

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-741
[2022] NZHC 204**

UNDER THE Declaratory Judgments Act 1908

IN THE MATTER OF An application for declarations as to the interpretation of section 18 of Te Ture Whenua Māori Act 1993

BETWEEN THE ATTORNEY-GENERAL
Applicant

AND MERYL TAIMANIA CARTER, RAINA
RAEWYN DOAR, RAYMOND PAUL
EDMONDS, JONATHON PEARCE
EDWARDS, ANITA LEE MARSH,
TAIPARI BARRY PHILLIP MUNRO and
WHITIAO RAEWYN PAUL, Trustees of
Whatitiri Māori Reserves under s 239 Te
Ture Whenua Māori Act 1993
First Respondents

AND NEW ZEALAND MĀORI COUNCIL,
constituted under s 17 of the Maori
Community Development Act 1962
Second Respondent

AND NORTHLAND REGIONAL COUNCIL, a
local authority constituted under the Local
Government Act 2002
Third Respondent

Hearing: 13 and 14 June 2022

Appearances: D A Ward and N I Denis-McCarthy for Attorney-General
M S Smith, L F Rogers and R L Grierson for 1st and 2nd
respondents
J V Ormsby and M J Doesburg for 3rd respondent

Judgment: 16 February 2023

JUDGMENT OF CULL J

TABLE OF CONTENTS

	Para No.
Introduction	[2]
BACKGROUND	[4]
Poroti Springs	[5]
<i>Declarations sought in the Māori Land Court proceedings</i>	[15]
THE ISSUES	[18]
Parties' positions	[20]
<i>The Trustees</i>	[20]
<i>The Crown</i>	[21]
<i>The Council</i>	[22]
THE LEGISLATION	[23]
Te Ture Whenua Māori Act 1993	[23]
<i>The Māori Land Court</i>	[29]
FIRST CLAIM: CUSTOMARY TITLE TO WATER	[36]
The meaning of "land"	[39]
<i>The scheme of Te Ture Whenua Maori Act</i>	[43]
<i>The authorities</i>	[53]
<i>Analysis</i>	[67]
The effect of Land Transfer Act registration	[80]
"Rights" to water	[96]
<i>Common law restrictions</i>	[101]
<i>Statutory controls</i>	[105]
Maori Reservation	[114]
<i>Conclusion</i>	[121]
SECOND CLAIM: DAMAGES FOR INJURY TO WATER	[124]
<i>Conclusion</i>	[132]
Result	[133]
Costs	[134]

Introduction

[1] This case concerns the Māori Land Court’s jurisdiction under s 18 of Te Ture Whenua Māori Act 1993 (the Act) to determine customary title over freshwater. The Attorney-General seeks declarations from this Court about the interpretation of s 18 of the Act and whether the Māori Land Court is the correct forum for determining ownership rights to water and damages for injury to it.

[2] The Trustees of Whatitiri Māori Reserves (the Trustees), with the New Zealand Māori Council in support,¹ seek orders from the Māori Land Court for customary title and rights to the Poroti freshwater springs in Northland and an award of compensation for “injury to their whenua” from the Northland Regional Council (the Council). The Council and the Attorney-General challenge the Māori Land Court’s jurisdiction to make such orders.

[3] The parties have agreed to seek a declaratory judgment from this Court to determine whether s 18 of the Act confers on the Māori Land Court jurisdiction to hear and determine the Trustees’ substantive claims.

BACKGROUND

[4] The background facts are largely taken from the Crown’s summary in its submissions and are uncontentious.

Poroti Springs

[5] Poroti Springs are located at the settlement of Poroti, approximately 17 kilometres to the west of Whangārei City and adjacent to Mangakahia Road.

[6] The headwater of the springs is situated on an 8094m² block of Māori freehold land known as Whatitiri 13Z4. The land is held by the Trustees under the fee simple title issued in 2006.

¹ The Trustees with the Maori Council in support will be referred to in this judgment as the “Trustees”.

[7] The water flows underground in an aquifer from Whatitiri Mountain before surfacing at Whatitiri 13Z4 and at other blocks of freehold land downstream of Whatitiri 13Z4. The water flows above ground from this point. The Crown describes it as then joining the Waipao Stream, although the Trustees' witness, Mr Munro, says that "the Waipao begins at the Springs". Maps of the area show the stream running from Whatitiri 13Z4.

[8] On a property across the road from Whatitiri 13Z4 are a number of water bores into the aquifer that surfaces at Whatitiri 13Z4. Over time, the Whangārei City/District Council and others have held rights to extract water from the bores on that property, and subsequently from land across the road from and downstream of Whatitiri 13Z4. In 1957, an easement was granted to an adjoining farmer to extract water from Whatitiri 13Z4, for which a rental was paid to the Trustees. There have been no recent consents to take water from Whatitiri 13Z4 Block itself.

[9] Under the Native Land Court Act 1894, Māori could convert their land from a customary title to a freehold tenure granted by the Crown. The Native Land Court identified those whom it considered were the customary owners and issued title orders. Changes in status or tenure were confirmed by the issue of a Crown grant or more recently, by way of a certificate of title under the land transfer system.²

[10] In 1894 and 1895, the Whatitiri Block was the subject of investigation by the Native Land Court. The block was awarded to two named hapū of Ngāpuhi. In December 1896, the Court made partition orders for freehold estates held by named hapū members. In 1939, the Native Land Court stated in a minute that a "Spring Reserve" should be created when consolidation of Māori land in the area was completed. Whatitiri 13Z4 was then set apart as a Māori reservation in 1960 for the specific purpose of water supply for the named sub-tribes of Ngāpuhi, under s 439 of the Māori Affairs Act 1953 (the predecessor to s 338 of the Act).

² See Native Land Court Act 1894, s 14.

[11] The record of title for Whatitiri 13Z4 under the Land Transfer Act 2017 records the estate as fee simple, its purpose as a Māori Reservation, and its status as Māori freehold land:



RECORD OF TITLE
UNDER LAND TRANSFER ACT 2017
FREEHOLD
Search Copy



Identifier **294604**
Land Registration District **North Auckland**
Date Issued 09 June 2006

Prior References
NAPR197/138

Estate	Fee Simple
Area	8094 square metres more or less
Legal Description	Whatitiri 13Z4 Block
Purpose	Set apart as a Maori Reservation for the purpose of water supply for the common use and benefit of the Te Uriroi Parawhau and Mahurihuri subtribes of Ngapuhi

Registered Owners
Meryl Taimania Carter, Raina Raewyn Doar, Whitiao Raewyn Paul, Taipari Barry Phillip Munro, Raymond Paul Edmonds, Anita Lee Marsh and Jonathon Pearce Edwards as Trustees

Interests

6898913.4 Status Order determining the status of the within land to be Maori Freehold Land - 9.6.2006 at 9:00 am

[12] Whatitiri 13Z4 was endorsed with Māori freehold land status by order issued by the Māori Land Court on 9 June 2006 under s 131 of the Act.

[13] In 2013, an order was issued by the Māori Land Court replacing the then trustees with seven new trustees and vesting the land in them as responsible trustees to hold and administer the land for the benefit of the beneficiaries in the “said notice” and the Whatitiri Māori Reserves Trust Charter.³ The beneficiaries were re-defined, replacing the “Mahurihuri” hapū with “Te Mahurehure” hapū.⁴

³ Te Ture Whenua Māori Act 1993, ss 37(3), 239 and 338(7).

⁴ “Notice Redefining the Purpose for Which Māori Reservation is Made” (16 May 2013) 57 *New Zealand Gazette* 1696.

[14] The new Trustees, the first respondents in this proceeding, are the registered owners of the land, and the first applicants in the substantive proceedings. The beneficiaries in the “notice” (and therefore of the Trust) are the Te Uriroroi, Parawhau and Mahurehure hapū of Ngāpuhi.

Declarations sought in the Māori Land Court proceedings

[15] On 7 December 2020, the Trustees and the New Zealand Māori Council filed proceedings in the Māori Land Court for “determinations on the nature and extent of the present day rights and responsibilities held in freshwater that is intrinsically interconnected to the whenua” and for associated remedial orders.

