IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA162/2021
[2022] NZCA 165

BETWEEN	RORE PAT STAFFORD Appellant
AND	ATTORNEY-GENERAL First Respondent
	ACCIDENT COMPENSATION CORPORATION Second Respondent
	KĀINGA ORA – HOMES AND COMMUNITIES Third Respondent
	HOUSING NEW ZEALAND LIMITED Fourth Respondent
	NELSON MARBOROUGH DISTRICT HEALTH BOARD Fifth Respondent
	NELSON MARLBOROUGH INSTITUTE OF TECHNOLOGY LIMITED Sixth Respondent

Hearing:	14 and 15 September 2021 (further material received 20 October 2021)
Court:	Miller, Clifford and Gilbert JJ
Counsel:	K S Feint QC, M S Smith and H K Irwin-Easthope for Appellant J R Gough, S M Kinsler and S L Gwynn for First Respondent V E Casey QC, R E Brown and G F Dawson for Third and Fourth Respondents No appearance for Second, Fourth and Fifth Respondents
Judgment:	5 May 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The Attorney-General's cross-appeal is dismissed.

C The appellant must pay the Attorney-General's costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

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Introduction

[1] In 1839 the New Zealand Company (the Company) purported to purchase from Māori customary owners some 20 million acres of land on both sides of the Cook Strait, including lands in western Te Tau Ihu: that is the top of the South Island comprising what we now know as Nelson City and the wider areas of Tasman Bay and Golden Bay.

[2] The appellant, Rore Pat Stafford, is one of the descendants of those customary owners. Mr Stafford is himself a kaumātua of those descendants, and has been recognised as having standing as such in these proceedings.

[3] In 2010, Mr Stafford commenced proceedings in the High Court against the Crown claiming that, when awarding land to the Company in terms of the Spain Award,[1] the Crown's failure to give effect to the arrangements for the Nelson Tenths[2] and the Occupation Lands[3] was a breach of trust which the Crown must now remedy (the Trust Proceedings).

[4] Mr Stafford, having been unsuccessful in the High Court[4] and in this Court,[5] was granted in February 2017 a declaration in the Trust Proceedings by the Supreme Court that:[6]

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

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1 The Spain Award, and the terms of the Company's offer of land to subscribing settlors, provided for the grant of urban, suburban, and rural lots. Those lots were to comprise one acre, 50 acres and 150 acres respectively. The urban and suburban lots were duly surveyed, balloted and allotted. The rural sections were never surveyed. Hence no rural sections were balloted and allotted to Māori.

2 In 1845, the Crown granted to the Company some 151,000 acres of land for the purposes of settlement. The "Nelson Tenths" comprises some 15,100 acres (that is, one tenth of the total grant) which, in fulfilment of Company promises, the Crown agreed to reserve for the benefit of the Māori customary owners.

3 The "Occupation Lands" comprises pā, urupā and cultivations which were meant to have been excluded from the Crown's 1845 grant.

4 *Proprietors of Wakatū v Attorney-General* [2012] NZHC 1461 [*Wakatū* (HC)].

5 *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 [*Wakatū* (CA)].

6 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 [*Wakatū* (SC)] at [2].

[5] Questions relating to breach of those duties, relief and the doctrine of laches (delay in bringing proceedings), were remitted to the High Court.[7] The Trust Proceedings continue in that Court.

[6] Since the Supreme Court's decision, Mr Stafford has been seeking to ensure that any Nelson Tenths and Occupation Lands remaining in Crown possession that could form part of relief in the Trust Proceedings is protected from disposal. In particular, prompted by ACC deciding to sell a property in Nelson, a part of which comprised original Nelson Tenths lands allocated to Maori (the ACC property), he sought a moratorium on the sale of land held by "core Crown", Crown entities and agents, and state-owned enterprises (SOEs). On 19 December 2019, the Attorney-General together with the Ministers of Finance and State Services (the Ministers) declined that request (the Reviewable Decision).

[7] Mr Stafford sought judicial review of that decision under the Judicial Review Procedure Act 2016, the Declaratory Judgments Act 1908 and the common law (the Review Proceedings). In the High Court, by way of relief he sought declarations that, in summary:

(a) the Crown has both a power and a duty not to dispose of, and to ensure that relevant Crown entities do not dispose of, any land now owned by it or any of those entities within the area of land the subject of the Spain Award, pending the resolution of the Trust Proceedings;

(b) the Crown had breached that duty by failing to establish in a timely way an effective mechanism for exercising that power and discharging that duty; and

(c) consistently with the Crown's ongoing obligations as a fiduciary in the Trust Proceedings, that land within the Spain award area, including the ACC property, held by relevant Crown entities and Crown agents was not to be transferred or otherwise disposed of by those entities or agents until the resolution of those proceedings (together with an

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7 At [7].

injunction or an order of prohibition preventing any such transfer or disposal).

[8] Ellis J declined Mr Stafford's application.[8] He now appeals. He says the High Court erred: that power and that duty exist because of equitable principles of private law, of wider principles of New Zealand public law relating to the Crown's role in the process whereby the Company's 1842 Nelson settlement in western Te Tau Ihu was established and, more generally, is founded on and consonant with the Crown's role as Treaty partner. Declarations should follow accordingly.

Background

The Wakatū decision

[9] Central to the decision of the High Court and this Court was the view the Crown did not, given the governmental role it performed, owe a fiduciary duty, that is an obligation of absolute good faith, to the customary owners.[9] The majority of the Supreme Court disagreed. In a summary of result, given by it as part of its judgment, the Court described the decision of the majority — as relevant here — in these terms:[10]

> [1] … The majority decision in this Court is that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award. The appeal is allowed on this point and Mr Stafford has been granted a declaration to that effect. Mr Stafford's claim may therefore proceed in the High Court for determination of matters of breach and remedy.
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> …
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> [4] A majority, comprising Elias CJ, Glazebrook, Arnold and O'Regan JJ, has held that Mr Stafford's claims are not barred by the Limitation Act 1950 to the extent that they are within the terms of s 21(1)(b) of the Act because they seek to recover from the Crown trust property either in the possession of the Crown or previously received by the Crown and converted to its use. Any other issues relating to limitation, including the availability of a limitation defence to any claim for equitable compensation, are remitted for

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8 *Stafford v Attorney-General* [2021] NZHC 335 [Substantive judgment]; and *Stafford v Attorney-General* [2021] NZHC 1466 [Final orders judgment].

9 *Wakatū* (HC), above n 4, at [230] and [260]; and *Wakatū* (CA), above n 5, at [123] per Ellen France J, and at [206]–[209] per Harrison and French JJ.

10 *Wakatū* (SC), above n 6.

> consideration by the High Court. It will also be necessary for the High Court to determine, once the facts as to breach and possible prejudice have been found, whether the claims are barred in application of the equitable doctrine of laches.

[10] The reasons of the majority differed, though not greatly.

