Tenths land retained by the Crown and agree upon its return.

[215] Equitable remedies are essentially restitutionary.[204] A declaration in the general terms sought would be meaningless. By settling the Wai 56 claim, as is described more fully by Clifford J,[205] and which has resulted in settlement legislation, the Crown has extinguished its liabilities relating to the creation and administration of the Nelson Tenths land – the same land which is the subject of this litigation. While Parliament has reserved Wakatū's right to continue with this claim, a declaration would lead the parties back to the same starting point: the same dispute about ultimate entitlement would remain unresolved between Wakatū and the interveners.

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203 At [298].

204 See generally ICF Spry *The Principles of Equitable Remedies* (9th ed, Sweet & Maxwell, London, 2014) at ch 2.

205 At [10]–[13].

[216] Lastly, in our view it is unnecessary and wrong both for doctrinal and policy reasons to strain settled legal principles in order to find a remedy where Parliament has by the Treaty of Waitangi Act 1975 established a mechanism to recognise and provide remedies for Treaty breaches by the Crown.[206] The Treaty is the primary instrument governing relationships between the Crown and Māori. In recognition of the Treaty's status as the source of the Crown's duties, both legal and moral, and its breaches of those duties, the Waitangi Tribunal has been established to enable the Crown's breaches to be remedied.

[217] The steps taken by the Government to date to implement the Tribunal's recommendations for settlement of the Wai 56 claim (among others relating to Te Tau Ihu) acknowledge the Crown's substantial wrongs and its obligations to compensate for the losses of the same proprietary rights giving rise to Wakatū's claim. Even though the settlement process is often informed by the processes mandated by the Treaty of Waitangi Act provisions, it has had the effect of settling common law claims relating to the same land. In this respect we emphasise that we are not suggesting that the Treaty or the statute operate to foreclose common law rights of claim which are established in accordance with settled principles. Our point is simply that the demands of justice do not require a court to fashion a parallel and potentially conflicting remedy based on expanding equitable principles to circumstances for which a remedy already exists and has been implemented.

[218] For these reasons, we do not accept that a fiduciary duty was arguable in this case.

Relational duty of good faith

[219] It may well be that the more appropriate claim for Wakatū to focus on would have been for breach of a relational duty of good faith. This possibility was noted by

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[206] See the observations in *Paki*, above n 72, at [165] per Elias CJ, [192]–[194] per McGrath J and [288] per William Young J.

this Court in *Paki*,[207] and recognised in the Supreme Court by Elias CJ,[208] McGrath J,[209] and William Young J.[210] Wakatū did not develop in argument before us its appeal against Clifford J's dismissal of this cause of action in the High Court.[211]

[220] It is beyond doubt that the Treaty created a special relationship between the Crown and Māori giving rise to reciprocal duties to act reasonably and in good faith in all their dealings in the Treaty context. However, questions must arise about the applicability and meaning of the good faith requirement in the private law context.[212] It is unclear how an obligation to act in good faith would differ, for example, from an obligation of loyalty or what it would add to Wakatū's claim. Wakatū's pleadings of the nature and breaches of the Crown's duties as a fiduciary and to act in good faith are almost identical. However, given that Wakatū did not pursue its appeal on this ground, we do not comment further.

Laches or delay

[221] The defence of laches or unreasonable delay requires a balancing of equities: in order to maintain it successfully, the Crown or another interested party must have an equity which on balance outweighs Wakatū's right. Mere delay of itself is not enough to invoke the defence but nor is it essential for the Crown to show material prejudice or detriment.[213] Two particularly relevant factors are the length of the delay and the nature of any acts done during the interval which might affect either party in the balancing of equities and justice.[214] In these circumstances we add that the inquiry is of an objective nature into whether the result of the delays is such that it is unreasonable to allow the claim to proceed.

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207 *Paki*, above n 107, at [106].
208 See at [155].
209 At [187].
210 At [257].
211 At [267].
212 See *Paki*, above n 72, at [183]–[185] per McGrath J.
213 See *Eastern Services Ltd v No 68 Ltd*, above n 174, at [13] and [29]–[37]; and see generally on laches 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 [38.1.4].
214 Butler and Every-Palmer, above n 213, at [38.1.4(4)]; and see *Eastern Services Ltd v No 68 Ltd*, above n 174, at [29]–[37].