[16] The application was viewed by the New Zealand Māori Council as “an important test case in respect of rights held by Māori in freshwater, and of [the Māori Land Court’s] jurisdiction to award damages for cultural, spiritual and economic development losses.” The claim was subsequently amended on 22 July 2021, seeking the following declarations as to customary title and damages respectively:

15. The First Applicants seek orders under s 18(1)(a) and/or s 18(1)(h) of Te Ture Whenua Māori Act 1993 (**‘TTWMA’**):
 - a) Declaring that the customary title in the water has not been extinguished;
 - b) Specifying the full nature and extent of that customary title today, in whom it is vested and on what terms and/or subject to what requirements; and
 - c) (Without limiting (b) above) declaring that, as incidents of the customary title, and in order to avoid future breaches of that title, the Council must provide the First Applicants and the hapū with rights and responsibilities (as specified by the Court) that are commensurate with the nature and extent of the customary title that the Court finds to exist in the water.

...
16. The First Applicants seek orders under s 18(1)(c) of TTWMA:
 - a) Declaring that the Council has injured the whenua in one or more of the ways specified above;
 - b) Awarding damages in respect of that injury; and
 - c) (Without limiting (b) above) including amongst the damages awarded:

- (i) Damages of \$100,000.00 for cultural and spiritual losses; and
- (ii) Damages for economic development losses in such sum, and payable on such terms or conditions, as the Court considers just.

[17] The substantive proceedings also refer to six other land blocks in the vicinity, some of which are located some distance from the springs. The pleadings claim a loss “of ability to effectively care for, use, manage and develop the [seven land blocks], including Whatitiri 13Z4, using either the water or income derived from the water”.

THE ISSUES

[18] The parties co-operated and resolved that the issues for this Court to determine by way of declaratory judgment are:

- (a) whether s 18 of the Act allows the Māori Land Court to make orders for customary title in respect of freshwater; and
- (b) whether the Māori Land Court can order damages for injury to customary title to water under s 18 of the Act.

[19] This judgment does not seek to engage with the merits of the Trustees’ claims of customary title to freshwater.

Parties’ positions

The Trustees

[20] The Trustees contend that the Māori Land Court has jurisdiction to recognise and provide for unextinguished customary rights and interests in the Poroti freshwater springs under s 18(1)(a) and/or s 18(1)(h) of the Act. They say that the Māori Land Court’s ability to inquire into and determine customary water rights is not ousted by the definition of “land” in the Act because “Māori land” includes interrelated waters, as the Māori Land Court has previously found. The Trustees seek compensation from the Council for injurious “affection” of such freshwater rights and interests under s 18(1)(c).

The Crown

[21] The Crown maintains that any extant customary rights to water fall outside s 18(1)(a), as that subsection is concerned with property rights that are incidental to or arise out of Māori freehold land. Section 18(1)(h) of the Act, the Crown says, does not give power to the Māori Land Court to make the orders sought but governs the status of land, not customary title to water. They also say that water is separate from “land” in the Act and that customary title was extinguished by the Māori freehold estate in Whatitiri 13Z4 block when it was made freehold land in 1986 under the Land Transfer Act. On damages, the Crown says the Resource Management Act 1991 (RMA) prevents the lawful exercise of powers being an “injury”.

The Council

[22] The Council’s submissions largely mirror the Crown’s arguments. In relation to the Trustees’ compensation claim, it submits that the exclusive authority to manage or control water has been conferred on the Council under the RMA, which is a code to deal with freshwater rights. Any challenge to the Council’s authority, it says, must be brought to the High Court by way of judicial review or to the Environment Court, not to the Māori Land Court.

THE LEGISLATION

Te Ture Whenua Māori Act 1993

[23] Te Ture Whenua Māori Act defines the Māori Land Court as a permanent court of record and imbues it with all the powers that are inherent in a court of record.⁵ The Act was designed to reform the laws relating to Māori land in accordance with the principles set out in the preamble.⁶ The preamble to the Act, in both Māori and English, provides specific guidance:

Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua

⁵ Te Ture Whenua Māori Act 1993, s 5. The Native Land Court was established by the Native Lands Act of 1865. The Court then became the Māori Land Court under the Māori Affairs Act 1953.

⁶ Long Title.

he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

[24] Section 2 provides further interpretative guidance:

2 Interpretation of Act generally

- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.
- (2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.
- (3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

[25] The definitions of “land”, “Māori land”, “Māori customary land” and “Māori freehold land” are of particular relevance:⁷

land—

- (a) means—
 - (i) Māori land, General land, and Crown land that is on the landward side of mean high water springs; and
 - (ii) Māori freehold land that is on the seaward side of mean high water springs; but
- (b) does not include the common marine and coastal area

⁷ Section 4.

...

Maori customary land means land that, in terms of Part 6, has the status of Maori customary land

Maori freehold land means land that, in terms of Part 6, has the status of Maori freehold land

...

Maori land means Maori customary land and Maori freehold land

[26] Section 129 of the Act provides for all land in New Zealand to have one of six statuses:⁸

- (a) Maori customary land:
- (b) Maori freehold land:
- (c) General land owned by Maori:
- (d) General land:
- (e) Crown land:
- (f) Crown land reserved for Maori.

[27] The section further defines land that is held by Māori in accordance with tikanga Māori and Māori freehold land. Section 129(2) provides:

- (2) For the purposes of this Act, —
 - (a) land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land:
 - (b) land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order, shall have the status of Maori freehold land:

...

[28] Of particular importance to this proceeding are the statutory provisions on the Māori Land Court and its jurisdiction.

The Māori Land Court

[29] The Māori Land Court is a statutory court of record with a limited jurisdiction. In *McGuire v Hastings District Council*,⁹ Lord Cooke for the Privy Council described the Māori Land Court jurisdiction as “specialised [and] limited”.¹⁰

⁸ Section 129(1).

⁹ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at 588.

¹⁰ At [12].

[30] Sections 17 and 18 of Te Ture Whenua Māori Act are central to the declarations sought. They prescribe respectively the general objectives and jurisdiction of the Court:

17 General objectives

- (1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—
 - (a) the retention of Maori land and General land owned by Maori in the hands of the owners; and
 - (b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.
- (2) In applying subsection (1), the court shall seek to achieve the following further objectives:
 - (a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
 - (b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
 - (c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:
 - (d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
 - (e) to ensure fairness in dealings with the owners of any land in multiple ownership:
 - (f) to promote practical solutions to problems arising in the use or management of any land.

18 General jurisdiction of court

- (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
 - (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:
 - (b) to determine the relative interests of the owners in common, whether at law or in equity, of any Maori freehold land:

- (ba) to determine whether a person is a member of a class of persons who are or will be beneficial owners of, or beneficiaries of a trust whose Trustees are owners of, land that is or will become Maori freehold land:
 - (c) to hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land:
 - (d) to hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Maori freehold land:
 - (e) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified person is a Maori or the descendant of a Maori:
 - (f) to determine for the purposes of this Act whether any person is a member of any of the preferred classes of alienees specified in section 4:
 - (g) to determine whether any land or interest in land to which section 8A or section 8HB of the Treaty of Waitangi Act 1975 applies should, under section 338 of this Act, be set aside as a reservation:
 - (h) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not Maori customary land or Maori freehold land or General land owned by Maori or General land or Crown land:
 - (i) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.
- (2) Any proceedings commenced in the Maori Land Court may, if the Judge thinks fit, be removed for hearing into any other court of competent jurisdiction.

[31] Any additional jurisdiction, as s 18(1) of the Act stipulates, must be specifically conferred on the Court. There are two further statutory provisions extending the Court's jurisdiction, which have relevance to this proceeding.

[32] The first of these is the Court's power to determine the status of land. Section 131 of the Act, under which the status order was made for Whatitiri 13Z4 as Māori freehold land provides:

131 Court may determine status of land

(1) The Maori Land Court shall have jurisdiction to determine and declare, by a status order, the particular status of any parcel of land, whether or not that matter may involve a question of law.

...

[33] To implement the Court's declaration, s 140 provides that every status order made under Part 6 of the Act and every vesting order made under s 134 shall be registered under the Land Transfer Act. Section 142 provides that every status order shall upon registration or upon notation in the register, have the effect of giving to the land the particular status specified in the order.