[11] Elias CJ saw the approach of the Supreme Court of Canada in *Guerin v The Queen* as being of particular significance.[11] There an Indian band had surrendered to the Crown its pre-existing legal interest in customary lands on terms well known to the Crown. Those terms were subsequently not observed by the Crown when letting land for a golf course. The Chief Justice summarised the principle recognised in *Guerin*:[12]

> In letting the land otherwise than on the terms of the surrender, the Crown had breached its fiduciary duties to the Band and was liable on the same basis as a trustee or other fiduciary.

[12] Adopting that approach in connection with the comparable surrender entailed in the Spain Award, the Chief Justice considered that the Crown's hands were tied by that Award's terms, summarising her conclusion in the following terms:[13]

> The alienation to the Crown of existing Māori property through the Land Claims Ordinance process was on terms which could only be fulfilled by the Crown. The Crown's acceptance of the alienation to it on the terms of the [Spain] award entailed assumption of responsibility to act in the interests of Māori whose interests were surrendered. The Crown's assumption of responsibility in respect of the tenths reserves also constituted it a fiduciary of those whose property interests were surrendered and opened the way to recognition of constructive trust on established equitable principles and by analogy with them.

[13] Fiduciary obligations arose because the Crown acted in relation to "independent legal interests" (that is, existing property interests, as in *Guerin*) and on behalf of Māori.[14] The Crown's obligations were, if anything, amplified by the nature and extent of Māori property and its recognition in New Zealand from the first engagements of the Crown and the Treaty of Waitangi. The resulting obligation, as

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11 *Guerin v The Queen* [1984] 2 SCR 335 at 382.

12 *Wakatū* (SC), above n 6, at [351], citing *Guerin v The Queen*, above n 11, at 388–389 (footnote omitted).

13 At [366].

14 At [385].

was recognised in *Guerin*, was "in the nature of a private law duty"; in this "*sui generis* relationship" it was "not improper to regard the Crown as a fiduciary".[15]

[14] Moreover, the nature of the fiduciary duties assumed by the Crown in relation to the terms of the Spain Award were, in the Chief Justice's assessment, obligations of trust.[16] Going further, the Chief Justice was satisfied the Crown had breached its fiduciary, trust, duty when it failed to "get in" that part of the tenths reserves to be constituted by the rural reserves.[17] The Chief Justice remitted other issues of breach, and all consequential questions of relief, to the High Court, observing it would be for "that Court to consider whether it is appropriate to order an account to be made by the Crown of its dealings in trust property".[18]

[15] Arnold and O'Regan JJ similarly concluded fiduciary duties arose out of the Crown's assumption of responsibility for ensuring (i) that the Tenth Reserves were dealt with as had been agreed with the Company and (ii) that the Occupation Lands were excluded from sale. They did not, however, determine whether there was an express or other form of trust.[19]

[16] Glazebrook J was also satisfied the Crown was trustee for the customary owners of the land reserved from the Spain Award on the basis it represented the Tenths Reserves.[20] If wrong on that trust analysis, Glazebrook J was satisfied that the obligations arising in the circumstances on the Crown were so close to those of a trustee that it was an "inevitable conclusion" the Crown owed fiduciary obligations to the customary owners.[21] Whilst expressing the view that not allocating the rural tenths reserves was a breach of trust, the Judge accepted, because there had been no detailed findings on breach in the courts below, definitive findings would be for the High Court.[22]

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15 At [385], citing *Guerin v R*, above n 11, at 385 per Dickson J.
16 At [393].
17 At [436].
18 At [500].
19 At [726].
20 At [571]–[587] and [718].
21 At [588]. The Judge noted, however, that she did not rely on a *Guerin* analysis in reaching that conclusion.
22 At [587].

[17] Hence the unanimous agreement of the majority is that the Crown owed fiduciary duties to the customary owners arising out of the particular circumstances of the grant to the Company. But, and as the Chief Justice put it:

> [391] None of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Māori. It is to say that where there are pre-existing and independent property interests of Māori which can be surrendered only to the Crown (as under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.

Overview

The substance of the Review Proceedings

[18] Although formulated as an application for judicial review and/or declarations, these proceedings in effect seek interim relief pending the substantive decision of the High Court in the Trust Proceedings. As Ms Feint QC wrote to Crown Law on behalf of Mr Stafford on 21 April 2017, shortly after the release of the Supreme Court's decision:

> Mr Rore Stafford has been considering the Supreme Court's decision to remit the 'tenths' case back to the High Court for determination of remaining questions as to liability, loss and remedy.
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> In seeking remedies, it is Mr Stafford's clear objective to obtain, to the extent possible, the return of the whenua tuku iho of the hapū and whānau. As the remedy process is likely to take some time, the first priority is to ensure that any 'tenths' land remaining in Crown possession is protected from disposal. We include in the definition of 'tenths' land not only the properties that were formerly selected as 'tenths' sections, but also land that could comprise the 'shortfall' of over 10,000 acres – that is, land in the possession of the Crown (either land whose registered owner is the Crown or public body, or land without title) within the boundaries of the 151,000 acres the subject of the Spain award.
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> In addition, Mr Stafford wishes to protect the pā, urupā and cultivations within the boundaries of the Spain award. We appreciate that the Crown will require information on exactly where the occupied lands are in order to protect them. We are working on compiling that information as a matter of urgency.
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> In the meantime, we would like to know whether there are any proposals to dispose of any Crown land within the boundaries of the Spain award, whether that be by sale, or by transfer to local authorities or other parties. We would appreciate it if you can make inquiries to ascertain whether there are any proposals to dispose of any properties within the boundaries of the Spain award?

[19] At private law, where well-founded allegations of breach of trust or fiduciary duty are made, a range of interim relief is available to preserve the position so that the plaintiff will not, if successful, be disadvantaged by actions the defendant might take, for example to dispose of contested property, pending the substantive determination. Thus:

(a) caveats may be lodged against title to land where a caveatable interest is claimed;[23]

(b) the High Court Rules 2016 provide for pre-judgment charging orders and payments on account;[24]

(c) the remedy of a Mareva injunction, restraining the disposition or dissipation of assets, has been developed by the courts;[25] and

(d) Anton Piller orders, also a remedy developed by the courts, provide in extreme cases for access to premises, the seizure of material (so as to ensure its preservation) and answers under oath to questions.[26]

[20] The right the beneficiary of a trust or a person owed fiduciary duties has to call for an account can also provide relief at both the interim, interlocutory, stage and in the substantive proceedings.[27] Once a breach of fiduciary duty has been established, proprietary remedies and equitable compensation are the principal forms of relief.

[21] In his engagements with the Crown that have followed Ms Feint's letter of 21 April 2017, Mr Stafford has sought to protect land in the area of the Spain Award still owned by the Crown principally through the use of caveats, by agreement with the Crown, by requiring the Crown to account and through the Review Proceedings.