[222] The events giving rise to Wakatū's claim occurred in the middle of the 19th century, over 160 years ago. On Wakatū's case the Crown's principal breach of duty occurred in failing to ensure that the Tenths were reserved pursuant to the 1845 Crown grant in a series of transactions culminating in the aftermath of the New Zealand Company's collapse in 1850. Throughout that time, at least between 1893 when decisions were made by the Native Land Court about those entitled to a beneficial interest in the lands and 1986 when the Wai 56 claim was commenced before the Waitangi Tribunal, the Crown has acted on the premise that its claim to title was unchallenged. In that sense, the Crown has necessarily altered its position to its detriment because in its capacity as legal owner it has alienated or used the land for other purposes. It is simply not now possible to return the property to Wakatū.

[223] In support of its defence of delay the Crown submitted that the Court is no longer able to do justice between the parties given the time lapse or to make reliable findings about what exactly was promised and expected as a result of dealings between the parties in the 1840s and 1850s or about the circumstances of decisions relating to reserves that are now said to be in breach of its alleged duties. We agree with Ellen France J, however, that the historical record is in fact relatively intact and there would be no prejudice in a forensic sense in conducting the Crown's defence.

[224] However, we respectfully differ from Ellen France J in her rejection of the Crown's defence that it has altered its position by establishing and relying upon the Treaty settlement process to resolve the historical grievances of Māori. As noted, Wakatū and the interveners are in dispute about which entity truly represents the relevant customary, collective groups.[215] It is clear that the Crown's settlement of the historical claims relating to the Nelson Tenths is its compromise of all claims by the entities which it recognises as mandated representatives of the descendents of the customary owners of the Nelson Tenths Reserves. Clifford J's provisional view, having heard a great deal of evidence, was that the interveners represented the collective iwi with the relevant customary rights.[216]

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[215] Clifford J succinctly summarised the competing arguments at [311]–[314].
[216] At [313].

[225] Mr Stafford was one of the two original claimants for Wai 56 when the Tenths claim was taken to the Tribunal in 1986. Furthermore, Wakatū was represented on the body that was mandated to negotiate a Treaty settlement. Both participated fully in the negotiations. But at a late stage in the settlement process Wakatū withdrew because it considered that the Crown refused unjustifiably to negotiate on private law grievances. Wakatū claimed that concessions by the Crown at the Tribunal inquiry – that the Tenths Reserves fell significantly short of what the Crown undertook to provide – lulled the incorporation into believing that the Crown would accept responsibility to remedy those private law claims.

[226] We are satisfied that Wakatū and Mr Stafford were content to submit to the Tribunal jurisdiction for the purposes of resolving all rights of claim to the Nelson Tenths Reserves until they decided at some point that either the terms offered by the Crown or likely to be recommended by the Tribunal were insufficient to satisfy their demands. By that stage the Crown's alleged wrongs were at least a century old and Wakatū and Mr Stafford had acquiesced in a complex process which was designed to provide a comprehensive resolution of a claim which had been before the Tribunal since 1986. All representative parties had expended considerable resources, time and money in finding a fair resolution to a long-standing grievance.

[227] We are not suggesting that Wakatū's conduct in delaying its formal claim to the High Court while participating in the settlement process amounted in legal terms to an estoppel, waiver or acquiescence. However, there can be no doubt that with the passage of time before 1986, followed by the Tribunal inquiry and the formal settlement, the Crown and the interveners have altered their positions. We repeat that it is not now possible for the Crown to return the land to Wakatū. In balancing the competing equities we are satisfied that it would be wrong to allow a separate claim relating to the same land to be instituted so long after the alleged breaches occurred.

[228] Accordingly, we would dismiss the appeal on this ground also.