[34] The second is the power of the Māori Land Court to set apart any Māori freehold or general land as a Māori reservation for communal purposes under s 338(7) of the Act. This power is additional to the Court's jurisdiction under s 18(1)(g) of the Act to set land aside as a reservation, where a Treaty claim to land or interest in land, which has been transferred to a State enterprise, is well-founded.¹¹

[35] Of note, under s 338(7), (12) and (13) of the Act, the Trustees in whom any Māori reservation is vested may, with the consent of the Māori Land Court, grant a lease or occupation licence of the reservation or of any part of it for any term not exceeding 14 years, subject to such terms and conditions as the Court thinks fit. Where revenue has been derived from any such lease or occupation licence, the Trustees need the direction of the Māori Land Court over its expenditure under s 338(13).

FIRST CLAIM: CUSTOMARY TITLE TO WATER

[36] The Trustees seek customary title to freshwater. In claiming to have the rights to and responsibilities over water, the Trustees seek to have the authority to allow or

¹¹ Treaty of Waitangi Act 1975, s 8A(2).

withhold use of the water by others as part of their customary title claim. Their claim is pleaded as follows:

For well over 150 years before the creation of the reserves in 1895 and 1896, the hapū were sustained by the water, exercising tino rangatiratanga and kaitiakitanga rights and responsibilities to the water that included (inter alia):

- (a) Use of the water, including in economic exchange with others;
- (b) Authority to allow or withhold use of the water by others;
- (c) Authority to set condition on use of the water by others; and
- (d) Responsibility to care for the water and to ensure the health of the water (collectively the “**customary title**” of the hapū to the water).

[37] The Trustees’ claim to freshwater has its basis in native title. They refer to the Court of Appeal’s decision in *Attorney-General v Ngāti Apa*, which decided that the Māori Land Court had jurisdiction to determine the status of land comprised of foreshore and seabed.¹² The Court held that the English common law did not extinguish Māori customary title on the Crown’s assumption of sovereignty; that any extinguishment of customary title had to be clearly and lawfully extinguished; and that the Māori Land Court had jurisdiction to determine the status of marine foreshore and seabed, which was not excluded from the definition of “land” under the Act.¹³

[38] I deal with the issues raised by the parties’ submissions in the following way:

- a. The meaning of “land.”
- b. The effect of Land Transfer Act registration.
- c. “Rights” to water.
- d. The purpose of the Māori reservation.

The meaning of “land”

[39] The first issue addressed by all the parties was the statutory interpretation of the word “land” in the context of the Act to determine the extent of the Māori Land Court’s jurisdiction.¹⁴

¹² *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

¹³ At [55], [110], [176], [177]–[179], [187] and [188].

¹⁴ These include the purposive approach to interpretation as set out in s 10(1) of the Legislation Act 2019, the presumption that legislation should be construed in a manner consistent with Treaty principles, (*Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] NZLR 801); the principle of legality enshrined in s 6 of the New Zealand Bill

[40] Mr Smith, for the Trustees, urges that the Act should be interpreted in a manner consistent with the obligations and guarantees flowing from the Treaty in relation to the retention of land in the hands of Māori, tikanga Māori, fundamental rights and freedoms enshrined in s 20 of NZBORA, and international obligations. Specifically, he asserts that it would be contrary to these principles to interpret “land” rights in the Act as excluding water. He submits that the presumption of consistency with Treaty principles should guide the application of s 2(3) of the Act and the interpretation of “whenua” in the context of tino rangatiratanga over territory and the extent of customary title. If this approach were to be adopted, the Trustees argue, the Māori Land Court has jurisdiction over freshwater and therefore their claims.

[41] In opposition, the Crown and the Council both argue that the Māori Land Court’s jurisdiction is limited to determining *land* rights, relying on the definition of “land” and “Māori land” and the purpose of the Act. The emphasis on the status of land and the recognition of the importance of Māori ownership in land, not resources such as water, they argue, is reinforced by the structure of the Act. The relevant sections of the Act, they say, cannot be interpreted to create new rights or vest rights that contradict or derogate from existing legal interests.

[42] I consider first the scheme of the Act, followed by the authorities on customary title to water.

The scheme of Te Ture Whenua Maori Act

[43] The starting point is the purpose of the Act. It is to provide for the “retention, use, development and control of M[ā]ori land” as taonga tuku iho and prescribe the jurisdiction and powers of the Māori Land Court under Part 1 of the Act.¹⁵

[44] The Act achieves its purpose by enabling the Māori Land Court to determine the status of land, enabling the registration of such interests in land and providing for

of Rights Act 1990, *Fitzgerald v R* [2021]NZSC 13; the principle that legislation should be read consistently with New Zealand’s international obligations, the rights guaranteed under arts 8(2)(b), 26(1), 26(2), 27 and 28(1) of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and art 27 of the International Covenant on Civil and Political Rights (ICCPR) being the corresponding provision to s 20 of NZBORA; and the principle that the law should be considered as “always speaking,”(*McGuire v Hastings District Council*, above n 9.)

¹⁵ Te Ture Whenua Māori Act, s 2.

the effective management of Māori Land particularly in the context of multiple owners. The Act also introduced the ability to establish various types of trusts specific to Māori land in order to better facilitate the management and ownership of Māori land.

[45] On the introduction of the Bill into Parliament, the Minister for Māori Affairs explained the framework of the proposed Act. Both the Crown and the Council point to the emphasis on “land”:¹⁶

Land is a corner-stone of Maori identity and is the single greatest physical asset on which our economic development depends. ... The Bill is the first major legislation that is based on what our people have said they need. They have always said that legislation should have its foundation in the principles of the Treaty of Waitangi. Legislation should reflect the value that the land is a heritage that the living must preserve and pass on to those who follow and that should be retained within the ownership of the family. Such principles form the framework on which the Bill has been woven.

Like its predecessors, the Bill deals mainly with Maori land—with the structures and agencies to administer it, the Maori Land Court and its powers, what happens when an owner dies, and what owners can do with their land interests. The Bill is in a form that will be easy to use by those affected by it, and the language used is modern and much clearer. The Bill heralds a new era in the use of Maori land. The structures for this are familiar ones, but they have been greatly expanded in their scope and in the degree of internal management. For the first time the role of the Maori Land Court will be spelt out clearly. Historically its role has altered from an agency that alienated land to one that helps with the retention and the use of land. The matter is now put beyond doubt. The provisions that stated that customary title shall not avail against the Crown have been dropped because they were contrary to the principles of the Treaty of Waitangi.

[46] As the Minister foreshadowed, there is a distinct policy change in the current Act, with the emphasis on retention of Māori land, not its alienation. The role of the Māori Land Court was specifically addressed to establish mechanisms to assist Māori to achieve the implementation of that policy shift.

[47] The preamble to the Act, both the Māori and English version, incorporates the obligations flowing from the Treaty and confirms the special relationship between Māori and the Crown. It recognises the desirability of recognising that land is a taonga tuku iho of special significance to Māori people. It promotes the retention of that land

¹⁶ (29 April 1987) 8610 NZPD.

in the hands of its owners, their whānau, and their hapū, and facilitates the occupation, development and utilisation of that land for the benefit of its owners, their whānau and hapū.

[48] Section 2 states that the interpretation of the Act is to further the principles set out in the preamble. Importantly, s 2(3) clarifies that in the event of any conflict in meaning between the Māori and English versions of the preamble, the Māori version shall prevail. The Privy Council in *McGuire v Hastings District Council*¹⁷ considered both versions of the preamble in s 2 of the Act were important to interpreting the Act.

[49] The structure of the Act consists of 18 Parts, the first three of which deal with the establishment and operation of the Māori Land Court and the Māori Appellate Court. Parts 4–18 relate variously to the powers of the Court to deal with the administration of estates involving Māori land, recording the ownership of land interests, determining the status of land, and the alienation of interests in land. Parts 9-18 confer wide powers on the Court to provide for more effective representation of Māori land owners, to constitute and oversee a range of trusts and incorporations in respect of Māori interests in land, to set aside land as Māori reservations, to order surveys, and make occupation orders among other related powers. Those powers can be used to facilitate the development and utilisation of the land for the benefit of the owners, as the Minister foreshadowed.