[22] Those efforts, and indeed the investigation and resolution of the substantive claims of breach and for relief, are affected in a procedurally and substantively

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23 Land Transfer Act 2017, s 138.
24 High Court Rules 2016, rr 17.41 and 7.71.
25 Taking their modern form as freezing orders: High Court Rules, pt 32.
26 Now known as search orders: High Court Rules, pt 33.
27 See generally *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

complex way by the terms of Treaty settlements reached with hapū and iwi from Te Tau Ihu[28] known collectively as the Tainui-Taranaki iwi.[29] The members of those iwi are the descendants of the 1845 customary owners "represented" by Mr Stafford and stand to benefit if his essentially private law claims of breach of duty and for relief succeed.

[23] By the time Mr Stafford's claim was heard by the High Court, the Tainui-Taranaki and Kurahaupō[30] groupings of Te Tau Ihu iwi had initialled settlement deeds with the Crown. Formal execution of those deeds and the passage of settlement legislation was put on hold pending the outcome of the High Court proceedings. As the High Court observed:[31]

> [13] By commencing these proceedings, the plaintiffs [that is, as now relevant, Mr Stafford] can be understood as saying they are not satisfied with either or both of the process for, and substantive outcome of, the negotiations which have led to the initialling of those deeds by those Tainui-Taranaki iwi, and the settlements they foreshadow.

[24] Following the High Court judgment, the process of Treaty settlements resumed. Those deeds were executed, and settlement legislation was enacted in April 2014 to give effect to them. Pursuant to the terms of that legislation, initial settlement transactions occurred on 1 August 2014 and the right to continue the Trust Proceedings was reserved.[32]

[25] The steps Mr Stafford has taken to secure interim relief are to be understood in that context.

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28 The settlement legislation for Te Tai Ihu comprises three Acts: (i) Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014; (ii) Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014; and (iii) Ngāti Toa Rangatira Claims Settlement Act 2014.

29 Including Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui.

30 Including Ngāti Kuia, Rangitāne and Ngāti Apa.

31 *Wakatū* (HC), above n 4.

32 Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act, s 25(6).

Interim relief — the process to date

Mr Stafford's 2012 caveats

[26] In late 2012 Mr Stafford lodged caveats against titles to land occupied by three Nelson primary schools (the School Land). The School Land had either been selected as part of the original Nelson Tenths or, being then occupied as pā, should have been separately reserved for ongoing use by iwi. A caveatable interest was claimed on the basis of the alleged breaches of trust/fiduciary duty and on the right to the return of that land because of those breaches.

[27] Under the settlement processes established by the relevant settlement legislation the School Land could be purchased by iwi.[33] Shortly before those settlements were to come into effect the Crown applied for the lapse of those caveats. The High Court rejected that application.[34]

[28] It did so principally on the basis Mr Stafford's claims were reasonably arguable and the balance of convenience favoured the reservation of the School Land from the settlement transactions, given it comprised only a very small part of the property involved in those transactions.[35]

[29] As we understand it, those caveats remain in place. That Mr Stafford has caveated land that otherwise would have formed part of redress for Treaty breaches reflects the complex overlap between Wakatū's private law claims and local iwi Treaty claims.

[30] That is where matters stood until the Supreme Court's February 2017 decision, and Ms Feint's 21 April 2017 letter.

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33 The School Land comprised a mix of what is termed "deferred selection" and "commercial redress" property.

34 *Proprietors of Wakatū v Attorney-General* [2014] NZHC 1785 at [68].

35 At [39], [50]–[63] and [66]–[67].

Mr Stafford seeks agreement with the Crown

[31] Mr Stafford followed up that letter with a proposal the Crown give one month's notice to him if Crown land in the area of the Spain Award was to be disposed of. He defined Crown land as including "land in Crown title (the Sovereign in right of New Zealand), including any government department, any local authority land, and any untitled land". Mr Stafford's request for one month's notice was sought so as to enable him to caveat that land to avoid a bona-fide purchaser for value, without notice, obtaining an indefeasible title. Mr Stafford also proposed the Registrar-General of Land be notified in the same way.

[32] It would appear officials began work identifying affected land around that time, but progress was slow. In late August 2017 Ms Feint advised Crown counsel that if an undertaking not to dispose of affected lands, without a system of safeguards being established, was not forthcoming Mr Stafford would file an urgent application to the High Court for declarations and directions analogous to those made in *New Zealand Māori Council v Attorney-General* (the *Lands* case).[36] That is:

(a) a declaration the Crown had a legal obligation to establish such a system and a duty not to dispose of land in the meantime; and

(b) a direction giving the Crown a relatively short timeframe to establish such a system for the Court's approval or, failing that, for the Court to do so.

[33] By October 2017 a measure of agreement had been reached, establishing what became known as the Land Protection Mechanism (the LPM). Under the LPM the Crown could continue to dispose of Crown land, as defined, triggering settlement rights of first refusal. At the same time the Crown (through Land Information New Zealand (LINZ)) would advise Mr Stafford in advance of possible sales, enabling him to take protective action.

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[36] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands* case] at 666 per Cooke P.

Mr Stafford lodges further caveats

[34] Around that time Mr Stafford became aware of a proposal by the Accident Compensation Corporation (ACC) to sell a property in Nelson it had acquired in the 1990s, part of which had originally formed part of the Nelson Tenths. The Registrar-General of Land initially refused to register caveats Mr Stafford had attempted to lodge against the titles involved. However, to settle Mr Stafford's judicial review challenge, the Registrar-General retrospectively accepted and registered those caveats. ACC immediately filed an application for removal based on the absence of caveatable interests. That application was heard by the High Court on 12 February 2018.

[35] In its 22 February 2018 decision, the Court considered two questions: (i) was it reasonably arguable ACC's property might be applied towards settling Crown liabilities arising from the Trust Proceedings; and (ii) did Mr Stafford have a beneficial, and so caveatable, interest in that property. Collins J decided it was reasonably arguable Ministers of the Crown could lawfully direct ACC not to sell the property under ss 103 or 107 of the Crown Entities Act 2004.[37] But, the Judge concluded, Mr Stafford did not have a caveatable interest unless such a direction was given.[38] The Judge exercised his discretion to maintain the caveat for one month to provide an opportunity for the Ministers to do so.[39]

[36] They did not. Mr Stafford appealed, and ACC cross-appealed, that decision. The Crown intervened, supporting ACC. It was to be some time before that appeal was resolved. In the meantime, Collins J subsequently granted a stay of his February judgment so that the caveat could remain in place pending appeal.[40] The purchaser has since cancelled the sale and purchase agreement with ACC.

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37 *Accident Compensation Corporation v Stafford* [2018] NZHC 218, [2018] 2 NZLR 861 at [82].
38 At [94].
39 At [97].
40 *Accident Compensation Corporation v Stafford* [2018] NZHC 429 [Result]; and *Accident Compensation Corporation v Stafford* [2018] NZHC 488 [Reasons].

