IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA485/2020
[2025] NZCA 584

BETWEEN	RICHARD TE POU MINHINNICK Appellant
AND	ATTORNEY-GENERAL First Respondent
	NEW ZEALAND STEEL LIMITED Second Respondent
	WAIKATO NORTH HEAD MINING LIMITED Third Respondent

Hearing:	26–29 February 2024
Court:	Cooper P, French and Gilbert JJ
Counsel:	M C Harris and S M Wilson for Appellant S M Kinsler and C E Sinclair for First Respondent J E Hodder KC and T D Smith for Second and Third Respondents
Judgment:	6 November 2025 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to file an amended notice of appeal is granted.

B The appeal is dismissed.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Cooper P)

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INTRODUCTION

[1] The factual matrix of this appeal spans some 150 years and the claims pursued by the appellant are wide-ranging. They reflect long-standing grievances of Ngāti Te Ata against the Crown, arising from the acquisition and confiscation of land in the shadow of the Waikato War that broke out in July 1863. The proceeding involves a challenge to the lawfulness of the acquisition of land by the Crown pursuant to an agreement executed by representatives of Ngāti Te Ata and the subsequent exercise of powers of the Crown to confiscate land under the New Zealand Settlements Act 1863. There is a particular concern relating to four blocks of land known as Te Papawhero, Te Kuo, Waiaraponia and Tangitanginga (the four wāhi tapu areas) located within Maioro on the Āwhitu Peninsula north of the mouth of the Waikato River. Over the years since 1938, those blocks were used for afforestation in an attempt to stabilise the sand dunes on the peninsula and then as part of the land used for the establishment of New Zealand Steel's manufacturing activities based on the mining of the ironsands in the area.

[2] The High Court rejected the various claims advanced on behalf of Ngāti Te Ata by Richard Minhinnick, who now appeals.[1] The respondents are the Attorney-General (the first respondent), and New Zealand Steel Ltd and Waikato North Head Mining Ltd (the second and third respondents, together "NZ Steel" unless the context otherwise requires).[2]

[3] The historical nature of the claims requires us to use language which in many cases strikes what now appears to be a jarring note. Many of the relevant materials employ terms like "Natives", "rebels", "rebellion", and refer to "friendly", "loyal" and "hostile" Māori. Necessarily, these terms featured frequently in submissions and the case on appeal. A number of the relevant precedents, which concern other indigenous and first nations peoples, also include language which would not be used today. In the judgment that follows, we have found it necessary to include these terms

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1 *Te Ara Rangatū o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 [judgment under appeal]. References to "Mr Minhinnick" throughout this judgment refer to the appellant, Mr Richard Minhinnick.

2 From February 1976, Waikato North Head Mining Ltd (a subsidiary company of NZ Steel) was responsible for the mining operations (as opposed to steel production) at Maioro. See below at [517].

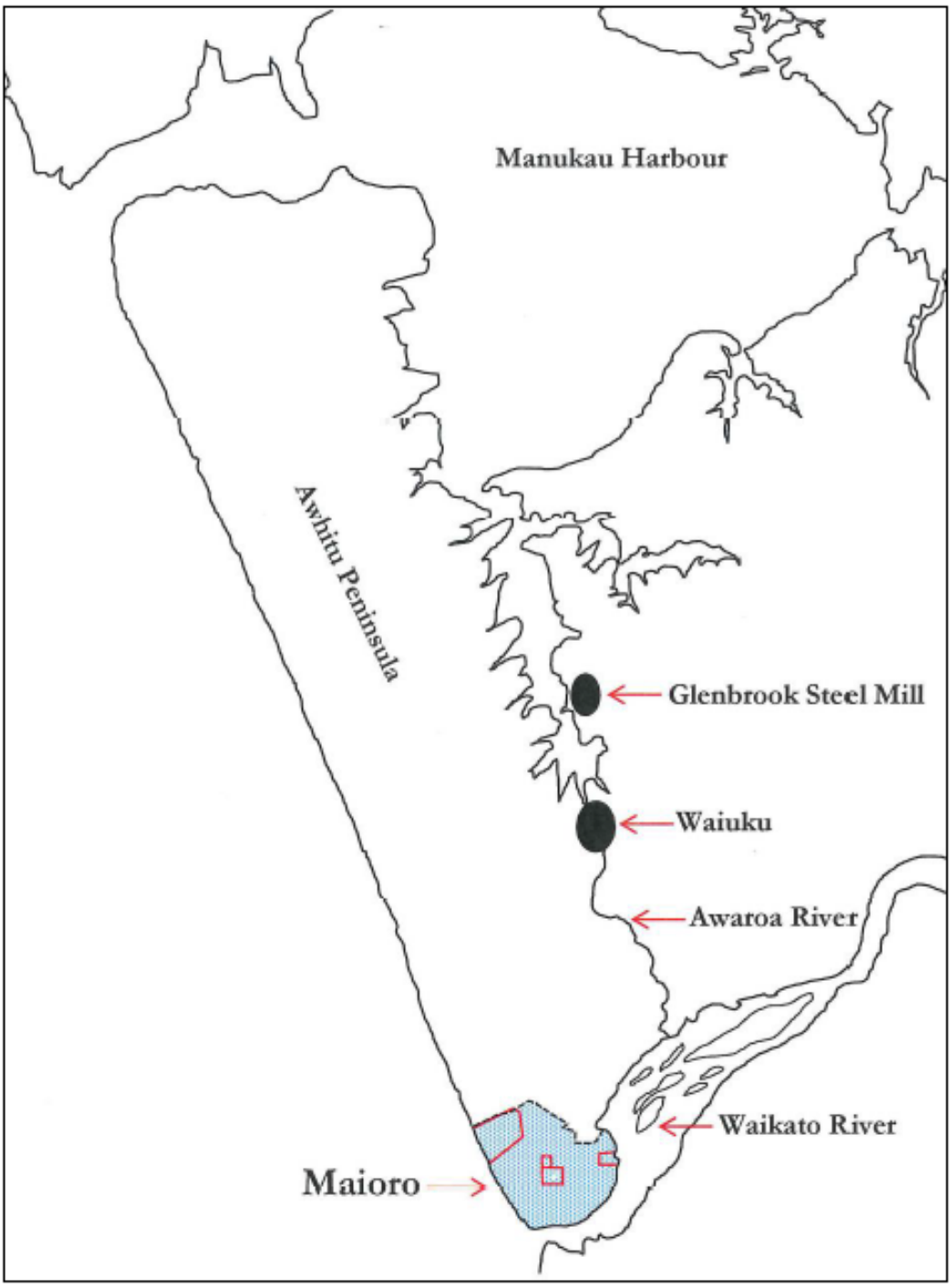
in order to present a full and accurate picture of the historical record and context.[3] That should not be taken as a contemporary endorsement on our part of the language used.

Overview of factual and procedural background

[4] Over the course of this judgment, the factual background will be traversed in detail. Much of it has been pieced together many years after the events to which it relates from an incomplete documentary record and is the subject of competing expert evidence. To assist in understanding what follows, we provide here a brief overview of the key historical events and mention also some aspects of the procedural history of the case, which have themselves given rise to substantive issues it will be necessary to resolve. A statement of the issues we have to consider is produced at [44] to [49] below, followed by a summary of what we have decided.

[5] Ngāti Te Ata's ancestral land relevant to the appeal lies on the Āwhitu Peninsula at Te-Pūaha-o-Waikato, the mouth of the Waikato River. Maioro lies at the southern end of the Āwhitu Peninsula and on the northern bank of the mouth of the Waikato River. The location of "Maioro" is shown on the map below which, as with all of the maps included in this section of the judgment, we adopt from the brief of evidence of James Parker, called by the Crown to give expert historical evidence in the High Court.

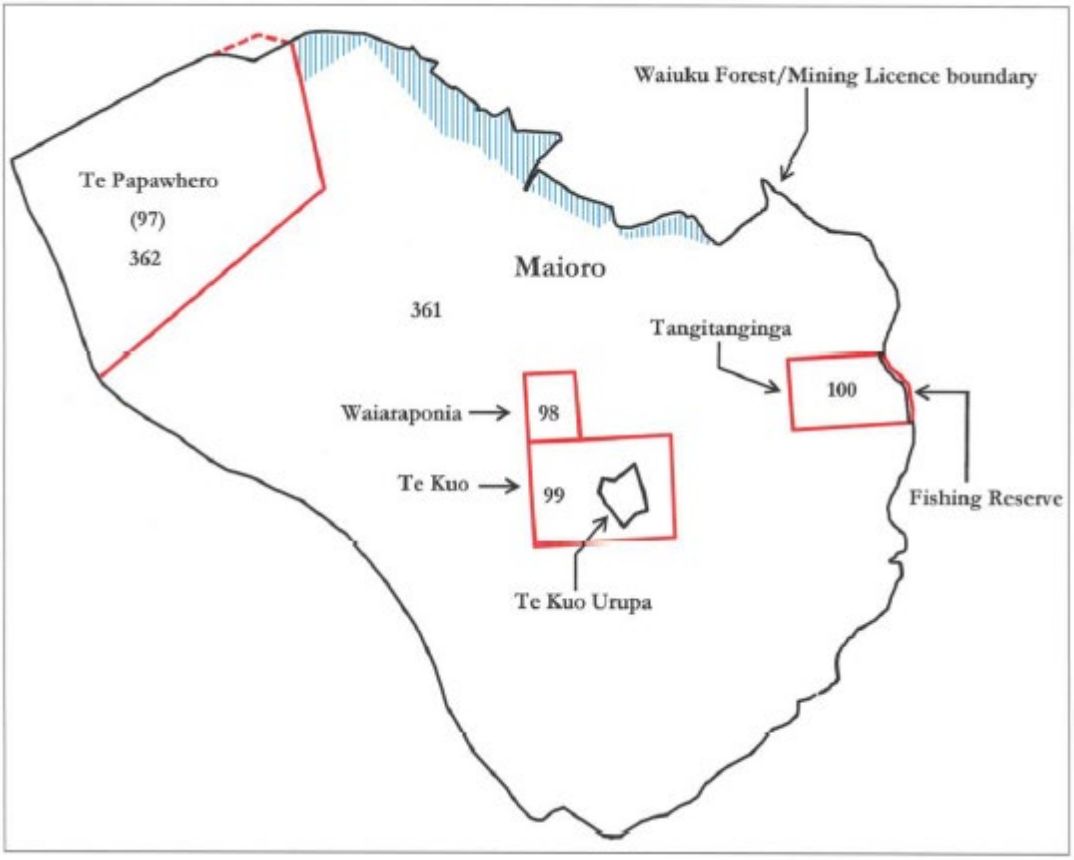
[3] Likewise, when quoting directly from historical documents we have preserved the language used and not amended it to correct, for example, the spelling of words in te reo Māori or the use of tohutō (macrons).