[50] In *Ngāti Apa*, the parties also focused on the meaning of “land” or “whenua.” Keith J emphasised that the meaning of the word “land” was not determinative. He said:¹⁸

[177] The respondents stress the use of the word ‘whenua’ or ‘land’ (as emphasised) in that preamble, but that begs the question. The immediately preceding passage reaffirms the spirit of the exchange of kawanatanga for the protection of rangatiratanga. Te tino rangatiratanga is over whenua and taonga, among other things, or in the English text over land and fisheries. That rangatiratanga plainly extended in fact to some marine areas...

[178] Given the long history of Maori customary property and rights in areas covered by water, a much clearer indication would have had to appear in Te Ture Whenua Maori Act for it to be a measure preventing the Maori Land Court from investigating claims in those areas. ...

¹⁷ *McGuire v Hastings District Council*, above n 9, at [4].

¹⁸ *Ngāti Apa*, above n 12, at [177] and [178].

[51] It is important therefore to have regard not only to the text and structure of the Act but whether the Act gave a clear indication that the Māori Land Court jurisdiction was ousted. The parties referred the Court to s 10(1) of the Legislation Act 2019, replacing s 5 of the Interpretation Act 1999, which contains the purposive approach to statutory interpretation. It provides that the meaning of legislation must be ascertained from its text and in light of its purpose and context. The Supreme Court said of the former s 5:¹⁹

[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation ... Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[52] Although the definitions of “land” and “Māori land” in the Act clearly refer to land interests only, the purposive approach to statutory interpretation requires that the meaning of the wording is not viewed in isolation. The text therefore, should be considered in the general legislative context to consider whether there is any impediment in the Act to the Māori Land Court’s jurisdiction to investigate claims of customary title to freshwater and the extent to which the courts have recognised customary ownership-type rights in water to date.

The authorities

[53] The parties canvassed a range of cases, concerning claims to lakebeds, streams, and to the status of land comprised of marine foreshore and seabed.

[54] I deal first with a number of authorities upholding ownership of lakebeds and rights to the water in them. In 1893, the Court of Appeal in *Piripi Te Maari v Mathews* held that a certificate of title held by Māori owners of land, a significant part of which was covered by waters of the upper and lower Wairarapa Lakes, included the waters of the lake in the certificate of title and comprised the right of fishing.²⁰

¹⁹ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, 3 NZLR 767 (footnotes omitted).

²⁰ *Piripi Te Maari v Mathews* (1893) 12 NZLRF 13 (CA) at 14 and 24.

[55] In the 1912 decision of *Tamihana Korokai v Solicitor-General*,²¹ the Court of Appeal held that the Native Land Court had jurisdiction to determine customary title in relation to the lakebed of Lake Rotorua, unless it could be shown that native title had been extinguished by proclamation, cession of owners, or Crown grant. The Native Land Court created a freehold title in the lakebed, which allowed the freehold owners to exercise common law legal rights in relation to the water column (the space above the land on which the water flows) and rights in relation to lake water.

[56] In a 1929 decision of the Native Land Court in *Lake Omapere*, Judge Acheson accepted that Māori:²²

... would see no more reason for separating the lake from its bed (as to the ownership thereof) than he would see from separating the rocks and the soil that comprise a mountain.

[57] The Judge found that “Māori custom and usage recognised full ownership of lakes themselves” and held Lake Omapere was customary land in terms of the Native Land Act 1909.²³ In doing so, the Māori Land Court determined that the freehold estate included the water and the lakebed as a single entity, consistent with Māori custom and practice. Applying the same reasoning in *Lake Tangonge*, Judge Acheson found that Lake Tangonge was native customary land under the Native Land Act 1931 and held that Māori “not only owned the beds but the lakes themselves.”²⁴

[58] In the *Lake Rotoaira* decision, the Māori Land Court determined the existence and extent of customary title to “customary land called Lake Rotoaira”²⁵ finding that the claimants had the rights to charge the Crown to use the lake waters for hydro-electric purposes.

[59] Water contained above lakebeds differs in character from running freshwater, such that ownership of flowing water in streams or rivers has not been recognised at

²¹ *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA).

²² *Lake Omapere* (1929) 11 Bay of Islands MB 253 [Lake Omapere] at 259.

²³ At 259.

²⁴ *Lake Tangonge* (1934) 65 Northern MB 348; see also Professor Richard Boast QC “Judge Acheson, the Native Land Court, and the Crown: A report to the Waitangi Tribunal” (Wai 1040, October 2016) at 72–76.

²⁵ *Lake Rotoaira* (1956) 34 Tokaanu MB 113 at 299–302.

common law, which I deal with below.²⁶ Mr Smith drew my attention to an early Native Land Court order in respect of fishery easements and occupation reserves in the area of *Kemp's Deed (Canterbury)*, (Kemp Block)²⁷ where the description of a Māori customary title included freshwater in streams running through the land. The order referred to “the rights of the owners of land to the undisturbed flow of water in the several streams running through the said parcel of land.”²⁸

[60] Reliance by the Trustees was also placed on Cooke P’s description of the scope of native title in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, in the context of a claim to customary title in river water, where he said: ²⁹

Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation.

[61] Although the Trustees rely on this case as authority recognising that native title or customary rights extend to freshwater, the claim was whether Māori treaty rights included the right to generate electricity by harnessing river water. In judicial review proceedings, Te Ika Whenua sought an interim declaration that the Minister of Energy not take any steps for the transfer of the dams to the proposed energy companies until their substantive claim to the rivers was determined by the Waitangi Tribunal. The appellants claimed that they had property rights in the rivers and alleged that the transfers would prejudice those rights, basing their claim on the doctrine of aboriginal title.

[62] Cooke P made further comment on aboriginal title:

The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law ... At the other extreme they may be treated at best a mere permissive and apparently arbitrarily revocable occupancy ...

²⁶ At [98]-[100].

²⁷ David Alexander *History of the Kemp Block Reserves*, 1988, Wai 27, Doc #05, pp 8-10 described in David Alexander “*Lake Omapere*” (Wai 2357, #A57(a), May 2012).

²⁸ At 16 (footnotes omitted).

²⁹ *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at [23] per Cooke P.

[63] The Court ultimately concluded that there could be no legal objection to the transfer of the dams to energy companies because the right to generate electricity by the use of water power had not been preserved or assured to Māori. The transfers were no impediment to the claims for compensation for interference with Treaty rights to land or water. The rights to or in the dams themselves were not held by Māori.

[64] Claims relating to the marine foreshore involved different rights. *Te Weehi v Regional Fisheries Officer* involved the exercise of a Māori fishing right.³⁰ *Ngāti Apa* concerned the claim for customary title to foreshore and seabed land. In both cases, the Courts were concerned with customary interests in the foreshore: taking shellfish from the foreshore in *Mr Te Weehi's* case and a claim to the foreshore and seabed in *Ngāti Apa*.

[65] In addition to canvassing a number of authorities on claims to customary title over land and freshwater, the Trustees point to s 14(1) of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926, to demonstrate that native title applies equally to land and water. Under this enactment, Parliament declared the beds of Lake Taupō and the Waikato River, together with the right to use the respective waters, as the property of the Crown. This freed and discharged the beds from Māori customary title (if any) or any other Māori freehold title.³¹

[66] The Trustees also rely on the recent decision of *Tūwharetoa Māori Trust Board v Taupo Waters Collective Ltd*³² where the High Court found that the Māori Land Court should hear the Trustee Board's claim under s 18(1)(a) of the Act, to grant rights of occupation or use to private entities for commercial activities in or on the waterways flowing to Lake Tāupo. Tāupo Waters had been vested in the Trust Board as Māori freehold land.

Analysis

[67] The substantive pleadings are brought by the Trustees under ss 18(1)(a) and (h) of the Act. Section 18(1)(a) enables the Māori Land Court to determine claims of

³⁰ *Te Weehi v Regional Fisheries Officer* [1968] 1 NZLR 680.

³¹ *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 at [41]–[43] per Elias CJ.