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Appendix A

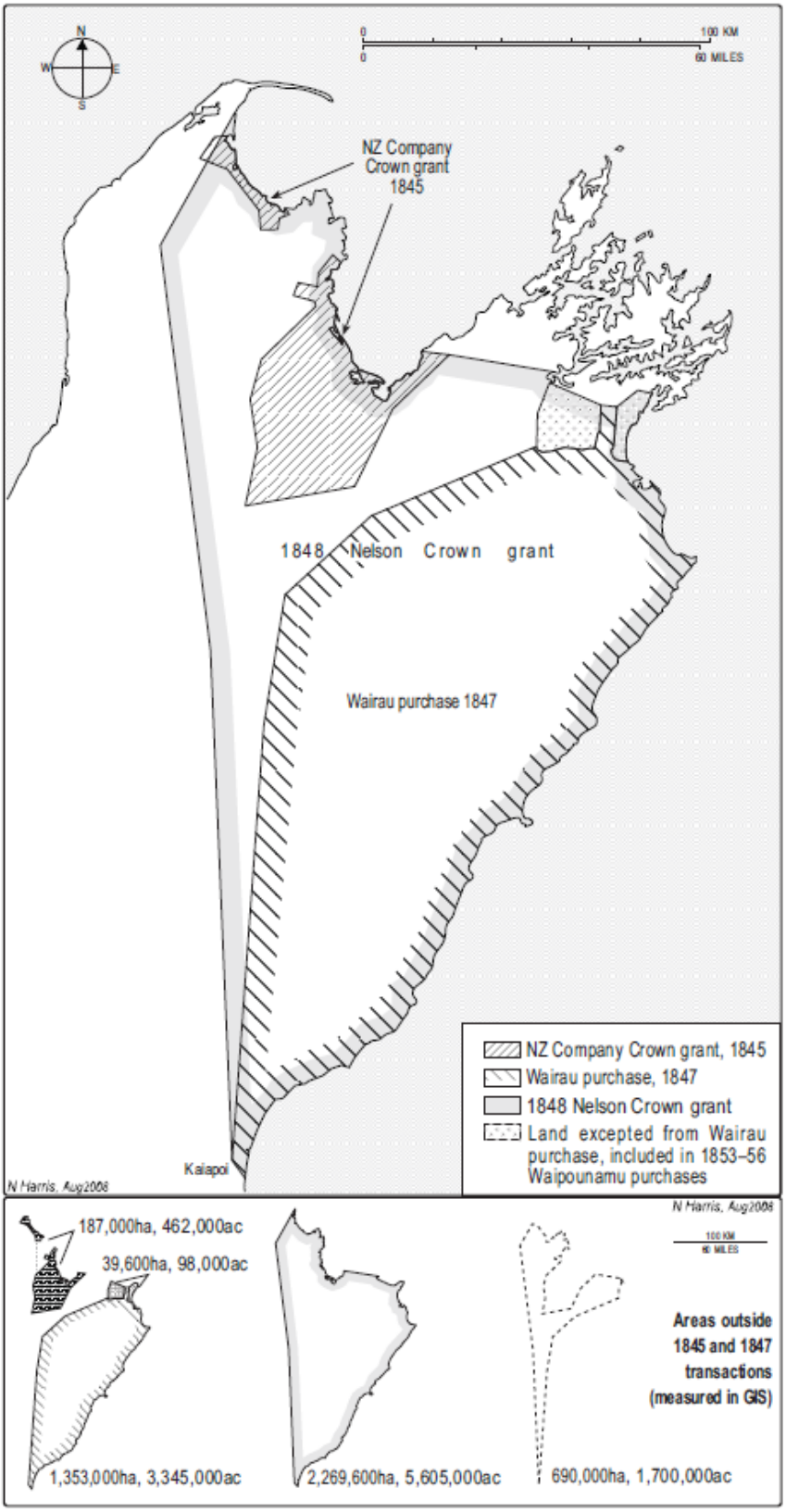

Figure 11: The 1845 and 1848 Nelson grants and the 1847 Wairau purchase

Source: AJHR, 1874, G-6; Nelson Crown grant

Appendix B – Alleged breaches

1.	A failure to reserve a full one tenth of the 1845 Crown grant (15,100 acres). In particular, it is said that the Crown failed to allocate the rural reserves after Governor Grey's decision in 1847 to abandon the Tenths scheme.
2.	A failure to ensure that pā, burial grounds and cultivations, including Te Maatu (the Big Wood), were separately reserved as occupation reserves. In particular, it is averred that in 1845 Commissioner Spain redesignated eight suburban sections in Motueka as occupation reserves, which were not replaced. This meant a total of 400 acres was lost from the Tenths Reserves estate. Further, the appellants claim that 12 town sections had been occupied as pā or cultivations and should have been reserved separately as occupation reserves.
3.	Removal of particular Tenths Reserves, diminishing the entitlements to one tenth. In this category are 47 one acre town section reserves reduced in 1847; Tenths Reserves exchanged for sections to be allocated as occupation reserves; and the grant of 918 acres of land in Motueka (from Tenths Reserves and occupation reserves) to enable the Anglican Church to build a school (the Whakarewa grant).
4.	The reserves should have been, but were not, increased in size to reflect the fact the Nelson settlement ended up amounting to 172,000 acres, not 151,000 (a claim known as the "Uplift").
5.	The Crown allowed the New Zealand Company to select land in the Tasman Bay area beyond the borders of the 1845 grant even though that land had not been lawfully acquired from the Tenths' owners.