A request for greater protection

[37] On 9 March 2018, whilst the High Court caveat decision was stayed, Mr Stafford formally requested the Crown to go further than the then existing LPM arrangements. He asked the Crown to agree to a moratorium on the sale of land within the Spain Award area held not only by the Crown, as defined for the purposes of the LPM, but also by Crown agents and by state-owned enterprises (SOEs), pending the resolution of the Trust Proceedings. In summary, and anticipating the position he would adopt in the Review Proceedings, Mr Stafford argued:

(a) The Crown, as fiduciary in terms of the Supreme Court's decision, had an ongoing duty to prevent the disposal of that land prior to the resolution of the Trust Proceedings: it held that land on trust, to the extent of the shortfall in the Nelson Tenths and Occupation Lands.

(b) The Crown had the legal power to do so pursuant to directions that could be made under the Crown Entities Act. Those directions should extend to the ACC property. The Crown also had, under its powers of a natural person arising from what Mr Stafford characterised as its "third source" residual freedom to act, the power to intervene to direct Crown entities.

(c) The Crown's duty to intervene could be sourced directly in its Article II guarantee to Māori in the Treaty of Waitangi, and the duty of active protection consequent upon that guarantee. That duty informed the Crown's fiduciary duties in this case, as well as being a stand-alone obligation in its own right. The *Ririnui v Landcorp Farming Ltd* (*Ririnui*) case presented an example of such powers being exercised.[41]

Mr Stafford requires the Crown to account

[38] As anticipated by the Chief Justice, on 6 April 2018, whilst his request for a moratorium was pending, Mr Stafford applied to the High Court in the

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41 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

Trust Proceedings for an order requiring the Crown to account "to the Māori customary owners of the land the subject of the 1845 Spain Award for what has happened to the land that either was, or should have been, reserved and held on trust for the benefit of the Māori customary owners".

[39] Mr Stafford specified the factual matters requiring investigation. As matters transpired the Crown did not respond formally by way of notice of opposition to that application. Rather Mr Stafford and the Crown filed separate memoranda on 22 June 2018, ahead of a judicial conference scheduled for 25 June 2018, recording the terms upon which they had agreed to a process whereby relevant information would be provided voluntarily by the Crown and a timetable for doing so. On that basis, the application for an account would be adjourned to a date to be fixed on further application.

The Review Proceedings

[40] The Attorney-General advised Mr Stafford by letter on 27 April 2018 he was not in a position at that point to respond to the request for a moratorium. On 10 May 2018, Mr Stafford commenced the Review Proceedings against the Crown and ACC, focusing at that time on that letter as the reviewable decision. That decision represented an error of law, for the reasons he had set out in his letter of 9 March 2018.

[41] Mr Stafford sought declarations to that effect against the Crown and ACC and, against ACC separately, a moratorium on land sales by way of injunction or an order of prohibition.

[42] The Crown did not respond substantively for some time. The agreed discovery/accounting process continued.

[43] By the time the hearing of the Review Proceedings commenced — some two and a quarter years later on 10 August 2020 — the following position had been reached:

(a) Mr Stafford had joined a further six respondents (the third to ninth respondents respectively): Fire and Emergency New Zealand

(FENZ); Housing New Zealand Corporation/Kāinga Ora (Kāinga Ora); Housing New Zealand (HNZL);[42] Radio New Zealand Ltd (RNZ); Nelson Marlborough Institute of Technology (NMIT); Nelson Marlborough District Health Board (NMDHB); and Transpower New Zealand Ltd (TNZ).

(b) As for the LPM:

(i) the Attorney-General, ACC, Kāinga Ora, HNZL, NMDHB and NMIT had given LPM covenants to give 30 working days' notice of relevant land sales up to the commencement of the hearing; and

(ii) FENZ, RNA and TNZ had done likewise, but their commitments were to remain in place until the resolution, including by way of appeal, of the Trust Proceedings.

(c) As noted,[43] the Crown had formally advised (the Reviewable Decision) it would not, because it neither could not or in any event should not, direct Crown entities as requested by Mr Stafford. The Ministers explained:

(i) Whilst the Crown acknowledged the land the subject of Mr Stafford's claims was a taonga tuku iho, they (i) considered they lacked statutory powers to direct the relevant SOEs, and (ii) doubted whether directions for a moratorium could be made under ss 103 and 107 of the Crown Entities Act. There was a good argument such a direction would offend s 113 of that Act, which safeguards the independence of all Crown entities.

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42 HNZL is an asset holding company only (being the registered owner of most of the properties that Kāinga Ora uses to provide public housing) whose Board members are the same individuals as those on the Board of Kāinga Ora. It employs no staff and its Board has delegated all delegable decisions to Kāinga Ora.

43 See [6] above.

(ii) Moreover, a 'blanket' moratorium would have a number of adverse implications for the operations and effectiveness for the entities concerned, the economic development of the areas the subject of Mr Stafford's claim, and the state sector and public finance generally. In particular, ACC and Kāinga Ora would be most disadvantaged by any moratorium because ACC manages a significant portfolio of investments, and Kāinga Ora buys and sells property in its capacity as public housing landlord. The Crown also had obligations to uphold under the relevant Treaty settlements.

(iii) The arrangements reached under the LPM, and the Crown's subsequent request to the relevant entities to inform their responsible Minister of any proposal to dispose of relevant land so the Crown could consider its position, would more specifically and efficiently protect Mr Stafford's interests without risking those adverse implications.

(d) Mr Stafford had amended the relief he sought by seeking against the Crown,[44] as he had previously sought against the other respondents, a moratorium based on a further declaration prohibiting the sale of any fee simple land in the Spain Award area.

(e) Only the Crown and, ACC and Kāinga Ora were opposing the relief Mr Stafford sought:

(i) Mr Stafford had discontinued his claim against FENZ, RNZ and TNZ on the basis of their extended undertakings; and

(ii) NMDHB and NMIT were abiding, but had given notices of appearance to reserve their rights.

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[44] As by then extensively defined in the Review Proceedings as being "the 'core' Crown [as defined in the quotation at [45] below], Crown agents (as defined in s 7 and Schedule 1 of the Crown Entities Act), Crown entities (as defined in s 7 of the Crown Entities Act) or State enterprises (as defined in s 2 and Schedule 1 of the [State-Owned Enterprises] Act".

(f) On 15 May 2020 this Court had handed down its decision on the appeal and cross appeal against the High Court's caveat judgment (the Caveat Appeal).[45] A majority (Gilbert and Courtney JJ) upheld Collins J's decision to remove Mr Stafford's caveat from the title on ACC's property on the basis, holding that any interest Mr Stafford might have in that land did not derive from ACC as the registered proprietor, as required by s 137 of the Land Transfer Act 2017.[46] That decision was not appealed.

[44] On the last day of the High Court hearing (13 August 2020) Mr Stafford further revised the relief he sought against the Crown by adding, in the alternative, an order requiring the Crown to undertake, in effect by way of a revised LPM, as opposed to a moratorium:

(a) to provide 30 working days' notice if it decided to commence a process for the transfer or disposal, including by lease for a term greater than 20 years, of any proposed sale of "core Crown land" within the Spain Award area pending the resolution of the Trust Proceedings;

(b) not to commence such a process without Mr Stafford's agreement, or by order of the High Court obtained on the Attorney-General's application; and

(c) to waive any undertaking for damages required, and to pay Mr Stafford's costs on an indemnity basis.