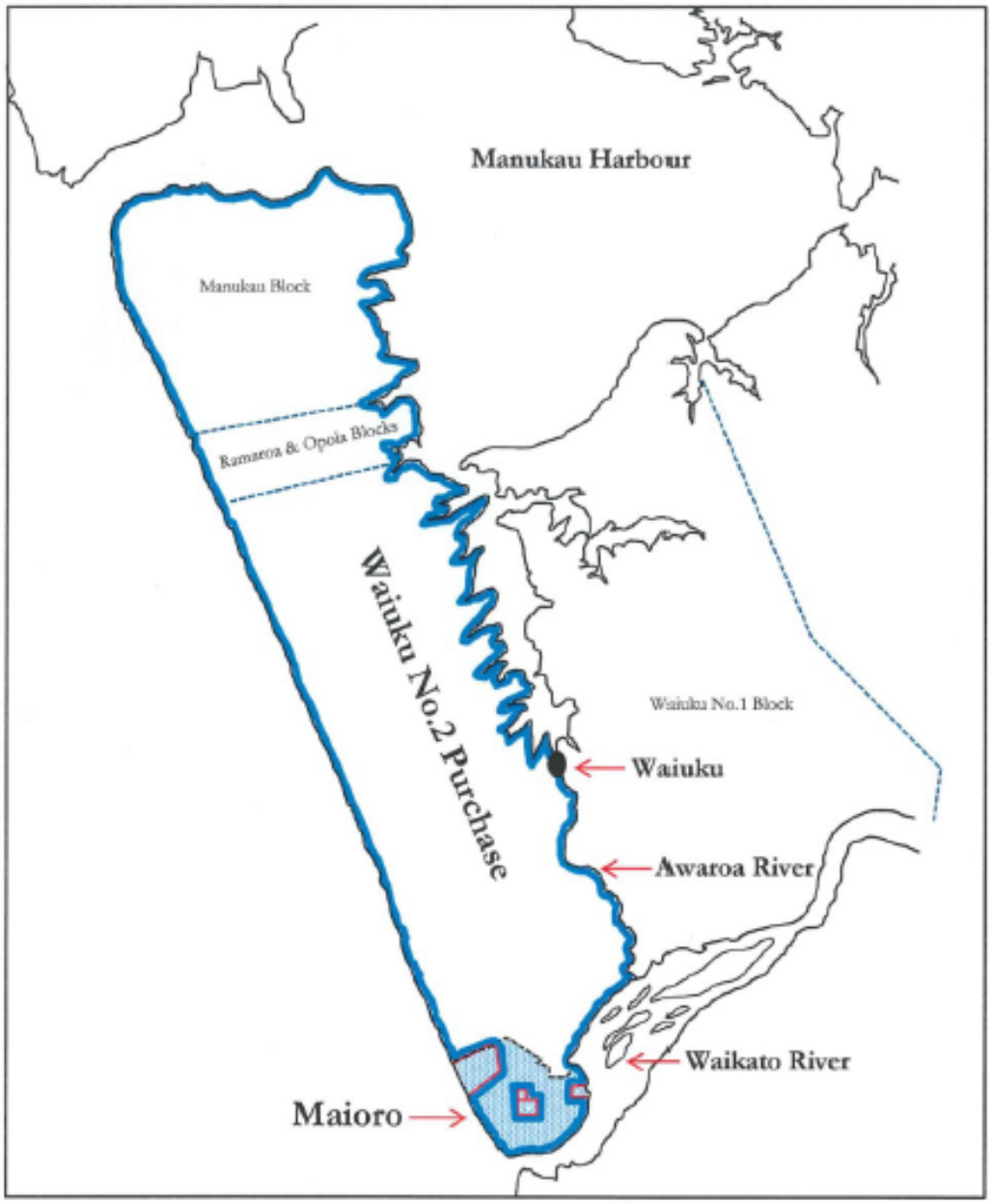
[6] The four areas referred to as wāhi tapu (sacred sites, in this context being burial grounds),[4] located within Maioro—Te Papawhero, Te Kuo, Waiaraponia and

[4] We note that the NZ Steel referred to the four wāhi tapu as the "Four Blocks": they consider that although the four areas were identified as wāhi tapu on early maps, this designation may not be accurate. NZ Steel identified its preference as being for specific sites of greatest importance to be identified, considering this has not been possible to date.

Tangitanginga—are central to Ngāti Te Ata's concerns. The locations of the wāhi tapu can be observed on the following map:



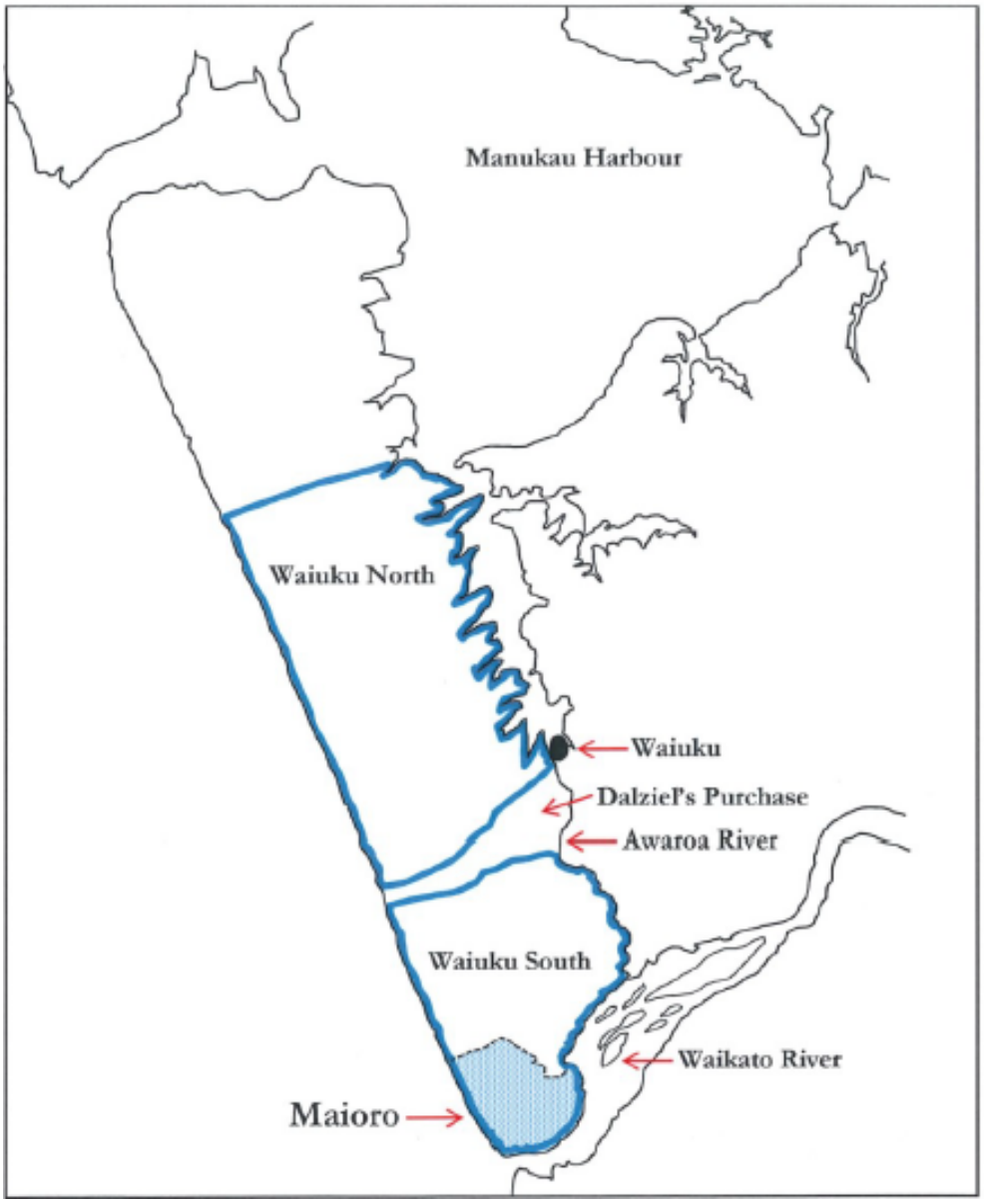
[7] In November 1864, the Crown purchased the North and South Blocks of the Āwhitu Peninsula, including Maioro, from Ngāti Te Ata. The transaction was documented in a deed which we call the Waiuku Deed, executed on 2 November 1864. The map below shows the boundary of the purchase (referred to as the Waiuku No. 2 Purchase):



[8] The land acquired by the Crown under the Waiuku Deed included some land that it had already purchased: the Manukau, Ramaroa and Opoia Blocks, as well as various other smaller areas with which we are not concerned. The Crown had, in 1854, also purchased the Waiuku No 1 Block, which lies to the east of the land purchased under the Waiuku Deed. The Waiuku No 1 Block is not directly relevant to these proceedings.

[9] The Waiuku Deed excluded a number of wāhi tapu, including the four which are in issue in these proceedings, and also provided that various lands (the habitation reserves) would be granted back to members of Ngāti Te Ata by way of Crown grants.

[10] One month after the execution of the Waiuku Deed, the Crown confiscated land in a purported exercise of the powers granted under the New Zealand Settlements Act. This occurred against the backdrop of the Waikato War. The land confiscated was described in the Order in Council as the Waiuku North and Waiuku South Blocks. The confiscated land is depicted in the following map:



[11] As can be seen, there was substantial overlap between the lands purchased under the Waiuku Deed and the lands confiscated. The consequence of confiscation was that Ngāti Te Ata's title was extinguished: under the New Zealand Settlements Act, confiscated lands were "deemed to be Crown Land freed and discharged from all

Title Interest or Claim of any person whomsoever".[5] Crown grants for the habitation reserves were later issued to named members of Ngāti Te Ata who were considered "loyal", as appears to have been contemplated by the Waiuku Deed itself.

[12] Notably, the wāhi tapu were excluded from the Waiuku Deed, but among the lands confiscated under the New Zealand Settlements Act. Crown grants were ultimately made in respect of the wāhi tapu, initially in October 1865, but subsequently those grants were cancelled, and new grants were issued on 18 February 1878. The new grants were made to named members of Ngāti Te Ata subject to restrictions on alienation. These restrictions were "from sale and mortgage, and from lease without the consent of the Governor".

[13] A concern arose in the early 1900s that sand dunes at Maioro were encroaching onto adjacent farmland. As a consequence, in 1914 the Crown began planting marram grass and lupin in the Maioro area. In May 1932, the Public Works Department began work on what became known as the Waiuku or Waikato North Head Sand Dune Project, which involved stabilising sand dunes before planting pine trees. The work was undertaken on Crown land, land owned by settlers and the four wāhi tapu. There are no contemporary records of attempts being made to contact the owners of land not owned by the Crown in respect of this work.

[14] In 1935, the Cabinet approved the afforestation at Maioro. In 1938, the first pine trees were planted on Te Papawhero by the Public Works Department. In 1939, Te Papawhero was taken under the Public Works Act 1928. In 1941, the Waikato-Maniapoto District Native Land Court assessed compensation of £180 for the taking and ordered that it be paid to the Waikato-Maniapoto District Native Land Board on behalf of the owners. All known Māori remains were exhumed from Te Papawhero on 31 April 1941. In 1957, Te Papawhero was declared to be Crown land subject to the Land Act 1948. It was later set apart for state forest purposes.

[15] Planting on Waiaraponia by Public Works Department began in 1940 and was completed in 1949. Planting on Te Kuo began in 1944 and was completed in 1953. In 1945, planting on Tangitanginga began and this was completed in 1949.

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5 New Zealand Settlements Act 1863, s 4.

[16] In 1952, the Conservator of Forests at the Auckland Conservancy informed the Director of Forestry that the Waiaraponia, Te Kuo and Tangitanginga wāhi tapu areas had been planted as part of the sand dune reclamation project without being acquired. He requested in a later memorandum that the three wāhi tapu be acquired as it was desirable that they be included in the project.

[17] In 1952, there were no living owners of the Waiaraponia, Te Kuo and Tangitanginga wāhi tapu. Attempts were made to contact successors to the grantees of the land, and the Crown subsequently ascertained from them that there were no objections to the land being taken except in respect of an urupā (burial ground or cemetery) in either Waiaraponia or Te Kuo,[6] and a strip of river frontage for a fishing reserve in Tangitanginga. Dame Ngāneko Minhinnick, a kuia (female elder) and leader of Ngāti Te Ata, made inquires as to compensation in 1971 and in 1972 compensation was paid.

[18] In 1966, all four wāhi tapu were set aside for ironsands mining purposes under the Iron and Steel Industry Act 1959. A heads of agreement was signed between the Crown and NZ Steel, under which the Crown granted NZ Steel a licence with an 100-year term, permitting it to mine land including the four wāhi tapu. The mining rights granted under the licence have since been exercised as the foundation of the steel manufacturing activities of NZ Steel at Glenbrook. The mining occurs by digging up sand deposits, filtering out iron-bearing minerals using fresh water and redepositing the remaining sand on the licence area as uncontaminated tailings. Remediation follows: in accordance with the requirements of the licence, the land is recontoured to replicate a natural dune shape and planted with marram grass.

[19] In 1978, NZ Steel applied for consent to expand its activities at Glenbrook. Water rights were granted. In this context a liaison committee was established with representatives of Ngāti Te Ata and NZ Steel, and the Commissioner for the Environment carried out an environmental impact audit of the proposed expansion. The report emphasised the importance of identifying sacred sites in the area and protecting them from mining. Dame Ngāneko lodged a claim on behalf of the Huakina

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6 For completeness, a successor to Te Kuo had no objections provided that the urupā "in the area" be preserved.

Development Trust with the Waitangi Tribunal concerning issues relating to the Manukau Harbour but also taking issue with the decision to grant water rights to NZ Steel in respect of the proposed Glenbrook extension. At the hearing in July 1984, counsel for Ngāti Te Ata raised concerns about the desecration of the wāhi tapu by the mining activities of NZ Steel.

[20] In its report on the Manukau claim (Wai 8) issued in July 1985, the Waitangi Tribunal recommended that "negotiations be continued with all affected parties for a settlement of the claims in respect of the compulsory acquisition of lands in the Waiuku State Forest, if practicable without further recourse to this Tribunal".[7] There was also a recommendation directed to the Ministers of Lands, Forests and Energy that the consents and licences authorising NZ Steel's mining operations be "reviewed and renegotiated, or new undertakings sought, to protect sacred sites and adjoining Maori lands".[8] On 30 September 1986, the Cabinet Social Equity Committee resolved to support these recommendations of the Waitangi Tribunal in principle, noting in doing so that negotiations were continuing.