³² *Tūwharetoa Māori Trust Board v Taupo Waters Collective Ltd* [2021] NZHC 1871.

ownership or rights to Maori freehold land and s 18(1)(h) confers jurisdiction to determine whether any specified land is Māori customary land or Māori freehold land or general land. The Trustees' case, however, is a claim to customary title to the Poroti freshwater springs. As the Crown contends, the claim in customary title is not as a consequence of the Trustees owning the freehold but is pleaded as a test case on the extent of rights held by Māori over freshwater.

[68] There are two reasons why I do not uphold the Trustees' submission that the definition of "land" is determinative of the Māori Land Court's jurisdiction to determine customary title to water.

[69] The first is the specific statutory wording of the Māori Land Court's jurisdiction provisions and the definitions of "land" in the Act. The definitions of "land" are restricted to the status accorded to the land, e.g., Māori land, general land or Crown land. There is no support in the statutory definitions of "land" for the Trustees' contention that land includes water. Further, such an interpretation does not sit easily with customary title claims to any land. The specific wording of the s 18(1)(a) jurisdiction constrains the Court to determine ownership to or right, title, estate or interest in Māori freehold land only. It cannot be right that the Māori Land Court could grant customary title in respect of resources attached to or connected with Māori freehold land and yet, by virtue of s 18(1)(a), not be able to do so in respect of Māori customary land or other general land, where customary rights may continue to exist. Such an outcome would be anomalous and counts against the interpretation sought.

[70] Similarly, s 18(1)(h) limits the Court to determining the status of any specified land to being Māori customary land or Māori freehold land or general land. The Trustees claim in the alternative, that s 18(1)(h) gives the Māori Land Court power to determine customary title and rights to Poroti Springs because it is "land that is held by Māori in accordance with tikanga Māori" under s 129(2). Section 129(2)(a) provides that the Court can order the land to have the status of Māori customary land.

[71] I uphold the Crown's submission in finding that this sub-section does not assist the Trustees' arguments. The status of the Whatitiri 13Z4 Block has been determined

as Māori freehold land. Section 18(1)(h) relates to the status of land, not customary rights to water on it. Section 18(1)(h) is of no application here, as the determination has already been made that the status of the land is Māori freehold land. There is no further inquiry to be undertaken by the Court.

[72] The Trustees' claim contrasts with the claim in *Ngāti Apa*, which sought orders as to the status of the land comprising the foreshore and seabed. The Court confirmed that the Māori Land Court had jurisdiction to determine the status of that land under s 18(1)(h).³³ I note that although the question posed for the Court of Appeal in *Ngāti Apa* sought to include the status of the foreshore or seabed "and the waters thereto," the Court did not find that the Māori Land Court's jurisdiction extended to determining customary title to the marine waters. No mention was made of the claim to the waters.

[73] Standing back from the text of the Act and applying the purposive approach to the interpretation of "land" within the Act does not assist the Trustees' position. Even with the policy changes to the Act and the guidance in the preamble, the focus of the Act and its structure emphasises the importance of retention of land for Māori and provides mechanisms for the Māori Land Court to achieve this overarching purpose, including by determining the status of land. The *Ngāti Apa* decision confirmed that the Māori Land Court had jurisdiction to hear and investigate the native title claim to the foreshore and seabed (the land under the sea), but that was consistent with the Māori Land Court's jurisdiction under s 18(1)(h) for determining the status of land.

[74] Second, the authorities cited by the Trustees do not support their argument in my view. In the decisions on customary title to lakebeds and the waters above them, the lake waters were part and parcel of the overall estate and interest in the lakebeds. There was not a separate grant of title to water in the freehold title to land. For instance, in *Tamihana Korokai*, the rights granted to the owners in relation to the lake water above the lakebed, as the Crown submits, were incidents of the freehold land title.³⁴ The title in the lakebed was granted, as a result of the customary title to the land in the lakebed, which was then converted to a Land Transfer Act freehold title. It

³³ *Ngāti Apa*, above n 12, at [2], [91], [124] and [182].

³⁴ *Tamihana Korokai*, above n 21.

did not extend to determining that the freehold owners of the lakebed owned the water itself.

[75] Here, there is no dispute that the Trustees hold the freehold title to Whatatiri 13Z4 but the claim seeks ownership of the Poroti Springs beneath it and the rights to not only use but to control the use of such freshwater. Even in the *Kemp Block* order, the Native Land Court granted the owners of the land, over which the streams flowed, no more than their common law rights as riparian owners to have the use of flowing waters, undisturbed, on their land.³⁵ Further, the decisions in *Lake Omapere*³⁶ and *Lake Tangonge*,³⁷ did not extend to the Court determining customary title to water separately from freehold title to land. Rather, the Court was concerned with the bundle of rights contained within the original title determination of the lakebed in both cases.

[76] The two sea-based decisions involving the collection of seafood and claim to the foreshore and seabed did not involve a claim to the ownership of the marine waters.³⁸ They were not claims to the native title of water.

[77] However, as the Court of Appeal cautioned, the definition of “land” is not necessarily determinative of the jurisdiction question. Given that the Maōri Land Court is a specialist indigenous Court to hear native title claims and protect fundamental customary rights as Keith J said in *Ngāti Apa*, a “clear indication” is needed to oust the Maōri Land Court’s jurisdiction to hear a native title claim.³⁹

[78] The same sentiment was echoed more recently in *Trans-Tasman*, where the Supreme Court repeated that a clear intention was needed if decision-makers were to be constrained from respecting Treaty principles by holding that:⁴⁰

[151] ... The Courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty

³⁵ Above n 27.

³⁶ Above n 22.

³⁷ Above n 24.

³⁸ *Te Weehi* above n 30 and *Ngāti Apa*, above n 33.

³⁹ *Ngāti Apa*, above n 33 at [178].

⁴⁰ *Trans-Tasman*, above n 14.

principles should not be ascribed to Parliament unless that intention is made quite clear.

[79] I consider then, a further aspect of the Act's provisions and that is the effect of Land Transfer registration on customary title.

The effect of Land Transfer Act registration

[80] The Crown argues strongly that the principal impediment to the Trustees' claim to customary title to the water of the Poroti Springs is the status of the Whatitiri 13Z4 land, namely, that Land Transfer Act registration has extinguished native title.

[81] Section 129 of the Act specifies that all land in New Zealand shall fall within one of six statuses. Whatitiri 13Z4 is Māori freehold land and by virtue of s 129(2)(b), is a Māori reservation under s 338 of the Act. According to ss 139 and 141 of the Act, Whatitiri 13Z4 became subject to the Land Transfer Act and is a legal estate in fee simple by virtue of the vesting order made under s 139. On this basis, the Crown argues that it is now well-established that registration of title to a fee simple estate under the Land Transfer system extinguishes customary title which may have existed in the land prior to registration.

[82] The Crown relies on s 51 of the Land Transfer Act which states the effect of registration under the Act. The section provides:

- (1) On registration under this Act of a person as the owner of an estate or interest in land, the person obtains a title to the estate or interest that cannot be set aside.
- (2) The title of the registered owner is free from estates and interests in the land that—
 - (a) are not registered or noted on the register; or
 - (b) are not capable of being registered or noted on the register.
- (3) Despite subsections (1) and (2), the title of the person registered as owner of the estate or interest is subject to—
 - (a) the exceptions and limitations in sections 52 to 56, subparts 1 and 3 of Part 4, and section 204; and
 - (b) any enactment other than this Act that overrides or limits the title.

- (4) Subsections (1) and (2) apply whether or not the registered owner acquired the estate or interest—
- (a) for valuable consideration; or
 - (b) from a fictitious person.
- (5) Nothing in this section affects the in *personam* jurisdiction of the court.

[83] Mr Smith for the Trustees, relying on Elias CJ's observation in *Ngāti Apa*, submits that the registration of freehold interests does not inevitably extinguish all customary rights associated with land, but only those rights that are inconsistent with the registered interests.⁴¹

[84] Elias CJ observed the difference in purpose of the current Te Ture Whenua Māori Act with the previous Act's purposes, which focussed on converting occupation interests in land into estates in fee simple. In contrast, the current legislation supports retention of customary land and title. Her Honour said:

[46] It is not clear to what extent the new jurisdiction equips the Maori Land Court to recognise interests in land according to custom which do not translate into fee simple ownership. In New Zealand, the common law recognition of property interests in land under native custom is little developed. ...