[45] Significantly, for those purposes, Mr Stafford specified the land to which that revised LPM was to apply, namely "core Crown land", in reduced terms compared to his pleadings for a moratorium by way of declaration. That is "core Crown land" meant:

> … land registered in the name of the 'core' Crown (comprising Her Majesty the Queen; the departments of public service that are listed in Schedule 1 of

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45 *Stafford v Accident Compensation Corporation* [2020] NZCA 164, [2020] 3 NZLR 731 [Caveat appeal].

46 At [34] per Gilbert J, and [150] per Courtney J.

> the State Sector Act 1988; and the New Zealand Police, which section 7(1) of the Policing Act 2008 confirms is an instrument of the Crown).[47]

[46] He also sought the opportunity for a bespoke arrangement with Kāinga Ora/HNZL to be agreed, or otherwise imposed by the Court, modelled on the orders made in the *Lands* case.

[47] Shortly after the completion of the High Court hearing, but before the judgment was released, the Attorney-General provided fresh undertakings which only departed from those sought by Mr Stafford by way of his 13 August 2020 alternative relief in two regards, namely:

(a) it would be for Mr Stafford to apply to the High Court to restrain, rather than for the Crown to apply to the High Court to permit, a notified disposition; and

(b) if Mr Stafford was unsuccessful, costs would be reserved until the conclusion of the Trust Proceedings.

[48] Those two matters were, accordingly, all that was at issue between Mr Stafford and the Crown as regards relief by way of the LPM, as opposed to a moratorium, prior to Ellis J releasing her decision.

The High Court decision

[49] Ellis J first released her substantive judgment on 2 March 2021.[48] Having summarised the implications of the Supreme Court's decision and this Court's caveat decision[49] she recorded her conclusions in the following terms:

> [185] Beginning with those aspects of Mr Stafford's application that relate to Spain award area land owned by the Crown entity respondents, I consider that:
>
> (a) the Crown entity respondents are separate legal entities from the Crown for the purposes of the *Wakatū* proceeding and so

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47 That is, unlike the moratorium Mr Stafford sought, the revised LPM would not apply to land held by Crown agents, Crown entities or SOEs.

48 Substantive judgment, above n 8.

49 At [132]–[133].

land owned by them is not directly available as relief in those proceedings; *and*

(b) the power of Ministerial direction contained in s 107 of the [Crown Entities Act] is inapt, and cannot be used to order a moratorium on the sale by Crown entities of land within the Spain award area; *and*

(c) even if the power conferred by s 107 was, on its face, available, Ministers were not wrong to refuse to exercise it; *but*

(d) Ministers were able to, and should have, advised Crown entities that they were expected to notify Mr Stafford in a timely way of any proposed disposals within the Spain award area; *but in any event*

(e) the Crown entities themselves, having been advised of the nature and history of Mr Stafford's claim, are obliged—in Kāinga Ora's case by dint of its own statute, but otherwise as a matter of general good faith arising in the particular and unusual circumstances of this case—to notify Mr Stafford in a timely way of any proposed land disposals within the Spain award area.

[186] And as for those aspects of Mr Stafford's application for review that relate to Spain award area land owned by the "core" Crown, I think the Crown accepts that the LPM previously agreed needs to be strengthened. As I have noted, the parties have, during the hearing, reached some agreement as to how this might be achieved, and my strong preference is to make orders on the lines of that (almost) agreement. But again, I have not heard from counsel on the disputed matters outlined above, and as a matter of fairness I should do so.

(Emphasis original.)

[50] Mr Stafford's claim for review had not succeeded. But nor had it wholly failed. Mr Stafford had achieved the High Court's endorsement of a strengthened LPM, albeit applying to "core Crown land" only. He also had the benefit of the Judge's "observations" at [185(d)] and [185(e)].[50] The Judge sought further submissions as to whether those observations should be reflected in a grant of declaratory relief, on aspects of the revised LPM and on costs.[51]

[51] The Judge released what she termed her "final orders" judgment on 21 June 2021.[52] She concluded declaratory relief was not appropriate. The language of "rights" was inapt to describe the present-day relationship between the Crown and

50 At [187]; see Final orders judgment, above n 8, at [17].
51 At [189].
52 Final orders judgment, above n 8.

Mr Stafford. The observations she had recorded at [185(d)] and [185(e)] of her substantive judgment sufficiently reflected, as expressions of principle, what was required of the Crown and Crown agents to protect Mr Stafford's interests.[53]

[52] As regards the revised LPM, the Judge acknowledged she had not referred to the Crown's fresh undertakings, filed shortly after the hearing, in her substantive judgment. But as those undertakings were in the same form as the draft orders discussed in that judgment, there was no need for formal findings or approval from the Court.[54]

[53] Costs were to lie where they fell as between all parties.[55]

ACC settles

[54] Shortly before this appeal was heard, ACC agreed not to dispose of any property in the Spain Award area pending the resolution of the Trust Proceedings. Mr Stafford discontinued his proceedings against ACC, and costs were to lie where they fell.

[55] The active parties to the appeal were, therefore, Mr Stafford, the Attorney-General and Kāinga Ora/HNZL.

This appeal

Mr Stafford

[56] As argued before us Mr Stafford's view continues to be that the Crown assumed fiduciary duties as a consequence of its constitutional role in protecting the rights of Māori — a role that was recognised in Te Tiriti and the related constitutional arrangements of 1840–1841. Accordingly, the Crown is obliged not to alienate any land the subject of his claim: that followed from a fiduciary's obligation in equity to protect the interests of its beneficiaries, but also on the basis of the principles set out

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53 At [16]–[17].
54 At [22]–[23].
55 At [26].

in the *Lands* case. Thus, Crown land in the Spain Award area is held by the Crown on an institutional constructive trust for those Mr Stafford represents.

[57] The LPM proposed by the Crown in terms of the undertakings it has offered does not go far enough, notwithstanding its conformity in all but two respects with the revised LPM he himself had sought in the High Court as alternative relief to that of the moratorium. Most significantly, its limitation — as regards obligations the Crown accepts — to land owned by what Mr Stafford categorises as "the core Crown" fails to respond to the character in which the Crown acted when it assumed those fiduciary obligations.[56] The creation over time of various categories of Crown entity, as separate legal persons responsible for performing in the modern New Zealand state the duties and functions of the Crown and holding public property assets to do so, could not be relied on to reduce the remedies available to Mr Stafford should a breach of those duties and obligations be established.

[58] Six factors, which broaden the argument advanced in the High Court, supported that proposition:

(a) Te Tiriti was a personal and enduring link between the monarch and Māori. Thus, and as put in Mr Stafford's written submissions:

> To allow the Crown unilaterally to contract out of the scope of its Article 2 obligations, through the re-organisation of the Crown from 1845 to the present day, is inconsistent with that feature of Te Tiriti, as well as with what this Court has referred to [in the *Lands* case] as its wairua, or spirit.
>
> (Footnotes omitted.)