[21] At about this time, consideration was being given to the disposal of the Crown's interest in NZ Steel. The State-Owned Enterprises Act 1986 provided for the abolition of the New Zealand Forestry Service and the transfer of its assets and liabilities to the New Zealand Forestry Corporation. The Deputy Prime Minister, the Rt Hon Geoffrey Palmer, wrote to Dame Ngāneko in response to her inquiry and pointed out that in the event of the transfer of land subject to a te Tiriti o Waitangi | the Treaty of Waitangi claim to a state-owned enterprise, the land would remain subject to the claim.

[22] On 17 March 1987, Dame Ngāneko lodged a claim (Wai 31) in the Waitangi Tribunal on behalf of Te Puaha ki Manukau and the Huakina Development Trust. She claimed they would be prejudicially affected if the wāhi tapu areas were transferred to a state-owned enterprise. In 1988, the claim was amended to cover the entire Waiuku State Forest. This claim remains unresolved in the Waitangi Tribunal.

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7 Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) [Wai 8 report] at 97.

8 At 98.

[23] We discuss in more detail later in the judgment the negotiations and discussions that took place between the Crown and representatives of Ngāti Te Ata down to June 1990. It is sufficient to record here that the Minister of Justice issued a press release on 15 June 1990. The Minister noted that the Government had set in motion a process to return the four wāhi tapu areas at Maioro to Ngāti Te Ata and remove them from the operation of the Iron and Steel Industry Act.

[24] The following day NZ Steel expressed its surprise at the foreshadowed removal, and claimed such an action would be ultra vires. The Crown nevertheless decided to proceed. On 24 September 1990, it entered into a memorandum of understanding with Ngāti Te Ata to the effect that the Crown would remove the four wāhi tapu areas from the ironsands mining licence, and that Ngāti Te Ata would propose conditions under which mining could proceed on the balance of the Maioro land.[9] There would be provision for ongoing observation of the activities by Ngāti Te Ata and a reinterment procedure for kōiwi (skeletal remains). A joint press release was issued by the Minister of Justice and Ngāti Te Ata. A copy of the memorandum of understanding was sent to NZ Steel. On 25 September 1990, the Minister of Justice wrote to NZ Steel informing it that the Cabinet had directed that the Minister of Commerce declare the four wāhi tapu areas no longer subject to the Iron and Steel Industry Act and to apply to the Māori Land Court to revest the four wāhi tapu in the descendants of the original owners. A further letter, of 15 October 1990, informed the company that the Minister of Energy intended to remove the four wāhi tapu from the Iron and Steel Industry Act on or after 19 October 1990.

[25] On 17 October 1990, NZ Steel commenced an application for judicial review in the High Court against the Minister of Energy. Interim relief was sought, and the Crown offered an undertaking that the Minister and the Government would not remove the four wāhi tapu areas from the Iron and Steel Industry Act. On 5 November 1990, Ngāti Te Ata was joined as a party to the proceeding. Then, on 14 November 1990, Tompkins J issued a minute recording NZ Steel's undertaking not to mine within the wāhi tapu areas and an undertaking by the Crown not to remove the wāhi tapu areas

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9 The memorandum of understanding is the subject of discussion below from [621].

from the Iron and Steel Industry Act.[10] These undertakings were exchanged on the basis the matter would proceed to hearing on the substantive application for judicial review, and there would be no need to hear the application for interim relief.[11]

[26] On 12 December 1990, Ngāti Te Ata filed a counterclaim seeking relief against the Minister of Energy and the Attorney-General for the takings. A further claim pleaded sought to enforce the memorandum of understanding. This was said to constitute a contract, for which specific performance was sought.

[27] A further pleading was filed by solicitors acting for Ngāti Te Ata on 14 December 1990, containing a counterclaim against NZ Steel. It contained similar allegations to the 12 December 1990 pleading but relied on them as constituting a basis on which NZ Steel should be declined relief in the Court's discretion on its application for judicial review because of the adverse impacts of the mining licence on the wāhi tapu areas.

[28] The proceedings were adjourned on the basis of the undertakings exchanged by the parties, and there were various inconclusive settlement discussions in subsequent years, including discussions with a view to settlement of Ngāti Te Ata's historical Treaty of Waitangi claims. This lengthy process came to an end when, in April 2013, Ngāti Te Ata negotiators rejected a settlement offer made by the Minister for Treaty of Waitangi Negotiations and indicated an intention to commence proceedings against the Crown in the High Court.

[29] On 19 December 2013, Te Ara Rangatū o te Iwi o Ngāti Te Ata Waiohua Inc and Mr Minhinnick commenced the proceeding which is one of those giving rise to

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10 *New Zealand Steel Mining Ltd v Butcher* HC Auckland M1761/90, 14 November 1990 (minute of Tompkins J) [interim orders minute] at [2] and [3].

11 At [2].

the present appeal.[12] On 15 May 2014, NZ Steel applied to the High Court to be released from its 14 November 1990 undertaking and to discontinue the application for review. The application was granted by Fogarty J, whose judgment was upheld by this Court on appeal.[13]

[30] As noted by Fitzgerald J, the progress of the 2013 proceeding was "fraught with delay and disruption".[14] The High Court trial eventually proceeded at its fourth allocated date, commencing on 4 June 2019 and occupying four weeks. This was over five years after the commencement of the 2013 proceeding and almost 30 years after the 1990 litigation was commenced.

[31] During the course of the substantive hearing, Fitzgerald J granted the plaintiffs leave to file a third amended statement of claim in the 2013 proceeding.[15] The Judge recorded the confirmation given by then counsel for Ngāti Te Ata that the 1990 proceeding was effectively "parked", having been substantially, if not wholly, taken over by the 2013 proceeding.[16] Consequently, she proceeded to hear and determine only the 2013 proceeding. There is an issue that we will shortly address concerning the procedural effect of what was done, which was raised in argument on an application by Mr Minhinnick to amend the notice of appeal at the hearing in this Court.

[32] Many of the facts relevant to the plaintiffs' claims relating to historical events taking place from around 1860 to the early 1900s were in dispute and the subject of

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12 The other proceeding dealt with in the judgment under appeal was the counterclaim from the 1990 proceeding which had effectively been dormant until NZ Steel was given leave in 2014 to discontinue its application for judicial review commenced in October 1990. We were told that Ngāti Te Ata's counterclaim was given a 2014 file number (CIV-2014-404-1172) to create an electronic file record, and for convenience we refer to it as the 2014 proceeding in accordance with the intituling. Mr Minhinnick was substituted as the counterclaim plaintiff following the judgment of Venning J in *Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2018] NZHC 2886, [2019] NZAR 12: the counterclaim had originally been advanced by Ngāti Te Ata as an unincorporated body.

13 *New Zealand Steel Mining Ltd v Butcher* [2014] NZHC 1552 [undertaking and discontinuance decision]; upheld in *Ngāti Te Ata v New Zealand Steel Mining Ltd* [2015] NZCA 547, [2016] NZAR 38 [undertaking and discontinuance appeal].

14 Judgment under appeal, above n 1, at [36]. The Judge explained the various reasons for the successive vacation of fixtures at [37].

15 At [40]. The Judge declined, however, to grant leave to make amendments which would have required further and "not insubstantial" evidence to be called, on the basis that would likely have required further adjournment of the substantive fixture: at [40], n 25.

16 At [40].

briefs provided by expert historians.[17] The plaintiffs however did not call all the expert witnesses for whom they had provided briefs of evidence, in particular Dr Vincent O'Malley, a prominent historian and acknowledged expert on the Waikato War, and Professor Richard Boast KC, a specialist in legal history and Māori land law. The plaintiffs suggested that their briefs be taken as read, but the Judge held that would be inappropriate given the witnesses were unavailable for cross-examination. Accordingly, she did not read or take into account the briefs of either Dr O'Malley or Professor Boast's evidence.[18] Two expert briefs were read: those of Messrs Roimata Minhinnick and Parker.[19] We discuss this evidence in more detail below, but note here that the appellant's position on appeal is that the Judge was wrong not to read the briefs of Dr O'Malley and Professor Boast.[20]

Amended notice of appeal

[33] On 21 February 2024, the appellant filed an application for leave to file an amended notice of appeal. The amended notice ostensibly sought to align the notice with the appellant's submissions in support of the appeal. But the respondents opposed the application, complaining that the amended notice sought to raise issues that had not been pleaded in the third amended statement of claim (and so had not been dealt with by the High Court) or had not been raised in the original notice of appeal.

[34] Two particular matters were the subject of argument addressed in the course of the hearing. First, the amended notice of appeal sought to allege that the memorandum of understanding created enforceable obligations, an issue not raised in the original notice of appeal. Secondly, the amended notice of appeal sought to pursue as a ground of appeal an allegation that the Crown failed, in exercising the statutory powers under the Public Works Act and the Iron and Steel Industry Act, to consider a mandatory consideration—namely the nature and significance of the four wāhi tapu areas, the effect of the takings on the wāhi tapu areas and the effect of including them in the mining licence.

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17 At [15].
18 At [16].
19 At [17].
20 See [57]–[70] and [102]–[104] below.

[35] As to the memorandum of understanding, the respondents accepted that its enforceability was raised in submissions in the High Court, albeit orally and only in closing. The complaint was that the issue had not been raised in the notice of appeal, but the issue was referred to in the third amended statement of claim, where it was alleged that the memorandum of understanding contained "commitments", which the Crown had failed to perform. The Judge recorded that one of the issues she had to determine was whether the Crown had given "a binding and enforceable commitment (through the [memorandum of understanding]) to remove the wāhi tapu from the Licence area".[21] She also recorded that counsel had argued that (as pleaded in the in the 1990 counterclaim) the memorandum of understanding "amounted to a binding contractual arrangement between the Crown and Ngāti Te Ata".[22] The Judge determined that issue.[23] The argument sought to be run on appeal was not included in the notice of appeal but that can hardly in the circumstances be a basis for rejecting an amendment to raise the issue. The appellant's intended argument was dealt with in written submissions five weeks before the hearing of the appeal and we can see no prejudice in allowing the argument to be advanced.

[36] As to the issue concerning the alleged failure to consider mandatory considerations, the complaint is that the issue was not raised in the High Court. Mr Harris, who appeared for Ngāti Te Ata in this Court (but not in the High Court), noted that the issue had been raised in the 1990 counterclaim in which it was pleaded that the taking of the wāhi tapu under the Public Works Act, the setting apart of those lands under the Iron and Steel Industry Act, and the granting of a licence to mine them were unlawful (and in breach of fiduciary duty) because those actions were carried out by the Crown without informing itself as to the nature and extent of Māori interest in the wāhi tapu and their significance to Māori. Secondly, Mr Harris claimed that the 1990 claim was alive at the trial, and referred to the Judge's second trial minute, in which she observed that Mr Kahukiwa "confirmed the plaintiffs do pursue the counterclaim", and also referred to the "considerable overlap between the claim against the Crown in the 1990 proceedings and those aspects of the current

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21 Judgment under appeal, above n 1, at [406(h)].
22 At [666].
23 At [669].

proceedings alleging [breach of] fiduciary duty".[24] Further, "that overlap [was] the reason the two matters [were] being heard together".[25] After recording Mr Hodder KC's observation that, as a matter of principle, pursuing the same issues in two proceedings is an abuse of process, she continued:[26]

> [7] Be that as it may, all parties have been on notice for some time that the counterclaim is to be heard at the same time as the substantive claim in the main proceedings. Any issues arising in this regard reinforce the need for clarity on the issues for determination at this trial …

[37] Mr Harris claimed the respondents should be taken to have prepared for trial on that basis, and argued there was no reason to suppose that any available relevant evidence was not before the Court. In any event, what was at issue was a legal question as to whether the Crown was obliged to consider the interests of Māori in order to exercise the relevant statutory powers reasonably and in accordance with law.

[38] Mr Smith, who addressed this issue for NZ Steel, referred to the Judge's fourth trial minute, which recorded Mr Minhinnick's agreement that the "live" proceeding for the purposes of the trial was the 2013 proceeding, and then indicated that challenges based on a failure to take into account the mandatory relevant consideration now contended for were not in scope.[27] An opportunity was afforded to amend the pleading to pursue the allegation but it was not taken up. Mr Smith submitted also that no issue of a failure to take into account a relevant mandatory consideration had been raised on the appellant's evidence, nor was there evidence of such a failure. It would not be appropriate to rely on an absence of evidence to infer there had been no consideration of the issues.