[85] Elias CJ attributed the lack of recognition of customary title to the success of the Māori Land Court in converting estates to fee simple.⁴² After canvassing the early cases decided by the Māori Land Court under the former legislation and the question of ownership of the foreshore and seabed at common law, Her Honour concluded that she was unable to draw a distinction between lakebeds or riverbeds and the seabed.⁴³

[86] However, Her Honour was drawn back to the question of whether Parliament intended to permit recognition of or to create property in the seabed under the current Act. Elias CJ concluded that if the legislation confers freehold interests, it extinguishes Māori customary property rights:

[58] ... There seems no argument that if the legislation confers freehold interests, it extinguishes any pre-existing Maori customary property rights inconsistent with such interests. The terms of the legislation were not,

⁴¹ *Ngāti Apa*, above n 12, at [58].

⁴² At [46].

⁴³ At [55].

however, the subject of argument. And it is artificial to consider the question further in the absence of identification of any customary property. I consider it preferable to avoid answering the question in those terms, while indicating that any customary property in the areas vested seems unlikely to survive.

[87] Elias CJ's articulation followed a number of Court of Appeal and High Court decisions on extinguishment of customary title. In *Faulkner v Tauranga District Council*, the High Court held that if there was any doubt about whether the Crown had extinguished customary title in the land at issue in that case, it was "laid to rest" by "the issue of a certificate of title under the Land Transfer Act 1952."⁴⁴ To similar effect, the High Court in *Te Roroa Whatu Ora Custodian Ltd v Kereopa* noted that customary rights in land can be extinguished by a Crown grant and reiterated that "it has also been recognised that when land is subject to a registered title under the Land Transfer Act, that any M[ā]ori customary rights in the land have been abolished".⁴⁵ The Court of Appeal, in dismissing an application for an extension of time to appeal against the High Court's judgment, ruled that an appeal against that judgment had "no prospect of success".⁴⁶

[88] There are several other authorities to the same effect. In *ANZ National Bank Ltd v Uruamo*, the High Court held that:⁴⁷

[24] ... [o]nce land is brought under the Land Transfer Act, any customary rights will have been extinguished. ... When it comes to land, customary rights can be extinguished ... by Crown grant, and by registration under the Land Transfer Act".

[89] More recently, in *Johnson v Johnson and Ors*, the High Court held that:⁴⁸

[14] ... The fact that ... a certificate of title was later issued under the Land Transfer Act, shows that the land has been the subject of a Crown grant. The effect of the Crown grant is to extinguish any earlier indigenous title.

[90] The Court concluded "[t]hat means that [the land at issue] can no longer be Māori customary land".⁴⁹ To the same effect, the High Court held in *Re Reeder (on*

⁴⁴ *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 367.

⁴⁵ *Te Roroa Whatu Ora Custodian Ltd v Kereopa* [2012] NZHC 1052 at [21].

⁴⁶ *Kereopa v Te Roroa Whatu Ora Custodian Ltd* [2013] NZCA 327, [2013] NZAR 1029 at [29].

⁴⁷ *ANZ National Bank Ltd v Uruamo* [2012] NZHC 1895, [2012] 13 NZCPR 643.

⁴⁸ *Johnson v Johnson and Ors* [2021] NZHC 624.

⁴⁹ At [14]. See also *Deputy Registrar Māori Land Court v Faulkner* [2009] NZAR 185 (MLC) at [24] and [43]. This decision was affirmed on appeal: *Faulkner v Deputy Registrar 2010 Māori*

behalf of Ngā Pōtiki) that extinguishment (pursuant to a specific statute) occurred at the point a certificate of title was issued.⁵⁰

[91] The Crown relies on the principle of indefeasibility of title under the Torrens system which makes the registered proprietor's estate paramount against interests which are not notified on the register,⁵¹ reflecting the fundamental purpose of the Torrens system".⁵² In addition to the principle of indefeasibility, the Crown submits that certainty in respect of interests in land is also reflected in the Act. Section 77 of the Act provides:

77 Orders affecting Maori land conclusive after 10 years

- (1) No order made by the court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.
- (2) Where there is any repugnancy between 2 orders each of which would otherwise, by reason of the lapse of time, be within the protection of this section, then, to the extent of any such repugnancy, the order that bears the earlier date shall prevail, whether those orders were made by the same or different courts.
- (3) Nothing in this section shall limit or affect the authority of the Chief Judge to cancel or amend any order under section 44.

[92] The principle of indefeasibility and the provision of s 51 of the Land Transfer Act have been held to be inconsistent with continued customary title. In *Hoole and Ors v Pickens*, the High Court confirmed that customary rights cannot survive under s 62 and the other indefeasibility provisions of the Land Transfer legislation.⁵³ Once customary title has been extinguished, the land does not have the status of Māori customary land.⁵⁴

Appellate Court MB 643 (2010 Appeal 643) and *2010 Māori Appellate Court MB 672* (2010 Appeal 672).

⁵⁰ *Re Reeder (on behalf of Ngā Pōtiki)* [2021] NZHC 2726 at [143].

⁵¹ See, among other authorities, *Frazer v Walker* [1967] NZLR 069 (PC) at 1075–1076; *Assets Company Ltd v Mere Roihi* (1905) NZPCC 275; *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA); *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC) at [49]–[54]; and *Minister of Conservation v Māori Land Court* [2009] 3 NZLR 465 (CA).

⁵² *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [149] (footnotes omitted).

⁵³ *Hoole and Ors v Pickens* [2014] NZHC 620 at [54]. On the primacy of the Land Transfer Act system, see also *Registrar-General of Land v Marshall* [1995] 2 NZLR 189.

⁵⁴ *Hoole and Ors v Pickens*, above n 53, at [53]; and *Faulkner v Tauranga District Council*, above n 44 at 365: “when land is held by way of an estate in fee simple, especially where there is a registered title under the Land Transfer Act, the title must be regarded as one derived from the

[93] This Court has confirmed that transformation of title, indefeasibility and certainty may not be impediments to acknowledging the tikanga Māori connections with land. In *Ngāti Whātua Ōrākei Trust v Attorney-General*, the Court held that customary connections and relationship with the land may continue even where the legal recognition of property rights is no longer possible due to the transformation of title.⁵⁵ As the Court observed, statutory references, for instance, to mana whenua or to relationships with resources, may acknowledge those tikanga Māori connections.

[94] It is clear from the authorities and most notably *Ngāti Apa*, that the extinguishment of customary title to the land in Whatitiri 13Z4 block occurred with the initial Crown grant and its subsequent registration as Māori freehold land under the Land Transfer Act. That, in my view, is the “clear indication” that the Māori Land Court’s jurisdiction to determine customary title to the land of Whatitiri 13Z4 is ousted.

[95] But it leaves the question open, however, whether customary title to the water in Poroti Springs has been extinguished and whether the Māori Land Court can determine customary title to the freshwater springs as a right or interest associated with the land.

“Rights” to water

[96] Under s 18(1)(a) the Māori Land Court can:

... hear and determine any claim, whether at law or in equity, to the ownership or possession of Māori freehold land, or to any *right*, title, estate, or *interest* in any such land ...

[97] Given that the Whatitiri Block 13Z4 is Māori freehold land, does the Māori Land Court have jurisdiction to determine “rights” or an “interest” in water associated with or in the Māori freehold land?

Crown. It is impossible, I think, to say that such a title is merely Crown recognised and continues, so far as the fee simple Owners (registered proprietors) are concerned, to be held according to custom”.

⁵⁵ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [357] and [371].