(b) Māori view the Crown holistically. That perspective is relevant in this context to the proper characterisation of the Crown as land holder in the area of the Spain Award.

(c) All Crown entities have a constitutional obligation to act in conformity with the Crown's Treaty obligations. Thus, the Crown entity

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[56] That is a problematic claim on appeal, given it was Mr Stafford who pleaded his claim for an LPM in the High Court.

respondents agreed to interim relief arrangements preserving the land-holding status quo. Those arrangements, and their common terms, show that the parties Mr Stafford alleges to be Crown instrumentalities can and do act consistently with being subject to those obligations. The majority in the Caveat Appeal had not found otherwise: only Courtney J had expressly reserved this position.[57] The reasoning of Williams J was to be preferred.[58]

(d) That conclusion is also supported by the Supreme Court's decision in *Ririnui* where, Mr Stafford asserts, the Court held that the power of Landcorp, a SOE, to permanently alienate land of importance to Māori was materially constrained by Crown obligations to Māori and Landcorp's own commitment to honour Te Tiriti principles.[59] That the Crown has greater controls over Crown agents compared to SOEs suggests it would be surprising if the *Ririnui* approach to the constitution of the Crown did not apply as regards Crown agents.

(e) In practice, Ministers exert considerable controls over Crown entities. There is a machinery of government established through legislative instruments and administrative practices which bind Crown entities to supporting the discharge of Crown Te Tiriti obligations.

(f) The United Nations Declaration on the Rights of Indigenous People places special emphasis on restitutionary remedies in remedying wrongs against indigenous peoples. That principle had been recognised by the Attorney-General in his explanation of the reasons for the Ministers' decision declining to direct a moratorium.

[59] In refusing declaratory relief as regards a moratorium which properly responded to a positive obligation of protection, Ellis J failed to take account of those factors.

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57 Caveat appeal, above n 45, at [132].
58 At [345]–[347], and [356].
59 *Ririnui v Landcorp Farming Ltd*, above n 41.

[60] During the hearing of this appeal Ms Feint handed up further revised orders sought by Mr Stafford. Notwithstanding the terms of the revised LPM he had sought in the High Court were limited to "core Crown land", Mr Stafford in that version of his alternative relief extended the reach of the LPM to the broader category of "Crown land" which featured in the rest of his pleadings. That is, not just "core Crown land", but also land held by Crown entities and SOEs.

The Attorney-General

[61] The Attorney-General supported Ellis J's decision, and her reasoning, save in one regard: namely the Judge's "finding" as to the communication of an "expectation" to the respondents they would notify Mr Stafford of Spain Award area sales.[60]

[62] In doing so, and by way of context, the Attorney-General emphasised the limits of the Supreme Court's decision. It went no further than the finding of fiduciary duties owed by the Crown to customary owners as regards the Nelson Tenths and the Occupation Lands. The Court did not identify a trust. Only Elias CJ and Glazebrook J did so:[61] Arnold and O'Regan JJ did not consider it necessary to decide that question.[62] William Young J decided there was no trust.[63] It made no findings about the extent to which any proprietary remedy may be available with respect to any particular land or the extent to which historical failures to perform a fiduciary obligation may give rise to ongoing obligations of a fiduciary character today. Importantly, the Supreme Court made no broader ruling about the role of Te Titiri. The Attorney-General specifically noted the Chief Justice's observation on that matter.[64]

[63] To the extent Mr Stafford seeks proprietary remedies in the Trust Proceedings, determining the implications of the specific fiduciary duty found to have existed will involve further factual and legal contest with respect to particular parcels of land as

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60 Substantive judgment, above n 8, at [185(d)].
61 *Wakatū* (SC), above n 6, at [393] and [401] per Elias CJ; and at [572], [577] and [579] per Glazebrook J.
62 At [726].
63 At [915]–[916].
64 See above at [17].

recognised by the Supreme Court and by Ellis J. As regards the Crown itself, the undertakings given are sufficient to protect Mr Stafford's interests.

[64] More specifically the Attorney-General noted Mr Stafford's challenge to the lawfulness of the Reviewable Decision was based on two propositions: namely those of the existence of the claimed power and of the asserted duty to exercise that power.

[65] The proposition the power existed was inconsistent with the separate existence at law of the Crown and of Crown entities as legal persons, as reflected in the provisions of the Crown Entities Act, the Companies Act 1993 and the State-Owned Enterprises Act 1986. That legislation provides a governance framework for such entities distinct from that of the Crown itself.

[66] In *Wakatū* the Supreme Court held the Crown owed certain fiduciary obligations as a matter of private law. That did not involve attribution of those obligations to separate Crown entities.

[67] The Reviewable Decision was, in orthodox judicial review terms, one properly made in a procedural sense and one which was manifestly reasonable in a substantive sense. The Supreme Court had recognised the Crown's fiduciary role. But questions of liability and relief were remitted to the High Court. There was a complex interrelationship between Mr Stafford's claims as regards the Nelson Tenths and the Occupation Lands, and the terms of ongoing Crown obligations under the Te Tau Ihu Treaty settlements. The Reviewable Decision recognised those interests and the Crown's correlative obligations, and sought to balance them in the undertakings given in response to Mr Stafford's request. That decision could not successfully be challenged on judicial review.

[68] Whilst the majority judgments in the Supreme Court had recognised the constitutional context of the events of the 19th century, that did not provide a basis for the existence of the positive duty requiring the establishment of the moratorium that Mr Stafford argued for.

[69] Mr Stafford's reliance on the *Lands* case and subsequent litigation was also misplaced. There, s 9 of the State-Owned Enterprises Act provided an express direction that the Act would not permit the Crown to act in a manner inconsistent with the principles of the Treaty. If Mr Stafford's propositions as to power and duty were correct, there would have been no need for that reliance on s 9 in the *Lands* case.

Kāinga Ora

[70] Kāinga Ora supported Ellis J's conclusion that Ministers had not erred in refusing to direct Crown entities as Mr Stafford sought. A proper interpretation of the scope of ministerial powers under the Crown Entities Act, and an examination of the consequences of a blanket moratorium, supported that view. More broadly, Kāinga Ora said these proceedings were not about the nature and extent of its obligations in relation to Māori rights and interests, nor was it about whether Crown entities are "part of the Crown". As a separate legal person, Kāinga Ora's land could not be available as relief in the Trust Proceedings.

[71] Even if Ministers did have the power to make the directions Mr Stafford sought, Kāinga Ora said it would be inappropriate to do so in these circumstances. A moratorium was not necessary to protect Mr Stafford's position, yet it would undermine Kāinga Ora's ability to fulfil its existing obligations to those iwi who have entered into the relevant Treaty settlements. Further, and as Ms Casey QC emphasised before us, a complete restriction on the ability of Kāinga Ora to sell properties would cut across its statutory objectives and functions as a public housing landlord and urban development agency. Accordingly, a moratorium would unduly prejudice the wider community in the Nelson area.