[39] Although the issue is not clear cut, we have decided that we should allow the proposed amendment to the notice of appeal in respect of the mandatory consideration issue. The amendment would assert that the actions of the Crown in taking the four wāhi tapu lands under the Public Works Act, granting a licence to NZ Steel to mine the areas and other former lands of Ngāti Te Ata for ironsands in

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24 *Te Ara Rangatu o te Iwi o Ngati Te Ata Waiohua Inc v Attorney-General* HC Auckland CIV-2013-404-5224, 6 June 2019 (Minute No 2) at [4] and [6].

25 At [6].

26 Footnote omitted.

27 *Te Ara Rangatu o te Iwi o Ngati Te Ata Waiohua Inc v Attorney-General* HC Auckland CIV-2013-404-5224, 17 June 2019 (Minute No 4).

June 1966, and setting apart the lands for the purposes of the Iron and Steel Industry Act in July 1966 were unlawful and in breach of the Crown's fiduciary duty because the Crown failed to consider and protect the interests of Ngāti Te Ata when dealing with the wāhi tapu areas.

[40] We consider it would be contrary to the interests of justice to deny the appellant the opportunity to address argument along these lines when the basis of the argument was well-signalled in the written submissions filed in advance of the hearing and when we think it is unlikely that the issues will turn on evidence not already before the Court. We say that against the background of the extensive material recording the processes that were followed by the officials and ministers who were involved in the relevant decision-making process. And the relevant context includes the fact that at the trial there were arguments directed against the Public Works Act, licensing, and Iron and Steel Industry Act processes on grounds other than that now sought to be pursued. These raised unlawfulness in terms of the exercise of powers under the Public Works Act, bad faith and improper purpose, failure to offer the wāhi tapu back, whether s 15 of the Public Works Act gave rise to a fiduciary duty and other issues. We think it unlikely that in preparing the necessary evidence to deal with these issues the evidence relating to the further issue now raised would not have been identified and called.

[41] Once that point is reached, the issue becomes one of what inferences may properly be drawn from the material before the Court and legal argument about the nature of the statutory powers conferred and exercised.

[42] For these reasons we have decided to grant leave to file the amended notice of appeal first provided in draft form on 21 February 2024.

[43] We turn now to a summary of the issues that arise for determination on appeal.

Issues for determination

[44] It is convenient to set out the issues which arise on appeal, which we will deal with in a chronological sequence.

[45] First, there are issues arising from events in the 19th century, which are as follows:

(a) Was the sale under the Waiuku Deed voidable as an unconscionable bargain, or for duress or undue influence?

(b) Was the Confiscation of Ngāti Te Ata's land under the New Zealand Settlements Act 1863 lawful?

(c) Did the New Zealand Settlements Acts Amendment Act 1866 validate any illegality in the Confiscation?

(d) Did either or both the Waiuku Deed and confiscation breach a fiduciary duty to consider and protect the interests of Ngāti Te Ata, or any other equitable duty?

[46] Secondly, there are issues arising from 20th century takings of the wāhi tapu, which are as follows:

(a) Were the takings of the wāhi tapu under the Public Works Act 1928 and the inclusion of the wāhi tapu in the mining licence issued under the Iron and Steel Industry Act 1959:

(i) unlawful on the basis that the Crown failed to consider the special status of the land;[28] and/or

(ii) a breach of a fiduciary duty owed by the Crown to Ngāti Te Ata to consider and protect their interests in the special circumstances prevailing?

[28] Submissions also addressed whether there was a duty to consult under the Public Works Act 1928.

[47] Thirdly, the issues arising from the memorandum of understanding and events related to it (which the Judge called collectively "the 1990 commitments") are as follows:

(a) Did the Crown's agreement under the 1990 commitments to return the wāhi tapu to Ngāti Te Ata and remove them from the mining licence give rise to binding and enforceable obligations on the Crown?

(b) Did the Crown breach a legitimate expectation of Ngāti Te Ata that its claims of breach of the Crown's Treaty of Waitangi obligations would have been fairly addressed by now and not rendered nugatory by Crown action or omission?

[48] In the amended notice of appeal, the appellant seeks a number of declarations in relation to these issues and says that the question of what other relief might be appropriate consequent on the making of these declarations or any of them should be the subject of a further hearing in the High Court.

[49] We must also decide whether any of the "affirmative defences" raised by the Crown and NZ Steel, being standing, limitation, and laches and acquiescence, fall to be determined in this appeal. Those issues were not determined by the High Court, evidently on the basis that it was agreed they should be left for a second trial should it be necessary to determine them. As it transpired it did not become necessary for the Judge to direct a further trial. As we explain below, we think there are some difficulties with the approach which Mr Harris suggested we follow on appeal, which is to make the declarations which the appellant seeks without considering and dealing with the affirmative defences. The defences would be left for the second stage when, in the event of a further appeal, we would have the benefit of the High Court's judgment on them.

Summary of our conclusions

[50] For the reasons we explain below, we have concluded in relation to the issues arising from events in the 19th century that:

(a) The sale under the Waiuku Deed was not voidable as an unconscionable bargain, or for duress or undue influence.

(b) The Confiscation of Ngāti Te Ata's land under the New Zealand Settlements Act 1863 (subject to the Crown grants of land to the signatories of the Waiuku Deed) was lawful in accordance with the statutory requirements and reflected the arrangements agreed between Ngāti Te Ata and the Crown under the Waiuku Deed.

(c) To the extent that the Order in Council of 29 December 1864 providing for the Confiscation did not state that the Governor in Council was satisfied that "a considerable number" of Ngāti Te Ata were in rebellion (referring simply to Ngāti Te Ata being in rebellion), that was an omission within the validating terms of the New Zealand Settlements Acts Amendment Act 1866.

(d) The Waiuku Deed and the Confiscation did not breach a fiduciary duty to consider and protect the interests on Ngāti Te Ata or any other equitable duty.

[51] In relation to the issues arising from the 20th century, the takings of the wāhi tapu under the Public Works Act 1928 and the inclusion of the wāhi tapu in the mining licence issued under the Iron and Steel Industry Act 1959:

(a) were not unlawful on the basis that the Crown failed to consider the special status of the land; and

(b) did not breach a fiduciary duty owed by the Crown to Ngāti Te Ata to consider and protect their interests.

In each case the Crown acted in accordance with powers conferred by statute.

[52] In relation to the issues arising from the 1990 commitments:

(a) The memorandum of understanding entered into in 1990 did not bind the Crown to return the wāhi tapu to Ngāti Te Ata and remove them from the mining licence.

(b) The Crown did not breach a legitimate expectation of Ngāti Te Ata that its claims of breach of the Crown's Treaty of Waitangi obligations would have been fairly addressed by now and not rendered nugatory by Crown action or omission.

[53] These conclusions mean there is no need to address the affirmative defences, as was the case in the High Court.

Structure of the judgment

[54] This appeal has layers of complexity: each issue, of which there are many, gives rise to a number of other issues, many of which overlap. The claims span over 150 years, and engage with novel questions of public and private law. To give each issue the attention required, we have split the claims into their logical groupings, and included in each resulting section a summary of the pleaded claims and the factual background relevant to them. We have then summarised the submissions made before setting out our analysis and conclusions.

[55] The structure of the judgment from this point is as follows:

(a) First, we address some procedural issues that arose at the trial and which the appellant contends require correction on appeal.

(b) Secondly, we consider the approach this Court should take on the issue of standing and other affirmative defences raised by the respondents.

(c) Thirdly, we address the appellant's claims relating to the Waiuku Deed and the subsequent confiscation of the Waiuku North and South Blocks.

(d) Fourthly, we address the appellant's claims relating to the 1939 and 1959 takings of the wāhi tapu, and the mining licence.

(e) Fifthly, we address the appellant's claims relating to "the 1990 commitments", based on the memorandum of understanding, subsequent events and legitimate expectation.

PROCEDURAL HISTORY

Procedural issues for this Court

[56] We address here procedural issues that arose at the trial in the High Court which the appellant contends require correction on appeal.

The O'Malley and Boast briefs of evidence

[57] First, Mr Harris submitted that the Judge's refusal to read the evidence of Dr O'Malley and Professor Boast deprived the Court of the uncontested parts of their evidence and at least some of the relevant historical materials. A more considered approach was called for.

[58] Mr Kinsler for the Crown submitted that the briefs of Dr O'Malley and Professor Boast had no evidential status and that the Judge was correct not to admit them. The Court could not have simply identified and relied on the uncontested parts of the briefs so as to treat them as uncontested documentary hearsay—this exercise would have required a meticulous comparison between the briefs and the Crown's evidence. The witnesses' unavailability for cross-examination was not the responsibility of the Judge.

[59] Mr Hodder for NZ Steel also submitted that the Judge was correct not to read the briefs of evidence of Dr O'Malley and Professor Boast. The appellant had the opportunity to seek a ruling on the admissibility of the briefs but elected not to. This did not lead to an error on the part of the Judge.

[60] As noted above, at trial, the plaintiffs did not call Dr O'Malley or Professor Boast. In relation to their briefs of evidence, Fitzgerald J recorded that:[29]

> The plaintiffs initially suggested their briefs simply be taken as read. That would have been inappropriate given the witnesses were not available for cross-examination. I have therefore not read or taken into account Dr O'Malley or Professor Boast's evidence.

[61] Some of the circumstances which lead to Professor Boast and Dr O'Malley not being called as witnesses were recorded by Venning J in his judgment declining an application by the plaintiffs to adjourn the trial.[30] In the application for adjournment, the plaintiffs claimed they were not ready for hearing primarily because of ongoing funding difficulties which meant they were not able to prepare with their witnesses. The plaintiffs said that they could not afford the costs of calling these expert witnesses.[31]

[62] Venning J said that if the plaintiffs wished to rely on the lack of funding to support their application, they should have provided more information.[32] Further, he noted that trial counsel may have been "overstating" the financial difficulty as it related to the witnesses.[33] The witnesses' evidence was finalised and briefs had been exchanged. Importantly, the Judge noted that although Mr Kinsler had confirmed that two briefs could be taken as read,[34] the Crown required Professor Boast for "very limited cross-examination".[35] Further, as Dr O'Malley was one of the plaintiffs' primary witnesses, Mr Kinsler confirmed that the Crown was prepared to pay his travel and accommodation expenses. Mr Hodder acknowledged that his clients would take a similar view regarding the calling of witnesses.[36]

[63] After the trial commenced, when it became apparent that Professor Boast and Dr O'Malley would not be available to give evidence, Fitzgerald J observed in a

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29 Judgment under appeal, above n 1, at [16].
30 See *Te Ara Rangatū O Te Iwi O Ngāti Te Ata Waiōhua Inc v Attorney-General* [2019] NZHC 1205.
31 At [8].
32 At [28].
33 At [30].
34 Those of Sir Edward Durie and Ian Lawlor.
35 At [30].
36 At [30].

minute that the briefs had "no evidential status".[37] If rulings were required, she advised they would need to be sought as soon as possible and before the completion of the plaintiffs' evidence.[38] It seems that the plaintiffs did not seek a ruling.

[64] Given the Crown's offer of financial assistance, it is unclear why at least Dr O'Malley was not called as a witness. Before us, Mr Harris conveyed that he had been instructed that the reason Dr O'Malley and Professor Boast were not able to appear because "there was no money to pay them". He stated that he had not been aware of the Crown's offer to cover Dr O'Malley's expenses.

[65] Regardless of why the witnesses could not be called, we consider that the Judge did not err in her conclusion that it would be inappropriate to take the briefs of evidence as read, given that the witnesses were not available for cross-examination.[39]

[66] The briefs of evidence of Professor Boast and Dr O'Malley had no evidential status—the witnesses were not called and did not read their briefs at trial. A brief of evidence is not, in itself, evidence. The Evidence Act 2006 identifies that the ordinary way for a witness to give evidence is orally in the courtroom.[40] In civil proceedings, evidence-in-chief may be given through a written statement, only where either both parties consent to the giving of evidence in this form or the rules of the court permit or require the giving of evidence in this form.[41] Rule 9.51 of the High Court Rules 2016 provides that disputed questions of fact must be determined on evidence given by means of witnesses examined orally in open court, unless otherwise directed or authorised. Rule 9.12(1) of the High Court Rules mandates that, when a brief by a witness is subject to an oral evidence direction, it must be read by the witness at trial as the witness's evidence-in-chief.

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37 *Te Ara Rangatu O Te Iwi O Ngati Te Ata Waiohua Inc v Attorney-General* HC Auckland CIV-2013-404-5224, 4 June 2019 (Minute No 1) at [7].

38 At [7].

39 See High Court Rules 2016, r 9.13(2): "When any part of the evidence contained in a brief is not given in evidence at the trial by the person to whose evidence that brief relates, any other party to the proceeding may, unless the trial Judge otherwise directs, put that part of the evidence to that person in cross-examination."