[98] There are numerous Māori Land Court decisions defining the extent of “interest” under s 18 of the Act. “Interest” has been confined to a property interest in the freehold only. Claims have been rejected where they involve “personal property” in shares in a Māori land entity.⁵⁶ Stock losses have also been held not to be a claim relating to Māori freehold land but must relate to ownership, possession or trusteeship of Māori freehold land.⁵⁷

[99] The Crown has also referred the Court to the Māori Appellate Court decisions, where the Court has held that s 18(1)(a) is declaratory in nature⁵⁸ and that it cannot create new rights or vest rights that contradict or derogate from existing legal interests.⁵⁹ Similarly, orders determining exclusive use and occupation rights that are contrary to the general right of co-ownership in a block are not available under s 18(1)(a).⁶⁰

[100] The Māori Land Court Judge Harvey (as he then was) cautioned that:⁶¹

[39] ... Customary rights are also a matter for the hapū exercising mana whenua in accordance with their traditions and customs. They can only fall within the purview of the Court where there is a legal basis to entertain such submissions. The Court cannot intervene where it does not possess the statutory jurisdiction to do so.

Common law restrictions

[101] The legal basis to entertain a claim to a proprietary interest or ownership right in water has been problematic at common law, even prior to the statutory enactments

⁵⁶ *Re Hamiora and Paki* (1996) 5 Tai Tokerau Appellate MB 16.

⁵⁷ *Re Mangaporou Trust* 132 AOT 219 at 220 and 221.

⁵⁸ *Tuwhangai v Boon – Kawhia U 2B Block* (2018) 160 Waikato Maniapoto MB 113 (160 WMN 13) at [11] and [14].

⁵⁹ *Paki – Matauri X Incorporation* (1996) 5 Taitokerau Appellate MP 16 (5 APWH 16); and *McCann – Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Takitimu Appellate MB 2 (11 ACTK 2).

⁶⁰ *Re Matauri 2F2B – Williams v Williams* 3/10/1991, MAC1991/06, 3 APWH 20 [3 TOK 20-26, 114] at 5 (relating to s 30 Māori Affairs Act 1953, which covers the same jurisdiction). The Court has developed its own approach relating to fixtures, where it may make orders declaring equitable ownership or possession of fixtures on Māori freehold land separate from the land. However, occupation orders are granted under the specific jurisdiction of s 329, not the general jurisdiction of s 18(1)(a). The modern approach under the 1993 Act is set out in *Re Pohio (Kekerione No 32)* (2022) 75 Te Waipounamu MB 171 (75 TWP171) at [23] to [25]. In that case the Court made occupation orders under s 328 but declined orders under s 18(1)(a) because the relevant structures were chattels, not fixtures. See also the approach to s 18(1)(a) in relation to houses in *Nicholas v Te Amo – Te Whaiti-Nui-A-Toi Block* [2021] Māori Appellate Court MB (2021) APP 273.

⁶¹ *Taunoka Trust v Trustees of the Mangaporou Trust* (2015) 337 Aotea MB 131 (337 AOT 131) at [39].

of the Water and Soil Conservation Act 1967, and more recently, the RMA.⁶² The common law, applicable throughout the Commonwealth, identified natural rights of the land owner, to take surface or underground percolating water in any quantities (with no liability for diminishing a neighbour's water supply).⁶³

[102] A riparian owner had the right to take stream water in any quantities for "ordinary" purposes in the use of a riparian land, namely for domestic purposes and for stock; or to take stream water (subject to only returning it) in reasonable use of riparian land for "extraordinary" purposes (for example, irrigation or industrial use or to receive the unimpeded flow of stream water from higher riparian owners).⁶⁴

[103] The other natural rights were the right to discharge surface water on one's own land and natural drainage of surface water from higher land to lower,⁶⁵ as well as rights acquired by easements to take, discharge or convey water from, on or through another's land.

[104] Ownership of water, particularly running water, has not been available at common law. "Ownership" is a distinct concept from the "use" of water. Professor FM Brookfield summarised the distinction between the common law rights of use as opposed to ownership of water as follows:⁶⁶

Water has never been subject to the ordinary rules of private property. Except when appropriated and taken into possession (say in a tank), it is incapable of being owned. Rights in respect of natural water have, thus, been rights of use not of ownership and in this respect the common law has recognized its public character – that it is, as a seventeenth century Judge said, 'necessary for the preservation of the commonwealth'; and hence that no man can have property in streams or rivers or surface waters.

⁶² Section 354(1) of the Resource Management Act 1991 continued the Crown's vested right, interest and title in water on the repeal of s 21 Water and Soil Conservation Act.

⁶³ *Acton v Blundell* (1843) 12 M & W 324.

⁶⁴ *Attwood v Llay Main Collieries* [1926] Ch 444; *Cooke v Vancouver Corporation* [1914] AC 1077, 1082 (PC); and *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71 (SC).

⁶⁵ *Bailey v Vile* [1930] NZLR 829 (HC); and *Wilsher v Corban* [1955] NZLR 478 (SC).

⁶⁶ Professor FM Brookfield "The Conveyancer, Water Rights and The Environment" [1975] NZLJ 645.

The “public character” of water in New Zealand has been legislated, imposing statutory and regulatory controls. The issue of native title to natural water has yet to be determined.

Statutory controls

[105] As the Crown submits, the common law rights are now greatly altered or regulated by statutory changes. Under the Water and Soil Conservation Act 1967, the ability to take and discharge “natural water” was vested in the Crown. Now, the RMA replaces the common law property rules over freshwater with a specific regulatory regime, conferring on Regional Councils or the Crown the ability to control water. This authority includes taking, using, damming or diverting water.

[106] While the Water and Soil Conservation Act did not vest ownership of water in the Crown, any customary right or title that does exist in relation to natural water is subject to regulation by the RMA to the extent of effective ownership.⁶⁷ Elias CJ in *Ngāti Apa* noted that:⁶⁸

[76] ... The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.

[107] As the Crown submits, the lake waters included in the owners’ title in *Tamihana Korokai*,⁶⁹ as an example, were still subject to regulation by the statutory regime over freshwater.

[108] Establishing ownership rights in water has been fraught in both the common law context and in claims for customary title. Customary rights in relation to freshwater have been recognised as incidents of the freehold title only and extend to the use and the taking of lake water, not ownership of the water itself.

[109] Although the registration of freehold interests may not inevitably extinguish all customary rights associated with land, those rights must be consistent with the registered interests. Therefore, the freehold interest, which the Trustees hold, is

⁶⁷ *Ngāti Apa*, above n 12, at [76], [123] and [192].

⁶⁸ At [76].

⁶⁹ *Tamihana Korokai*, above n 20.

subject to the regulatory control of water on the land under the RMA, absent any other right not inconsistent with the registered Māori freehold interest in the land.

[110] In their claim, the Trustees assert the rights and responsibilities to:

- (a) use the water, including in economic exchange with others;
- (b) allow or withhold the use of water by others;
- (c) set conditions on the use of the water by others; and
- (d) to care for the water and ensure its health.

[111] On the pleading alone, the claims in (b) to (d) reflect the controls vested in the Crown under the RMA to regulate and control freshwater. The specific statutory jurisdiction conferred on the Māori Land Court does not permit the Court to exercise powers under the RMA. As Judge Harvey warned, the Māori Land Court cannot intervene to determine customary rights where it does not possess the statutory jurisdiction to do so.⁷⁰

[112] The timing of the legislative reforms into water management in New Zealand overlapped with the time it took Te Ture Whenua Māori Act to be enacted. There is weight in Mr Ormsby's submission for the Council, that if Parliament had intended that the Māori Land Court should have the ability to determine rights in respect of water (including water flowing through Māori and non-Māori land), then it would have been explicitly provided in the Act,⁷¹ particularly as the RMA was introduced and received Royal Assent in 1991, with a "comprehensive framework for the management of water in New Zealand"⁷² during the five year period between the Bill's introduction in 1987 and 1993 when the Act was passed.

[113] Without a clear indication in the Act that Parliament intended the jurisdiction of the Māori Land Court to include customary rights over resources, such as water, I find the Māori Land Court does not have the jurisdiction to do so. The jurisdiction is

⁷⁰ Above n 58, at [39].

⁷¹ *Manukau City Council v Ports of Auckland Limited* [2000] 1 NZLR 1 (PC) at 13.

⁷² See Resource Management Act 1991, s 354(1). The vesting of water in the Crown was continued on the repeal of s 21 of the Water and Soil Conservation Act 1967.

specific. There is therefore no legal basis or jurisdiction then remaining for the Māori Land Court to determine customary title in Poroti Springs.