[72] Kāinga Ora was willing, however, to continue to provide Mr Stafford with notice of proposed dispositions in the interim, and to reach agreement with him going forward. During the hearing, Kāinga Ora provided a proposal for a land protection mechanism of its own as regards "sites of special significance" to Mr Stafford involving 90 days' notice of sale of such sites and, more generally, a cap on the net area of sales of land in the area of the Spain Award.

Further developments

[73] After the hearing:

(a) The Attorney-General provided undertakings the Crown would give notice to Mr Stafford of proposed land sales by NMDHB and NMIT before the relevant Minister or Secretary grants the necessary approvals for those sales.[65] Those arrangements would endure until the Trust Proceedings are finally resolved.

(b) NMIT similarly undertook directly to Mr Stafford.

Analysis

Overview

[74] Mr Stafford's claim as formulated in the Trust Proceedings is squarely based on principles of private law, in particular those of equity, fiduciary obligations and trust principles. As a matter of private law, Mr Stafford's claim was only able to be brought so long after the events of which he complains because of the exception from the operation of generally applicable limitation rules which apply in the case of claims for breach of trust.[66] It was in terms of private law principles that the Supreme Court ruled, in Mr Stafford's favour, that the Crown had acted as a fiduciary as regards the Nelson Tenths and the Occupation Lands. That three of the Judges did so by applying in the New Zealand context the approach taken by the Supreme Court of Canada in a not dissimilar legal and factual context, does not change that.[67] Rather, and as the Attorney-General submitted, the significance of the *Guerin* analysis was to provide a basis for applying private law principles to actions of the Crown, that is the Government. In that way the "political trust" doctrine, which had been seen by

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65 Under the provisions of the New Zealand Public Health and Disability Act 2000 and the Education Training Act 2020, NMDHB and NMIT require permission of either the Minister of Health or the Secretary for Education respectively before those entities can dispose or otherwise encumber their real property.

66 Limitation Act 1950, s 21(1)(b); see *Wakatū* (SC), above n 6, at [453] per Elias CJ, at [687] per Glazebrook J, and [813] per Arnold and O'Regan JJ.

67 As reflected in the observation of the Chief Justice referred to at [17] above.

the courts below as standing in the way of Mr Stafford's private law claims against the Crown, was rendered inapplicable.

[75] In the Review Proceedings, however, Mr Stafford takes a different approach. He asserts, based on public law principles and, in particular, the developments in New Zealand law over the last 40 years in the proper approach to recognition of the principles of the Treaty, the existence of an obligation to ensure no public land in the area of the Spain Award is sold. That obligation is, in turn, based on an asserted general duty, founded on the Treaty principle of active protection. In effect, Mr Stafford seeks to obtain through the Review Proceedings the relief he was denied in the caveat proceedings.

[76] The developments in New Zealand law Mr Stafford relies on have occurred not only in the settlement of historic claims but also in the legislative and administrative mechanisms which exist today to promote public policy outcomes consistent with those principles. Thus, Mr Stafford relies on the *Lands* and *Ririnui* decisions, on a duty to exercise powers under the Crown Entities Act and on the various mechanisms established by the Government more generally to ensure the Crown as a whole acts consistently with Treaty principles.

[77] In our view, there is a real tension between those two approaches. That tension is reflected in three high level considerations which have influenced our approach to this appeal:

(a) First, there is the fundamental problem Ellis J identified in her judgment.[68] That is, the Supreme Court thus far has limited its finding to the confirmation the Crown acted as a fiduciary with corresponding duties to Māori with respect to the Nelson Tenths and the Occupation Lands. That finding itself does not provide a basis for the positive obligation Mr Stafford asserts to place a moratorium on land sales within the area of the Spain Award. Whether and to what extent the duties associated with that fiduciary obligation now create remedies, including a right to land, can only be determined in

[68] Substantive judgment, above n 8, at [78]–[79].

the Trust Proceedings in the High Court. Therefore, in terms of his proposition such a duty currently exists Mr Stafford is, in our respectful view, putting the cart before the horse.

(b) Secondly, to the extent Mr Stafford relies on the decision of this Court in the *Lands* case he is, in our view, mistaken. The declarations this Court made in the *Lands* case, and the protective mechanisms it required pursuant to those declarations, relied for their legal foundation on s 9 of the State-Owned Enterprises Act. In support of the submission that an express statutory direction such as s 9 is no longer required, Mr Stafford refers to the well-known cases of *Huakina Development Trust v Waikato River Authority* and *Barton-Prescott v Director-General of Social Welfare*.[69] The Treaty's significance enabled the courts in those cases to use the Treaty as an extrinsic aid to statutory interpretation in the absence of an express so-called "Treaty clause".[70] That position gives effect to the presumption that Parliament intends to legislate in terms consistent with the Treaty, albeit with the limitation that an interpreting court cannot do violence to parliamentary purpose or the words Parliament adopted.[71] In our view, however, the cases Mr Stafford relies on do not go as far as to provide that a statutory obligation is no longer required to create enforceable, specific, Treaty duties and obligations. A court may interpret Parliament's words consistently with the Treaty in the absence of statutory direction, but it cannot enforce an obligation on a Minister to exercise discretionary powers consistently with, or to give effect to, the Treaty where there is no statutory obligation on the Minister to do so.

(c) Thirdly, the Trust Proceedings survived the settlement of historic claims effected by the Tainui-Taranaki settlement Acts because of an

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69 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

70 A proposition which "can be stated with confidence": *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46].

71 *Urlich v Attorney-General* [2022] NZCA 38 at [55] and [62].

> express statutory provision.[72] Nevertheless, there is an inevitably complex relationship between the settlement processes effected and initiated by those Acts and the resolution of the Trust Proceedings. Yet the positive duty and obligation, resulting in the moratorium Mr Stafford seeks, would impact directly the Treaty settlement process, without those most directly affected, the iwi and iwi organisations concerned, having been involved in that decision.

[78] Those considerations, we accept, may do little more than emphasise the special character of the Trust Proceedings and of Mr Stafford's success thus far, as represented by the Supreme Court decision. But they are, we think, important elements of the context for this appeal.

A power and a duty?

[79] The specific questions posed in the Review Proceedings were essentially as the Attorney-General identified. First, does the power Mr Stafford asserts — by reference to the Crown Entities Act or more generally — for the Crown to direct separately existing land-owning entities to be part of the moratorium and the LPM actually exist? Secondly, if that power does exist, was the Crown required to exercise it in the circumstances so that the Reviewable Decision was unlawful.

[80] The Ministers themselves doubted, but could not discount, the existence of the power Mr Stafford asserted. For our part, we have not found it necessary for the purposes of this appeal, given the view we have reached on the second of the questions referred to above, to answer the first question. That is, even if the Crown does have the power to so direct, we do not consider it was under any duty to exercise that power.

[81] The High Court's inquiry as to breach will involve an assessment of the Crown's actions over time as regards the Nelson Tenths and Occupation Lands, a determination of the particulars of the duties of the Crown as fiduciary and of

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[72] Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act, s 25(6).

the extent to which breaches of those duties, and hence entitlement to relief, are established.