40 Evidence Act 2006, s 83(1)(a).

41 Sections 83(1)(c)(ii) and 84(2).

[67] There is no provision in the Evidence Act or the High Court Rules which provides for evidence in civil proceedings to be given in written briefs which are not then read or adopted in the courtroom. Accordingly, the briefs were not given in evidence and we consider, as the Judge did, that it is not appropriate to read or take into account Dr O'Malley or Professor Boast's evidence.

[68] We agree in principle with Mr Kinsler's submission that it would not be possible for this Court to identify and rely on the "uncontested" parts of the briefs. He made this submission on the basis that, even if this exercise were undertaken, the Court would be unable to safely conclude that particular parts of the briefs were uncontested.

[69] There is, however, an exception to this in respect of the portions of Professor Boast's evidence cited by Mr Parker, the Crown historian. Fitzgerald J relied on some evidence given by Mr Parker, where the source he cited was Professor Boast's brief of evidence,[42] and this approach was not contested before us.

[70] Where the Crown has called a witness who commented on other historical evidence which, for whatever reason, Ngāti Te Ata did not call, we can refer to it because it is evidence on which the Crown relied. There is nothing on the record which suggests that the Crown does not stand by any part of the evidence it called.

The status of the 2014 proceedings

[71] Secondly, Mr Harris submitted the status of the 2014 proceedings created a difficulty.[43] There was overlap between the 1990 counterclaim filed by Ngāti Te Ata and the 2013 proceeding.[44] Both were pursued at trial, and the Judge noted in a minute that all parties had been on notice that the two claims were to be heard together.[45] However, the defendants objected to there being two "live" and overlapping

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42 See for example judgment under appeal, above n 1, at [83(d) and (f)–(g)].

43 As explained above at n 12, the 2014 proceeding refers to Ngāti Te Ata's counterclaim to NZ Steel's application for judicial review in 1990, which was given a 2014 file number to create an electronic file record.

44 Ngāti Te Ata's counterclaim filed in NZ Steel's judicial review proceeding sought relief by way of declarations that the Crown was obliged to perform its obligations under the 1990 commitments.

45 Minute No 2, above n 24, at [7].

pleadings,[46] which Mr Harris claimed led to the challenges to the Public Works Act takings and the issuing of the mining licence falling between the cracks.

[72] Mr Kinsler submitted that there was no error regarding the scope of the pleadings. It was clear from the procedural background that the 2013 statement of claim was to be treated as the "live" proceeding, overtaking the 1990 counterclaim. The trial proceeded on that basis and so must the appeal.

[73] Mr Hodder also noted that the matter of the 2013 proceeding and 1990 counterclaim was considered in the second week of trial, and the Judge recorded the appellant's acceptance that the "live" proceeding for the purposes of the trial was the statement of claim in the 2013 proceeding. The Court had granted leave to amend the statement of claim in that proceeding on a limited basis where amendments involved questions of law or were minor and did not require factual evidence.[47] Accordingly, the 1990 counterclaim did not "fall between the cracks".

[74] As we recorded at [31], and as noted by Mr Hodder, after being asked to clarify whether the 2014 proceedings were being pursued, and if so to what extent, trial counsel for the appellant accepted that the "live" proceeding for the purposes of the trial was the statement of claim in the 2013 proceeding. We consider this is dispositive of any complaint that the 2014 proceedings were not given adequate consideration.

The statement of defence to Ngāti Te Ata's 1990 claim

[75] This issue arises from the Crown's pleading to the claim made by Ngāti Te Ata in the context of NZ Steel's application for review. Mr Harris submitted that on the critical question as to whether the Crown had agreed to return the wāhi tapu and remove them from the mining licence, the Judge appears not to have been informed that the Crown admitted in its statement of defence to Ngāti Te Ata's 1990 proceeding that it had agreed to take those actions. Mr Harris claimed that the admission then

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46 Minute No 4, above n 27, at [2]–[3].

47 Referring to *Te Ara Rangatu O Te Iwi O Ngati Te Ata Waiohua Inc v Attorney-General* HC Auckland CIV-2013-404-5224, 19 June 2019 (Result Ruling 1) at [8]–[19].

made by the Crown was binding and could not subsequently be abandoned as the Crown purported to do.

[76] Mr Kinsler contended that the appellant's focus on the Crown's alleged concession in the 1990 claim is misconceived. He submitted the only relevant position is that in the Crown's 2013 statement of defence.

[77] Mr Hodder submitted that the absence of reference by the Judge to the supposed admissions made by the Crown in its statement of defence to the 1990 claim is explained by the appellant's confirmation that the 2013 proceeding was to be treated as the "live" proceeding. In any event, it was well-understood at trial that the Crown had changed its position on the legal effect of the memorandum of understanding between 1991 and 2013, as it was entitled to do.

[78] This procedural issue is inextricably linked with the substantive determination of the ground of appeal relating to the 1990 commitments, and is more appropriately discussed when we reach those issues below from [671]. For the reasons we give there, we do not accept the appellant can rely on the Crown's claimed admission in respect of the present claim.

AFFIRMATIVE DEFENCES

[79] At this point, we turn our attention to standing and the affirmative defences raised by the respondents.

[80] In the judgment under appeal, Fitzgerald J did not consider it necessary to address the affirmative defences, including standing, advanced by each of the Crown and NZ Steel.[48] As a result, we do not have the benefit of relevant evidential findings made by the trial Court. The question is whether the affirmative defences should be addressed on appeal.

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[48] Judgment under appeal, above n 1, at [723].

Submissions

[81] Mr Harris submitted that standing and the affirmative defences raised by the respondents should be determined at the next stage. His contention was that it is not presently necessary to determine the issue of standing. At trial, that issue was deferred until after the determination of liability, and accordingly, the appeal should proceed on the same basis. The issue of standing would become relevant in the event this appeal was successful. Standing and the other affirmative defences were plainly important, but not obstacles to the declaratory relief currently sought. Rather, they should be dealt with in a future stage of litigation if necessary.

[82] Mr Harris submitted that the Supreme Court majority in *Proprietors of Wakatū v Attorney-General* set out a "blueprint" for how to approach issues of standing and other affirmative defences in cases such as this.[49] In that case, a Mr Stafford was able to bring his claim by virtue of his status as a kaumātua (elder).[50] The Court held there may be a case for a "more relaxed" approach to standing in relation to claims by collective groups of indigenous owners.[51] The declaration made by the Court was made in Mr Stafford's favour.[52] Here, Mr Minhinnick, a descendant of Ahipene Kaihau,[53] occupies effectively the same position that Mr Stafford did in *Proprietors of Wakatū*. Accordingly, at this stage, declarations should be made in his favour on a representative basis. At the second stage, if any proprietary or financial relief was to be ordered, it would be appropriate for Mr Minhinnick to demonstrate that should be in his favour, and to satisfy the Court that those with appropriate whakapapa and a relationship with the land would benefit.

[83] Mr Kinsler told us that consenting to the two-stage approach was a tactical decision he made to promote efficiency, based on his belief that liability could not be established. He did not consider declarations should be given on a provisional basis;

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

50 At [494] per Elias CJ, [673] per Glazebrook J, [807] per Arnold and O'Regan JJ and [952] per William Young J.

51 At [490]–[491] per Elias CJ, [673] per Glazebrook J and [799] per Arnold and O'Regan JJ.

52 At [495] per Elias CJ, [723] per Glazebrook J and [827] per Arnold and O'Regan JJ.

53 In some of the documentary evidence, Ahipene Kaihau is also spelt "Aihepene Kaihau". We adopt the spelling used by Mr Roimata Minhinnick. Ahipene was a rangatira of Ngāti Te Ata (who was one of the signatories to the Waiuku Deed).

he wanted to ensure that the Crown's affirmative defences were thoroughly ventilated. He noted that even though a declaration is all that is sought now, if successful, the appellant would ultimately seek proprietary and monetary remedies.[54]

[84] Mr Kinsler submitted that Mr Minhinnick lacks standing to pursue these claims. At trial, although it was contended by both plaintiffs that the claim was brought on a representative basis for Ngāti Te Ata, they did not apply for a representation order. This Court should be slow in such circumstances to find that litigation which has led to the suspension of Treaty of Waitangi settlement negotiations with the mandated representatives of Ngāti Te Ata can be advanced in the absence of formal confirmation of the representative status of the claim.

[85] While Mr Kinsler acknowledged that the Minhinnick family have a longstanding connection to the subject matter of this litigation, he submitted that a historical connection alone is insufficient. Moreover, there are inherent risks in allowing an individual to pursue a claim in circumstances where other parties who claim representative status are not before the court.

[86] Mr Kinsler submitted Mr Minhinnick lacks standing to pursue the claim on behalf of customary owners, claiming that there is insufficient evidence to establish the claim is properly representative. Mr Kinsler submitted it is also unclear whether Mr Minhinnick would have standing on behalf of any successors to legal title enabling him to bring proceedings of claims vested in them, due to the evidence that succession has not been maintained in relation to the 1878 Crown grant.

[87] Mr Kinsler argued that the standing issues arising here are different from those in *Proprietors of Wakatū*. Crucially, in that case, Mr Stafford had standing to bring a claim as a beneficiary of the trusts asserted in that claim. However, the question of whether Mr Stafford should have been heard on a representative basis was not substantially considered by the Supreme Court.

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[54] Referring to *Paki v Attorney-General (No 2*) [2014] NZSC 118, [2015] 1 NZLR 67 [*Paki (No 2)*] at [200] per William Young J.

[88] Mr Hodder for NZ Steel submitted that the liability findings and declarations sought by the appellant could not be made without consideration of the affirmative defences.

Our view

[89] We are not persuaded that it would be appropriate for us to deal with the issue of standing in the absence of relevant findings by the trial Judge directed to that issue and focussing on the relevant evidence. To that extent it seems we are in agreement with the approach taken by counsel, but Mr Harris differs from Mr Kinsler and Mr Hodder to the extent that he urges us to make the declarations sought without reaching any determination on standing or the other affirmative defences. We understand that would be on the basis that if we were otherwise satisfied about the appellant's claims, relief could be granted on the basis that it was contingent on the outcome of a further hearing in which standing and the other affirmative defences would be addressed.

[90] We do not consider Mr Harris is right to suggest that the course followed in *Proprietors of Wakatū* would support that approach. In that case, the second High Court hearing proceeded after the Supreme Court had authoritatively determined that Mr Stafford had standing to bring the claim as a successor of parties who were entitled to sue on the Crown's breach of fiduciary duty.[55] The Supreme Court was also able to deal with the Limitation Act 1950 defence in the context of factual findings in the Courts below. By contrast, here Mr Minhinnick seeks standing as a plaintiff in the context of a historical record showing some members of Ngāti Te Ata were the recipients of Crown grants and others were not. Absent some process in which the Court could be satisfied that relief sought would be in accordance with the wishes of everyone potentially affected, we think it would be wrong in principle for this Court to determine standing when the High Court did not do so.

[91] In a joint memorandum of 6 May 2019 filed in the High Court, counsel for the Attorney-General and NZ Steel recorded an agreement previously reached by

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55 *Proprietors of Wakatū* (SC), above n 49, at [494] per Elias CJ, [673] per Glazebrook J, [807] per Arnold and O'Regan JJ and [952] per William Young J.

the parties that "the claim be staged in two phases with liability to be addressed at a first trial and remedies to be addressed at a subsequent trial, should it prove necessary". It was said that the defendants agreed that approach was still appropriate. The memorandum referred to an attached schedule setting out the key issues to be determined. The schedule began by reiterating that the imminent fixture would be on liability issues only, in accordance with the agreement of the parties. If the Court found in favour of the plaintiffs on the liability issues, a further hearing would be necessary to address remedies. Counsel anticipated that any additional evidence necessary for the remedies hearing would be limited because much of the evidence relevant to liability would also be relevant to remedy. Counsel also noted that in some of the pleaded claims the line between liability and remedial issues was uncertain.

[92] The schedule then identified issues relating to both liability and remedy, the latter subject to the qualification that whether they needed to be addressed would depend on the outcome of the liability hearing. In the latter category, under a heading "Remedies (for separate hearing)", were issues such as what is the appropriate relief for any breaches of fiduciary duty and duties of good faith. It should be noted that the list of matters for separate and subsequent hearing followed the statement of issues concerning the affirmative defences raised by the defendants, concerning standing, limitation, laches and acquiescence.

[93] For the plaintiffs, Mr Kahukiwa filed a memorandum on 8 May 2019, stating that they agreed to the "two staged approach". As to the schedule of issues, Mr Kahukiwa was critical of what he saw as the implied assertion of the defendants that their statement of the issues should prevail, but he did not engage constructively with the defendants' list or suggest other issues for trial.