Maori Reservation

[114] There is one aspect of the Māori Land Court's jurisdiction, which relates to water. That is the Court's power to set aside Māori freehold land or any general land as a Māori reservation for the purposes of a spring, well, catchment area or other source of water supply.⁷³ As noted, Whatitiri 13Z4 has been set apart as a Māori reservation and is held by the Trustees "for the purpose of water supply for the common use or benefit" of the named subtribes of Ngāpuhi.⁷⁴ It is those interests, water supply for common use or benefit, which I consider assist in the analysis of the Māori Land Court's jurisdiction.

[115] Although the early Native reservations were authorised under the New Zealand Native Reserves Act 1856, reservations for the purpose of springs, wells or other source of water supply were not authorised until 1909 and were made by the Governor-in-Council.

[116] Although formerly set aside as a reservation, Whatitiri 13Z4 Block was first set apart as a Spring Reserve in 1939. Under the provisions of s 439(1) of the former Māori Affairs Act 1953, a Māori reservation could be made for the purposes of a "spring", "well", "catchment area" or "other source of water supply." It was under this provision that the Māori Land Court set the Block aside in 1960 as a Māori reservation for the purpose of water supply for the common use and benefit of the subtribes of Ngāpuhi.

[117] Although not exercised in relation to Whatitiri 13Z4, the 1953 Act also enabled the Māori Land Court to grant a lease or occupation licence of the reservation for any term not exceeding seven years, at the request of the Trustees of the reservation.⁷⁵ The Court had a discretion to impose such terms and conditions as it thought fit on any grant of lease or occupation licence. The Court also had the power to direct how the

⁷³ Te Ture Whenua Māori Act, s 338(1).

⁷⁴ Te Ture Whenua Māori Act, s 338(3).

⁷⁵ Māori Affairs Act 1953, ss 439(1) and (9).

revenue derived from any such lease or occupation licence was to be expended by the Trustees.

[118] Section 338 of Te Ture Whenua Māori Act mirrors those provisions, which have been updated by amendment. Trustees in whom any Māori reservation is vested may seek the consent of the Court to grant a lease or occupation licence of the reservation, or any part of it, for any term not exceeding 14 years (formerly seven years), subject to such terms and conditions as the Court thinks fit.⁷⁶ These specific provisions under the Act, as in the Māori Affairs Act 1953, confer on the Māori Land Court a supervisory role to approve and protect the interests of the beneficiaries, to whom the Trustees are accountable. As in the 1953 Act, any revenue derived from any lease or occupation licence that has been approved by the Court, can be expended by the Trustees, as the Court directs.⁷⁷

[119] Those supervisory controls and protections to approve a grant of a lease/licence and the use of the derived revenue have been exclusively conferred on the Māori Land Court since 1937.⁷⁸ These powers enable the Court to exercise its jurisdiction, consistent with any legal obligations, to enable the hapū of Ngāpuhi, as named, to have the common use or benefit of the reservation as a source of water supply.

[120] The Māori Land Court's jurisdiction to set aside a spring as a Māori reservation is distinct from the jurisdiction required to determine the Trustees' claim for title in the freshwater of the Poroti Springs. The water supply has been protected by virtue of the Māori reservation order, to preserve that benefit for beneficiaries, present and future. I consider this is the extent of the Māori Land Court's jurisdiction to determine rights to water.

Conclusion

[121] The Trustees' claim for customary title in the freshwater falls outside the jurisdiction of the Māori Land Court. The registered freehold land interest of Whatitiri 13Z4, together with the legal constraints of the limited jurisdiction of the Māori Land

⁷⁶ Te Ture Whenua Māori Act, s 338(12).

⁷⁷ Section 338(13).

⁷⁸ Native Purposes Act 1937, No 34, s 5.

Court and the statutory control over water vested in the Regional Council under the RMA are impediments to the Māori Land Court's jurisdiction.

[122] The Māori Land Court does not have jurisdiction to make orders for customary title to freshwater under s 18 of the Act. The Māori Land Court does, however, have jurisdiction to supervise or amend the conditions of the Reservation Order and exercise its jurisdiction over Whatatiri 13Z4 as a Māori reservation. This includes the Court's ability to approve any leases or licences and give directions to the Trustees as to the expenditure of any revenue derived from such leases or licences.

[123] As other courts have noted, the time may well have come for a test case in relation to the issue of customary title in the context of freshwater resources.⁷⁹ The Māori Land Court, however, does not have the jurisdiction to consider that issue under the Act.

SECOND CLAIM: DAMAGES FOR INJURY TO WATER

[124] In light of the above finding to the first issue, the same answer applies to the second issue. The reasons can be given briefly.

[125] The Trustees also claim that because water is inseparable from whenua (land), injuries to the customary title to the water are also "injuries to the whenua." Although the declaration seeking damages refers to injury to "whenua", almost all the detail in the pleading relating to "injury" is to water.

[126] Under s 18(1)(c), the Māori Land Court can hear and determine any claim to recover damages for trespass or any other injury to Māori freehold land. The Trustees' pleading is that the hapū owns the water as a result of customary law and title and it is the water ownership and injuries affecting the water that is the subject of the claim. As pleaded, the injuries relate to:

- a) Restricting and/or preventing the use of the water by the First Applicants and the hapū to support and advance the cultural and economic rights and interests ... including by way of the over-allocation of water to third parties ...

⁷⁹ See for example *Te Whānau A Kai Trust v Gisborne District Council and Others* [2022] NZHC 1462 at [89].

- b) Restricting and/or preventing the First Applicants and the hapū from exercising authority to allow or withhold the use of water by the others;
- c) Restricting and/or preventing the First Applicants and the hapū from exercising authority to set conditions on the use of the water by the others;
- d) Not providing to and/or sharing with the First Applicants and the hapū any remuneration in connection with the allocation or use of the water; and
- e) Not compensating the First Applicants and the hapū for allocations of the water where the third party recipient profited from water allocated to it.

[127] The pleading constitutes a claim in compensation for the above “injuries.”

[128] However, the Trustees have a number of obstacles to overcome. The first is that this is not injury to Māori customary land but to water. This is outside the jurisdiction of the Māori Land Court. Secondly, the injuries as alleged are a consequence of the Regional Council exercising legitimate statutory powers under the RMA and not acting unlawfully. Again, a determination of unlawfulness is outside the Māori Land Court’s jurisdiction. Thirdly, the Māori Land Court has a limited jurisdiction to grant damages for injuries to Māori land.

[129] The Privy Council in *McGuire*, in ruling that the local authority exercising powers to designate Māori land for roading could not be the subject of an interim injunction for trespass or injury to Māori land, reinforced that the nature of the Māori Land Court jurisdiction was “specialised [and] limited.”⁸⁰ It found that the lawful exercise of powers under the RMA could not be an injury to land within the Māori Land Court jurisdiction and that the exercise of powers under the RMA is a matter for the Environment Court or for the High Court on judicial review.

[130] As the Trustees’ claim is against the Council, the *McGuire* ruling is binding on the Māori Land Court. The Māori Land Court therefore lacks the jurisdiction to determine the Trustees’ claim.

[131] Finally, I note there is one further problem for the Trustees. Section 144 of the Act specifies that only the Māori Trustee may seek to recover possession of Māori customary land or to recover damage for injuries to Māori customary land. That problem may be circumvented by a delegation or approval from the Māori Trustee for

⁸⁰ At 533.

the applicant Trustees to take such action but as the issue is moot there is no need to take this further.

Conclusion

[132] The Māori Land Court does not have jurisdiction to issue the orders sought for customary title in respect of freshwater or to order damages for injury to such customary title to water and a declaration is made in the form below.

Result

[133] A declaration is made on the following terms:

Question: Does s 18 of Te Ture Whenua Māori Act allow the Māori Land Court to make orders for customary title in respect of freshwater?

Answer: No

Question: Does the Māori Land Court have the jurisdiction to order damages for injury to customary title to water under s 18 of the Act?

Answer: No

Costs

[134] As Counsel have agreed, costs are to lie where they fall.

Cull J

Solicitors:
Crown Law Office, Wellington for Applicant
Woodward Law, Wellington for First and Second Respondents
Wynn Williams, Christchurch for Third Respondent