[82] The declaratory relief Mr Stafford seeks in reliance on public law and Treaty principles would call for a theoretical determination of at least aspects of those questions absent that factual context. In our view the duties the Crown has, in terms of public property "owned" for the time being by a particular Crown entity, are best determined on a case-by-case basis rather than by reference to general assertions.

[83] The Supreme Court's recognition of Mr Stafford's entitlement to require the Crown to account, acquiesced thus far by the Crown in terms of the agreed discovery process, underscores that point. The High Court has not yet ordered the Crown to account in the Trust Proceedings. But therein lies Mr Stafford's most obvious private law right to move his claim in the Trust Proceedings along. Given (i) the resources of the Crown, (ii) the research expertise built up particularly in the Treaty settlement process, and (iii) the historic clarity at least of the lots allotted to Māori in the original plans attached to the Spain Award, and (iv) the original agreement between the Crown and Mr Stafford as to what that process involved, if Mr Stafford is dissatisfied with the progress in that accounting he could apply to the High Court for appropriate supervisory orders.

[84] More generally, and as Elias CJ observed, the recognition by the majority of the Supreme Court of a fiduciary duty, and by her and Glazebrook J of the existence of a trust, did not suggest there was any general fiduciary duty at large owed by the Crown to Māori.[73]

[85] We are therefore not persuaded the Crown had a specific and enforceable duty owed to Mr Stafford to establish the moratorium he sought. Thus, that the Ministers declined to do so does not, of itself, render the Reviewable Decision unlawful. Rather that question is to be discussed in terms of orthodox judicial review principles.

[86] In the Reviewable Decision, the Ministers acknowledged:

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[73] *Wakatū* (SC), above n 6, at [391].

(a) the duties owed by the Crown to Mr Stafford;

(b) the interest Mr Stafford has in lands within the area of the Spain Award owned not only by the Crown but also by Crown entities, reflecting the way the Crown as a whole responds to historic Treaty claims and constructs Treaty settlements;

(c) the preservation of Mr Stafford's private law claims from the settlements effected by the legislation; but also

(d) the overlap of the relief Mr Stafford seeks as a matter of private law and the relief provided by those settlements.

[87] Against those considerations, we agree with the Attorney-General that the Reviewable Decision is, in an administrative law sense, one that shows no material procedural irregularity and on its face is a reasonable decision, one which was open to the Ministers to make.

[88] The obvious check on that reasonableness, in this context, is whether the Reviewable Decision, and the mechanisms established pursuant to it to protect the interests of Mr Stafford as recognised by the Ministers, provide appropriate and reasonable protection.

[89] The Reviewable Decision relates to a specific area (the area of the Spain Award) and, from Mr Stafford's viewpoint, all land within that area owned by the Crown and related entities. The Spain Award area is the area from which the New Zealand company was to select the 151,000 acres that it had purchased from the Māori customary owners. The image below overlays the boundaries of the Spain Award on a satellite image of western Te Tau Ihu:

[90] Ms Johnston, the Chief Executive of Wakatū Inc, included in an affidavit she swore in the Review Proceedings a summary of the research thus far undertaken by Wakatū as to current land holdings by relevant Crown entities in that area. That research identified separately land held by the Crown and relevant agencies and entities within the categories of "town" land, "suburban" land and "rural" land, as those terms apply to land within the Company's Nelson settlement. Taken overall:

(a) The core Crown currently holds 14,905.29 acres within that area of which the vast majority, namely 13,637.29 acres constitutes "conservation or reserve" land.

(b) Relevant Crown agents and entities hold 180.8 acres of land within the Spain Award area. The Crown agents and entities identified by Wakatū are those which are or have been respondents in the Review Proceedings. All but Kāinga Ora have provided undertakings accepted by Mr Stafford.

[91] As can be seen, therefore, the undertakings Mr Stafford has either accepted or has been offered provide for him to receive prior notice of sales of all land within the Spain Award area held by the Crown, as he would define it extensively in terms of the orders and directions he seeks in the Review Proceedings, Kāinga Ora aside. In our view, and to that extent, Mr Stafford's position and his interests are adequately protected in terms of interim relief.

[92] Accordingly, we dismiss Mr Stafford's appeal.

[93] We also dismiss the Attorney-General's cross-appeal. Ellis J herself accepted that her "observations" in [185(d)] and [185(e)] of her judgment, and in particular that Ministers were expected to tell the Crown entity respondents they were to notify Mr Stafford of proposed sales of land within the Spain Award area, were not "hard law" findings but expressions of principle which she declined to record in declaratory form.[74] As such there were no substantive orders made contrary to the Attorney-General's interests that he can challenge. And so his cross-appeal must fail. In reality, those Crown entity respondents have, through their undertakings, agreed to notify Mr Stafford in a timely way of any proposed land disposals. Moreover, the Attorney-General has undertaken to facilitate that process on behalf of NMDHB and NMIT. In those circumstances, we dismiss the Attorney-General's cross-appeal.

[94] That, in terms of the issues before us, leaves the relationship between Mr Stafford and Kāinga Ora unresolved. Kāinga Ora's existing undertaking, on its terms, applied up to the commencement of the High Court hearing. During the hearing of this appeal, however, Kāinga Ora handed up fresh arrangements it was prepared to commit to as noted at [72]. In doing so, Kāinga Ora emphasised that any arrangement it reached with Mr Stafford could not inhibit its ability to perform its statutory

[74] Final orders judgment, above n 8, at [17].

functions, which requires it to effect routine dispositions of its land in the management of its portfolio of public housing assets.

[95] We accept the appropriateness of that consideration. Moreover, and for the reasons earlier set out, we do not think that orders along the lines of the *Lands* arrangements that Mr Stafford sought should in today's environment be imposed on Kāinga Ora. Accordingly, we decline to do so. It will be for Mr Stafford to engage with Kāinga Ora in terms of the arrangements proposed during the hearing of this appeal. In our view, as with the arrangements voluntarily entered into by the other respondents, these provide a basis for satisfactory interim protection.

[96] It is also to be noted that where proprietary relief is not available, equitable compensation is the most obvious, alternative, remedy. The Crown is, effectively, judgment proof. Mr Stafford's cause of action having survived the local Treaty settlements, private equitable compensation would avoid the complexity of competing Treaty settlement claims to land, and possible Treaty relativity issues, while providing Mr Stafford and those he represents a fund to acquire, over time, the whenua tuku iho they seek, including where it has passed into private ownership.

Result

[97] The appeal is dismissed.

[98] The Attorney-General's cross-appeal is dismissed.

[99] Although neither Mr Stafford's appeal nor the Attorney-General's cross-appeal have succeeded, we consider the Attorney-General has substantially succeeded in the matters before us. Accordingly, the appellant must pay the Attorney-General's costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
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Crown Law Office, Wellington and Meredith Connell, Wellington for First Respondent
Bell Gully, Wellington for Third and Fourth Respondents