[94] It is clear that the trial proceeded on the basis that issues of remedy were for a subsequent hearing. It is also clear that the Judge approached the liability issues by asking first whether the plaintiffs' claims could succeed, and she dismissed them

without considering standing or the other defences raised. She summarised her approach at the end of the judgment, under the heading "Affirmative Defences":[56]

> [723] As I have dismissed the plaintiffs' claims, it is not necessary to address the affirmative defences advanced by each of the Crown and NZ Steel. Further, the outcome on some of the affirmative defences (including standing and whether the claims are subject to statutory time limitation bars) would have depended on which and to what extent the plaintiffs' claims were successful, and/or what consequences flow from any findings on liability (for example, whether an institutional or remedial constructive trust arose, and if so when). It is therefore inappropriate in my view to seek to determine the affirmative defences in a vacuum.

[95] Given the Judge's conclusion that the various claims advanced by Mr Minhinnick could not succeed, it was strictly speaking unnecessary for her to deal with the affirmative defences. We note however that the passage from the judgment just quoted did not suggest that the affirmative defences would not have been addressed at the trial had Mr Minhinnick's claims been successful. That is what we infer was in fact intended in accordance with the defendants' statement of issues: it was only issues as to remedy which were to be left for a second trial.

[96] In this Court, Mr Harris submitted that the issue of standing had been deferred until after the liability issues were determined at trial. We do not think that is an accurate way of describing what occurred. As the Judge recognised in the case of the other affirmative defences, their availability would be to a large extent contingent on the liability findings, but that did not mean that from the outset they were deferred to a further trial.[57] They could have been dealt with at the same trial, and we infer they would have been had the Judge considered Mr Minhinnick's claims were otherwise made out.

[97] Mr Harris acknowledged that issues of standing and Mr Minhinnick's ability to maintain the claim in a representative capacity would need to be resolved "before any relief beyond that sought in this appeal" could be granted. While that is no doubt correct, it is problematic to proceed on the basis that declarations can be granted in proceedings where there are unresolved standing issues, and as pointed out by Mr Kinsler, one of the plaintiffs in the High Court, Te Ara Rangatū o te Iwi o Ngāti Te

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56 Judgment under appeal, above n 1.
57 At [723].

Ata Waiohua Inc, has not participated in the appeal. Although Mr Minhinnick claims he is bringing the claim in a representative capacity, there has been no attempt to invoke r 4.24 of the High Court Rules.[58] Given the nature of some of the issues in this case and the historical background in which individual members of Ngāti Te Ata had different relationships with the Crown, the standing issue is not insignificant.

[98] In the end, we consider it appropriate to adopt the pragmatic approach taken by Fitzgerald J of considering the substantive claims first, and then considering the affirmative defences to the extent it is necessary and possible to do so.

THE WAIUKU DEED AND CONFISCATION

[99] On 2 November 1864, a significant amount of land, including Maioro, was purchased from Ngāti Te Ata under the Waiuku Deed. The sale and purchase excluded the four wāhi tapu at issue in these proceedings. The next month, in late December 1864, Maioro was part of the land in the Waiuku South Block confiscated by the Crown together with the Waiuku North Block (the Confiscation) pursuant to the New Zealand Settlements Act. The Waiuku South Block contained the four wāhi tapu.

[100] The issues that arise on this part of the case can be encapsulated in the following questions:

(a) Was the sale under the Waiuku Deed an unconscionable bargain, or voidable for undue influence or duress?

(b) Was the Confiscation under the New Zealand Settlements Act lawful?

(i) What is the correct interpretation of the word "rebellion" under the Act?

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[58] Rule 4.24 of the High Court Rules provides: "One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
(a) with the consent of the other persons who have the same interest; or
(b) as directed by the court on an application made by a party or intending party to the proceeding."

(ii) Was Ngāti Te Ata, or a "[s]ection" of it, or any "considerable number thereof", in rebellion?[59]

(iii) Is the Crown entitled to justify confiscation on the basis that a "considerable number" of Ngāti Te Ata were in rebellion when the Confiscation wrongly stated that Ngāti Te Ata was an iwi in rebellion?

(iv) Even if there was jurisdiction under the New Zealand Settlements Act, did the Governor exceed his statutory power by declaring all the land in the district confiscated?

(c) Did the New Zealand Settlements Acts Amendment Act validate any illegality in the Confiscation?

(d) Did the Waiuku Deed and the Confiscation breach a fiduciary duty to consider and protect the interests of Ngāti Te Ata?

Our approach to the historical evidence

[101] Before addressing the relevant evidence which concerns events that took place in the mid to late 19th century, it is appropriate to set out our approach to evaluating it.

[102] While some matters are not in dispute (there was a statement of agreed facts) and are the subject of documentary evidence, the record is incomplete and there is dispute about some matters of primary fact and the inferences that can appropriately be drawn from the information available. The disputed facts relating to historical events were the subject of comprehensive expert evidence given by Messrs Roimata Minhinnick and Parker.[60]

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59 New Zealand Settlements Act, s 2.

60 Because Mr Roimata Minhinnick shares a surname with the appellant (his brother), Mr Richard Minhinnick, we refer to him by his full name.

[103] At the time he prepared his brief of evidence, Mr Roimata Minhinnick was the chief executive officer of Ngāti Te Ata and the lead negotiator for the Ngāti Te Ata Claims Support Whānau Trust. He also had a significant number of other roles. His representative work for Ngāti Te Ata began in 1987. Mr Roimata Minhinnick is the son of Dame Ngāneko, who was an advocate for Ngāti Te Ata and the Manukau environment for most of her adult life. She was descended from "hereditary rangatira" of Ngāti Te Ata.[61] Mr Roimata Minhinnick's brother, Mr Tahuna Minhinnick, and Dame Ngāneko were to be the principal witnesses for Ngāti Te Ata in this case. However, both had passed away by the time of the High Court trial and Mr Roimata Minhinnick took on the responsibility of presenting the evidence they might have given, based on his own familiarity with the relevant history. Fitzgerald J observed of him that, in addition to the role set out above, he had been a researcher for the Waitangi Tribunal and had "devoted very substantial time and energy to researching the history of Maioro and Ngāti Te Ata's claims".[62]

[104] Mr Parker is the senior historical researcher at Te Tari Ture o te Karauna | Crown Law Office where, at the time he prepared his brief of evidence, he had been employed for 24 years. Previously, he was an archivist at what was then National Archives (now Te Rua Mahara o te Kawanatanga | Archives New Zealand). He has specialist knowledge of information in archival repositories, and the identification and assessment of that information, as well as the storage and retrieval of government information dating back to 1840. He has appeared for the Crown as an expert witness before the Waitangi Tribunal, the Māori Land Court, and the High Court. Mr Parker described the incomplete nature of the documentary records available in the following way:

> Over time a large quantity of the Crown's records have been lost, primarily in fires in storage facilities, and primarily affecting nineteenth century records. The loss of those nineteenth century records means, that for this proceeding, experts have to work out what occurred from, often, fragmentary surviving information[.] For instance, where inwards correspondence to a Government department in the nineteenth century has been destroyed, it is possible to obtain some insight into the subject matter of a letter by looking at the description of it in registers created to control inward correspondence and also by looking for the reply to that letter, which has often survived. In that way a partial picture can be built up of what was going on. However, a review

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61 Dame Ngāneko Minhinnick's maiden name was Kaihau.

62 Judgment under appeal, above n 1, at [17].

> of the evidence that has been produced in this proceeding reveals that much of it consists of speculation that an event that occurred at some distance away from the area in question is relevant, even though its relevance is a moot point or simply irrelevant. This is where experts have to be careful.

[105] The appellant contends there is "ample evidence" for the Court to reach conclusions on events occurring in the 19th century. Mr Harris drew our attention to arguments made to, and rejected by, the Supreme Court in *Proprietors of Wakatū*. Particularly, as noted by Elias CJ in that case:[63]

> [458] The Crown says it has been prejudiced by its inability to call and cross-examine witnesses with [first-hand] knowledge of the events in issue and by the loss of relevant documents. The Crown points out that there is little or no documentary material in relation to the rationale for the Crown's agreement to remodelling of the settlement in 1847 …
>
> [459] I am not persuaded that the Crown has shown material evidential prejudice such as would justify the claim being barred for delay. I agree with the Court of Appeal's unanimous conclusion that the historical record is "relatively intact" and that, as Harrison and French JJ noted, no significant prejudice in a forensic sense to the Crown has been made out. This accords with the view of Clifford J, who pointed out that the parties were able to present a full statement of agreed facts.

[106] Here, the Crown asserts that it does face significant prejudice in attempting to defend any challenge to the validity of the Waiuku Deed after such an extraordinary lapse of time. It submitted that this Court should be wary of drawing inferences, including inferences as to the intentions of the parties and the broader circumstances of the transaction, from the limited evidence that remains.

[107] The Crown contended it was "irretrievably prejudiced" by its inability to call witnesses—the entire case, particularly with respect to events between 1860 to 1950, was built on a "superstructure of expert opinion" from Mr Roimata Minhinnick and Mr Parker. Mr Kinsler submitted that documentary hearsay is not a proper foundation for primary factual conclusions; evidence must be sufficient to discharge the burden of proof. Although there is a record of decision making, it does not approach the standard of what would be expected in an application for judicial review today.

[108] We consider the sufficiency of evidence must be considered on an issue-by-issue basis. The nature of any piece of evidence dictates how much it can be

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63 *Proprietors of Wakatū* (SC), above n 49 (footnotes omitted).

relied on and for what purpose. We do not consider any particular approach to historical evidence needs to be articulated—where there is insufficient evidence to prove the particulars of a claim, that will be dispositive of the claim regardless of whether that claim arises from historical or contemporary events. The standard of proof does not relax, nor the burden alter, with the passing of time.

Background to the Waiuku Deed and Confiscation

[109] As discussed above, Maioro is located at the southern end of the Āwhitu Peninsula and on the northern bank of the mouth of the Waikato River. Maioro contains the four wāhi tapu at issue in these proceedings: Te Papawhero, Te Kuo, Waiaraponia and Tangitanginga.

[110] The claims pertaining to the 19th century arise from several key events. In November 1864, the Crown purchased from Ngāti Te Ata all the land in the Waiuku North and South Blocks, including Maioro but excluding the wāhi tapu areas. In December 1864, all of the land purchased *and* the wāhi tapu that had been excluded from the purchase was confiscated by the Crown under the New Zealand Settlements Act. In 1865, the wāhi tapu were granted back to members of Ngāti Te Ata pursuant to the conditions of the Waiuku Deed. However, the majority of land outside the wāhi tapu areas has remained in Crown ownership since 1864.

[111] To be understood, these events must be placed in their proper historical context.

Ngāti Te Ata's relationship with Maioro

[112] Mr Roimata Minhinnick gave evidence that Ngāti Te Ata are mana whenua of Maioro and have been so since time immemorial. In support of this, he referred to the Māori Appellate Court's 1994 ruling in favour of Ngāti Te Ata on the ownership of Maioro based on customary tenure.[64]

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64 *Minhinnick v R – Maioro Lands* (1994) Waikato Maniapoto Appellate Court MB 220 (18 APWM 220) [*Minhinnick* Māori Appellate Court decision] at 16. In this decision, the Court determined that there was sufficient evidence for it to find that Maioro was included within the rohe (boundary) of Ngāti Te Ata and that Ngāti Te Ata held rangatiratanga over Maioro at all material times from 1840 to 1865: see at 235.

[113] Maioro contains ancient burial grounds where, originally, the "most illustrious chiefs" of Ngāti Te Ata were buried. Oral tradition records the burial of the earliest tupuna of Ngāti Te Ata, Ohomairangi, approximately 1000 years ago. The site had also been used for mass and dispersed burials: first, when remains were exhumed from some burial grounds elsewhere on the Āwhitu Peninsula in the 1860s and then taken to Maioro, and secondly, during "epidemics".[65]

[114] Mr Roimata Minhinnick gave evidence as to the enormous cultural significance of Maioro, which he attributed to its location at the "heart of spirituality" at the mouth of Ngāti Te Ata's ancestral river, Te Awa o Waikato. At Maioro, the mouth of Te Awa o Waikato joins with Ngā Wai Hohonu o Rehua, which is part of Te Moananui o Rehua. The point at which the mauri (life force) of these two large natural waterways meet is where one would go to karakia (pray) and was also where wai teretere tanumia, burial by submerging into the wairua (the meeting of life force of the two waters), was carried out. Members of Ngāti Te Ata have continued to carry out a range of customary and cultural practices on the land.

[115] Mr Parker did not expressly dispute Mr Roimata Minhinnick's evidence on this, but gave evidence that the customary interests of various Māori groups in the South Auckland and Lower Waikato districts are complex, due to the movement of various groups, shared lineages, and inter-marriage. He cautioned that these factors can lead to some confusion where documents discuss events at one locality and commentators wrongly assume the event involved a certain group, which could be misleading.

The economic prosperity of Ngāti Te Ata

[116] Mr Roimata Minhinnick said that, at the height of their prosperity, Ngāti Te Ata were at the centre of trade in the Auckland region. From 1840 to 1863, Ngāti Te Ata held rangatiratanga and kaitiakitanga in respect of significant tracts of land and controlled a number of resources.

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65 These epidemics include the 1918 influenza pandemic.

[117] The resources controlled by Ngāti Te Ata ranged from large aquifers and rivers for water, large forest stands for wood and building, and an abundance of flax which was in high demand for rigging on sailing ships. The iwi processed their natural resources, participated in trade, and controlled trade routes. They grew produce, caught and processed fish, owned and operated the means of transporting their goods on waka, and traded for guns. There was no need for Pākehā middlemen, as the iwi transported their own produce to the market and entered into direct negotiations for its sale.

[118] As early as January 1836, Ngāti Te Ata was described by William Woon, a missionary, as being "very covetous after trade". In January 1841, the missionary James Hamlin wrote that the result of provisions in the area being scarce was that:

> … the natives … can get a much larger price for their productions, hence it is difficult to keep a native in our employment or a girl to assist Mrs Hamlin in her domestic duties which with her large family are heavy. The natives at present seem to be carried away with the love of trade.

[119] Ngāti Te Ata cultivated land in a number of areas around the Auckland region, including Onehunga, Ōrākei and throughout the Āwhitu Peninsula. In December 1869, as recorded in evidence given in the Native Land Court, Ngāti Te Ata rangatira Hori Tauroa recounted that the iwi had cultivated land at Okahu right up until "the time of the war at Taranaki" in 1860.[66] He also apparently quantified the numbers of Ngāti Te Ata at the time:[67]

> The number of N. Tiata residing at Orakei was 100. Those who lived at Awitu at the same time were 100 men, besides women and children.

[120] The evidence of Mr Roimata Minhinnick was that, prior to the 1863 military invasion and the Confiscation, Ngāti Te Ata had successfully participated in the economic development of the Auckland region and New Zealand as a whole.

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66 This evidence was given for the "Orakei Hearing", which concerned the claim by Apihai te Kawau, on behalf of himself and the members of several iwi for a certificate of title to an estate at Okahu, on the shores of the Waitematā. Hori Tauroa appeared as a co-claimant, on behalf of himself, Ahipene Kaihau and another member of Ngāti Te Ata: see the decision in F D Fenton *Important judgments delivered in the Compensation Court and Native Land Court, 1866–1879* (Auckland, 1879) at 53.

67 Footnote omitted.

Throughout the 1850s, "the Manukau was the harbour that kept Auckland alive".[68] The importance of the trade route, "the great thoroughfare" controlled by Ngāti Te Ata, was noted by many.[69]

The Taranaki conflict

[121] In 1858, Ahipene Kaihau of Ngāti Te Ata was appointed as the Superintendent of Police for the Kīngitanga movement. The Kīngitanga movement is succinctly summarised in the preamble to the Waikato Raupatu Claims Settlement Act 1995, which we can adopt for present purposes:[70]

> *Kiingitanga*
>
> B in 1858 Pootatau Te Wherowhero was raised up as King to unite the iwi, and preserve their rangatiratanga and their economic and cultural integrity, under his authority in the face of increasing settler challenges, Waikato regarding themselves as principal kaitiaki of the Kiingitanga and as remaining so ever since:
>
> C those chiefs who formally pledged their land to Pootatau Te Wherowhero gave up ultimate authority over the land to him, along with ultimate responsibility for the well-being of the people, and through this bound their communities to the Kiingitanga, resisting further alienation of their land:
>
> D the New Zealand Government at the time perceived the Kiingitanga as a challenge to the Queen's sovereignty and as a hindrance to Government land purchase policies, and did not agree to any role for, or formal relationship with, the Kiingitanga:
>
> …

[122] On 5 March 1860, possession was taken by force of the Waitara block of land located in Taranaki, under the orders of Governor Thomas Gore Browne. The Waitangi Tribunal has since found, in relation to the seizure of the Waitara block, that:[71]

> The historical record leads indelibly to the view that Wiremu Kingi and his people never rebelled but were attacked by British troops in violation of

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68 Dick Scott *Fire on the clay: the Pakeha comes to West Auckland* (Southern Cross Books, Auckland, 1979) at 10.

69 Mr Roimata Minhinnick was quoting Dr Hochstetter, a geologist with an Austrian government expedition, who visited Waiuku in 1858.

70 We reproduce the English version.

71 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) [Wai 143 report] at 83.

> the principles of the Treaty. Thereafter, a climate for war developed, where, in our view, Maori could not expect anything like the protection promised in the Treaty. They had cause to consider, in the circumstances of the time, that their best hopes for keeping their homes, lands, and status lay in the assertion of arms.

[123] Mr Roimata Minhinnick said that Ahipene Kaihau, authorised by the Kīngitanga to maintain peace and order, led a delegation of chiefs to meet Governor Browne in February 1861 to seek a peaceful resolution to the war in Taranaki. A truce in March 1861 ended the military conflict in Taranaki for the time being.

[124] Following the events in Taranaki, on 27 September 1861, a Native Department official reported Ahipene Kaihau's position that Ngāti Te Ata intended to maintain "friendly relations" with Pākehā and an "attachment to the Government". On 10 December 1861, Governor George Grey visited Ngāti Te Ata "headquarters" and was warmly welcomed.

Sales of land by Ngāti Te Ata before November 1864

[125] Mr Parker gave evidence that members of Ngāti Te Ata entered into some 39 transactions to sell land to private persons and the Crown prior to the execution of the Waiuku Deed in November 1864. There were eight sales to private purchasers prior to 1840, ranging from 250 to 1,800 acres. A historian, Tony Walzl, prepared a report on behalf of Ngāti Te Ata focussing on land issues, in the context of the claim to the Waitangi Tribunal lodged by Dame Ngāneko on 17 March 1987 (Wai 31). Mr Walzl said of the transactions from 1837 to 1840 that:[72]

> … a number of matters must be taken into account. Manukau was still a Ngati Te Ata world and the contact of iwi members with Europeans was at a much lower level than elsewhere in the north. … Additionally, Ngati Te Ata were careful about the land they transacted retaining the most and best part for their own exclusive use. Finally, the features of the transactions, including subsequent payments, recast boundaries, the return of land, and continued occupation existed and these are often cited as being indicative that a traditional land allocation was occurring. These transactions, therefore, can primarily be viewed as transferrals of use/occupation rights in order to establish a reciprocal relationship specific to the person with whom the agreement was reached. This result, indicating the maintenance of a traditional viewpoint towards land transferals, has important ramifications for

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72 Tony Walzl *Ngati Te Ata: Land Issues* (January 2000) at [1.213].

> any consideration of the way in which the Crown's post-1840 land claim process subsequently impacted on Ngati Te Ata's land rights.

[126] On 14 August 1839, Lord Normanby had given instructions to the newly-appointed Lieutenant-Governor William Hobson that land transactions with the Crown were not to be a source of hardship to Māori:[73]

> All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of her Majesty's sovereignty in the islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves; you will not, for example, purchase from them any territory the retention of which by them would be essential or highly conducive, to their own comfort, safety, or subsistence. The acquisition of land by the Crown for the future settlement of British subjects, must be confined to such districts as the natives can alienate without distress or serious inconvenience to themselves. To secure the observance of this rule, will be one of the first duties of their official Protector.

[127] Between 1843 and 1863, there were 31 sales of land from Ngāti Te Ata to the Crown. As evidence of Ngāti Te Ata's experience in negotiations, Mr Roimata Minhinnick pointed to the Hikurangi transaction, dated 10 November 1853. This transaction, in which Ngāti Te Ata were co-vendors, covered 57,000 acres of land and contained "the 10% clause", under which 10 per cent of proceeds from the resale were to be spent for "native purposes", including funding for schools and the construction of hospitals.

The Waikato War

[128] Messrs Parker and Roimata Minhinnick both gave evidence that after the construction of a "military road" through to Mangatāwhiri, completed in 1862, tensions had begun to build in the Waikato. Mr Roimata Minhinnick gave evidence that there was increasing pressure on Ngāti Te Ata to demonstrate their loyalty to the Crown as, in 1863, the military road was widened and extended, a telegraph line was erected, the presence of troops increased, forts were constructed, and a steam-powered warship arrived.

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[73] See "Extract from a Despatch from the Marquis of Normanby to Captain Hobson, R.N., dated 14th of August, 1839" in John Ward *Information Relative to New-Zealand Compiled for the Use of Colonists* (2nd ed, John W Parker, London, 1840) in Appendix No XI at 165–168.

[129] On 9 July 1863, a notice was issued by Governor Grey, requiring Māori residing in the Manukau district and on the "Waikato frontier" to take an oath of allegiance to the Crown and to hand over their arms, or retire to the southern side of the Mangatāwhiri River. The notice specified that those who did not comply with the order would be "ejected". The notice was not taken to Ngāti Te Ata settlements, although Fitzgerald J accepted Mr Roimata Minhinnick's evidence that some members were likely present at settlements to which the notice was taken.[74]

[130] Mr Parker gave evidence that Ngāti Te Ata were never required to take the oath or leave. A newspaper report published on 17 November 1863 by the *Daily Southern Cross* explains why:[75]

> It may be as well to explain for the benefit of the public that Ahipene, the chief of the Waiuku tribe, having taken the oath of allegiance before the present war, he and the tribe were not required at the commencement of the war as were the other Manukau tribes to take the oath, and lay down their arms, or go beyond the frontier lines. A telegram was sent to the Government at the commencement of the war, saying they were willing to resign their arms, but upon official enquiry this telegram proved a mistake and no demand for their arms being pressed upon them, they have consequently retained them.

[131] On 12 July 1863, troops under General Cameron crossed the Mangatāwhiri River, the aukati (boundary), against the warning of King Tawhiao of Waikato. To Waikato iwi, this was a declaration of war.[76]

[132] At the time, Ngāti Te Ata was viewed as "friendly" or "loyal". On 4 July 1863, Ahipene Kaihau wrote to Major James Speedy, the Resident Magistrate at Waiuku, warning the Government of an impending attack by Māori. He advised that the Europeans of Waiuku should remain in their homes and that he would appoint 40 Ngāti Te Ata to protect them.[77]

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74 Judgment under appeal, above n 1, at [65].

75 "Waiuku." *Daily Southern Cross* (Auckland, 17 November 1863).

76 Wai 143 report, above n 71, at 88. According to this report, Waikato iwi said the Mangatāwhiri River was not to be crossed, and any breach of this would be considered a declaration of war.

77 We note the evidence is illegible, however, Mr Roimata Minhinnick gave evidence that "forty" members of Ngāti Te Ata were appointed to protect the Waiuku residents and that 15 actually went to do so.

[133] On 15 July 1863, Governor Grey issued a further notice to the "Chiefs of the Waikato":[78]

> …
>
> I now call on all well-disposed Natives to aid the Lieutenant-General, to establish and maintain [posts at several points on the Waikato River], and to preserve peace and order.
>
> *Those who remain peaceably at their own villages in Waikato or move into such districts as may be pointed out by the Government, will be protected in their persons, property, and land.*
>
> Those who wage war against Her Majesty, or remain in arms, threatening the lives of Her peaceable subjects, must take the consequences of their acts, and they must understand that they will forfeit the right to the possession of their lands guaranteed to them by the Treaty of Waitangi, which lands will be occupied by a population capable of protecting for the future the quiet and unoffending from the violence with which they are now so constantly threatened.

[134] On 17 July 1863, fighting broke out between General Cameron's troops and Kīngitanga supporters at the battle of Koheroa. The preamble of the Waikato Raupatu Claims Settlement Act records that:[79]

> E in July 1863, after considered preparations by the New Zealand Government, military forces of the Crown unjustly invaded the Waikato south of the Mangatawhiri river, *initiating* hostilities against the Kiingtanga and the people …
>
> …
>
> R the Crown now acknowledges that grave injustice was done to Waikato when the Crown, in breach of the Treaty of Waitangi, sent its forces into the Waikato, occupied and subsequently confiscated Waikato land, and unfairly labelled Waikato as rebels:

[135] A newspaper article dated 14 August 1863 records that:[80]

> Ngatiteata, the tribe at Waiuku, galled, it is said, by the insults or terrified by the threats of injudicious *pakehas*, were on the verge of rebellion when KUKUTAI, with Mr. ARMITAGE, visited them, and enlisted them also in this transport service; they have entered heartily into the scheme. Several large canoes from Awhitu, as well as other canoes left by the Mangere natives upon their exit, have been dragged across the portage at Waiuku to the Awaroa, where they have been given up to the Government.

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78 Emphasis added.

79 Again, we reproduce the English translation (emphasis added).

80 "Friendly Natives" *The New Zealander* (Auckland, 14 August 1863). Emphasis in original.

[136] On 15 August 1863, Ahipene Kaihau and Hori Tauroa wrote to Governor Grey, warning that some Ngāti Te Ata had "gone to Waikato", expressing their fear that their lands would be confiscated, and seeking assurances that those who remained with them would be protected:

> Friend Salutations this is to inform you of the men of Nga Titeata who have gone to Waikato … whose names are under written.
>
> …
>
> … The ground of their going was from a letter written by Peno (Te Wharepu) to Ruihana[81] inviting him to go to him and Ruihana asked Ngatiteata to go with him — we both (Ahipene and Hori Tauroa) held them to no purpose, they would not listen to us.
>
> Ngatiteata had no desire to go but they were allured by men and deceived, by which their desire to go burst forth — another cause was their envy of us both for the lands which we possess and the monies which are given to us (by the Government) from that cause they went that you might have grounds against us to punish us — then would their hearts be satisfied.
>
> Now O friend our tribe left in an evil way because we listened to your policy for which we have shut them outside for persisting to go, and for their continuing to trample on the law and on your words also.
>
> O friend, great is our darkness through their going away — now they are separated from us and the remainder of the tribe have joined themselves to us — altogether those who left are 18 men … and the women who went with them would make the number thirty, those who remain with us are thirty men and forty one women numbering together seventy one — not counting the children.
>
> O friend this is a question of ours to you — What are we to do? The people who have remained under your assurances — it rests with you to arrange for us. The place at which we now reside is Huarau — better for you to inform us what your wishes are, we should like to remain at Huarau — O friend hasten the coming of Mr Puckey — we are waiting for him — it is finished.
>
> From your loving friends
>
> [illegible] Ahipene Kaihau
>
> Hori Tauroa

[137] The evidence demonstrates that, at the time, Government agents and members of Ngāti Te Ata remaining in Waiuku shared concerns in relation to a threatened attack on Waiuku or surrounding areas. On 6 September 1863, Edward Puckey of the Native Department informed Captain Thomas Lloyd (who we discuss in more detail

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81 A rangatira of Ngāti Tipa.

below) that a messenger had arrived from Meremere the previous day to warn Ahipene Kaihau of an impending attack on Mauku and Pukekohe. On 10 September 1863, the *Daily Southern Cross* reported that the threat of attack had been partly brought on by misrepresentations. However, on 19 September 1863, Mr Puckey reported that Ngāti Te Ata wanted arms and ammunition, and that he believed an attack on Waiuku was imminent. That same day, Captain Lloyd reported that "friendly Chief Hori Tauroa" had come to his aid with an armed party, and warned him that there were "400 Rebels" waiting in the bush for an opportunity to attack Waiuku.

[138] Māori were besieged at Meremere between 29 to 31 October 1863. Following the siege of Meremere, Crown forces attacked Māori entrenched further up the Waikato River at Rangiriri. The battle of Rangiriri took place between 20 and 21 November 1863. The statement of agreed facts records that, when British troops attacked the pā (fortification) at Rangiriri, members of Ngāti Te Ata were among those captured and imprisoned.[82] However, other members were considered by Crown officials to be loyal or neutral towards the Crown and members of the iwi provided logistical assistance to the British troops.

Alleged harassment of Ngāti Te Ata

[139] Some of the Māori settlements in South Auckland were subjected to looting at around the time that war broke out, but Mr Parker gave evidence that this did not include any Ngāti Te Ata settlements. He pointed to the Government's instructions, issued on 17 July 1863, that waka belonging to hostile Māori be destroyed, which expressly excluded waka located along the Waiuku creek. He maintained that the exclusion was likely for the benefit of Ngāti Te Ata.

[140] Mr Roimata Minhinnick referred to extracts from James Cowan's *The New Zealand Wars: A History of Māori Campaigns and the Pioneering Period* as support for the fact that, in spite of the Government's instructions, in or around July 1863, 21 large waka belonging to Ngāti Te Ata were confiscated and destroyed.[83]

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82 Mr Parker suggests that contemporary accounts show there were between 12 to 13 members of Ngāti Te Ata captured.

83 James Cowan *The New Zealand Wars: A History of the Maori Campaigns and the Pioneering Period: Volume I (1845-64)* (R E Owen, Wellington, 1955) at 324.

Mr Parker doubted this account was correct, "at least in relation to timing".[84] Fitzgerald J made several findings relevant to Cowan's account:[85]

> [74] … Having studied the text to which Mr [Roimata] Minhinnick refers, Mr Parker notes that it is based on the recollections of a Mr Henry Parker in 1918, 55 years after the events in question. Mr Henry Parker was a member of the ANV [Auckland Naval Volunteers]. His account, said to be of events in July 1863 and in relation to Ngāti Te Ata waka, refers to shots being fired and a Seaman Thomas Barron being hit in the ankle by a slug from a Māori gun. However, Mr Parker notes that Seaman Barron himself applied in 1876 for a New Zealand war medal and described what had happened in July 1863, namely slipping off the Harrier *Man of War* while trying to tie seized waka to it and suffering a "severe injury to my leg". Mr Parker doubts that incident concerned Ngāti Te Ata waka, given Henry Parker's report indicates the ANV were in the Mangere and Papakura areas at that time. Mr Parker also notes a statement by Henry Parker in 1892 in support of a further application by Seaman Barron for a medal, noting that Barron had been shot "while storming of a Māori stronghold in upper Thames district in the year 1863. He also received injuries while on service at Papakura Creek in the same year".[86]
>
> [75] Mr Parker also refers to a report of 25 July 1863 by the Officer "Commanding Detachment ANV" describing the expedition to round up waka from around Manukau. Mr Parker states:
>
> > The report states the detachment was accompanied by a Mr Puckey (Edward Puckey of the Native Department) and that between 19 to 25 July it had visited Māngere, Puponga (near Cornwallis on the North Head of the Manukau Harbour where the expedition spent the night), Papakura Creek, Pukekohe, Ihumātao and Oruronga (Orurangi). In all they moved 17 canoes to Onehunga. The substance of this report is confirmed by a newspaper account published on 24 July [1863].
>
> [76] Mr Parker also considers that confusion has arisen and led to the view that Ngāti Te Ata waka were destroyed in July 1863 because reports refer to another expedition of the ANV in *November* 1863. The source to which Mr Minhinnick refers does not date the expedition, but refers to the flagstaff at Manukau Heads being cut down by Māori while the expedition was underway. Mr Parker confirms that the flagstaff was cut down during the night of 7 November 1863.
>
> [77] On the basis of the above evidence, it seems unlikely that a large number of Ngāti Te Ata waka were seized and destroyed in or around July 1863. But the report of the *November* 1863 expedition nevertheless refers to the taking of waka, including the "after-portion" (the stern) of Te Toki-a-Tāpiri, a magnificent Ngāti Te Ata waka now on display at the Auckland Museum. The report of that expedition states that with

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84 Judgment under appeal, above n 1, at [74].

85 Original footnote retained at [74] and footnotes omitted at [76]–[79]. Emphasis in original.

86 It nevertheless seems that some, albeit not necessarily Ngāti Te Ata, waka were destroyed in July 1863, as on 24 July 1863, the Minister of the Colonial Defence wrote to the Commander of the Colonial Defence Corps at Ōtāhuhu reprimanding him for allowing his men to destroy the waka, being inconsistent with the orders only to seize and secure them.

> the exception of Te Toki-a-Tāpiri, waka were destroyed. The report also refers to men under the command of a Captain Lloyd … conducting an expedition to Āwhitu and taking 16 "old men" prisoner, most likely being members of Ngāti Te Ata. As to that event, the author of the report, a member of the ANV expedition, states:
>
> > In a couple of days, despatches arrived from head quarters. Imagine our disgust at being informed that we had attacked a friendly village! And that our prisoners were all peaceable and friendly Māoris!!
> >
> > The Captain was instructed to release his prisoners forthwith, and restore all the captured property. Whether the thirty muskets were actually returned, we had no means of knowing.
>
> [78] Accordingly, while not in July 1863 but more likely in November 1863, I am satisfied a number of Ngāti Te Ata waka were seized and destroyed. I am also satisfied that, as pleaded, a number of elderly Ngāti Te Ata men were held prisoner, though were released some two days later.

[141] We have no reason to doubt Fitzgerald J's findings on this point and adopt them.

[142] Captain Lloyd, mentioned above at [137], was a notorious figure in the Waikato Wars. He was in charge of the militia forces operating around Waiuku, Mauku and Pukekohe. Fitzgerald J considered that:[87]

> The evidence seems tolerably clear that he caused a number of problems in the area in the second half of 1863, which led to various complaints about his and his men's conduct, from both Māori and Government agents alike.

We agree with that assessment.

[143] The relevant evidence includes the following:

(a) On 13 August 1863, Captain Lloyd was informed by letter from Mr Fenton of the Colonial Defence Office that:

> … it is the wish of the Government that all the persons under your command as military men should be restrained from visiting any native pas or settlement except when specially ordered by yourself, which order you will be good enough not to give unless for some extraordinary necessity.

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87 Judgment under appeal, above n 1, at [82].

(b) On 16 August 1863, Captain Lloyd's expedition to the north bank of the Waikato River resulted in two pigs belonging to Ahipene Kaihau being killed. On 19 August 1863, Captain Lloyd reported the following:

> Aihepene a chief of this place who has not joined the Rebels expresses his great dissatisfaction at my men having marched along the coast towards the Waikato Heads.
>
> Regret to say two wild pigs were killed by my party which has caused complaint to be made by that chief — and who has been to the Resident Magistrate concerning the same. On hearing of which I directed that they should be paid for.

(c) Around 21 August 1863, Captain Lloyd and his men left Waiuku for the Waikato Heads and, in "cross[ing] over to the southern shore", they destroyed property belonging to both "loyal" and "rebel" Māori. On 24 August 1863, the Resident Magistrate of the Lower Waikato forwarded complaints about Captain Lloyd's conduct to Mr Fenton at the Colonial Defence Office, which stated that Captain Lloyd and his men had destroyed Māori possessions, killed and eaten pigs, destroyed canoes belonging to both loyal Māori and the Crown, taken Māori property with them, and breached a pact made between General Cameron and the Waikato tribes that active operations would be restricted to the northern bank of the Waikato River. On 27 August 1863, Hon Thomas Russell, the Minister of Colonial Defence, annotated the letter of complaint as follows:

> If Captn Lloyd has been guilty of the acts of folly described in this letter, I don't think him fit to hold the position he now has at Waiuku …

(d) On 31 August 1863, Captain Lloyd wrote to the Military Secretary in Auckland strongly refuting the allegations. General Galloway found, following an investigation, that Captain Lloyd was "with the exception of displaying a little too much energy … not censurable".

(e) On 24 October 1863, Mr Puckey wrote to the Native Department, stating that Captain Lloyd had "destroyed canoes belonging to friendly

Natives". On 27 October, the Native Secretary replied and informed him that if it was found that the canoes belonged to friendly Māori, they would be paid for.

(f) Expeditions in early November 1863 involved the entry into a whare and taking of property. On 6 November 1863, Mr Puckey forwarded a list of property belonging to "friendly Natives" to the Native Department, said to have been destroyed by volunteers under Captain Lloyd's command. On 7 November, he forwarded a letter from Hori Tauroa asking for the return of one of the waka taken by the *Lady Barkly* and complaining about damage to property caused by the volunteers. An edition of the *Daily Southern Cross* published on 6 November 1863 described the events as follows:[88]

> The 'Lady Barkly' then proceeded to Waiuku, where she arrived on Tuesday morning. The object of the visit being to remove any canoes lying in the creeks. The same day the brigade, assisted by a party of the Waiuku force, under Captain Lloyd, secured a number of canoes belonging to the Waiuku natives. This step the natives do not object to; but they allege that their whares were entered by the men, and clothing and other property carried away. It is certain that other articles besides canoes came under the inspection of the men, and that Captain Lloyd ordered the men under his charge to leave the articles in their places. The civil and native authorities intended to institute a search on board the steamer to-day, in order to ascertain if the allegations, of property having been carried away, were true; but the very gusty afternoon has, I believe, delayed their intention. The natives have not made any unpleasant demonstration on the matter, but they are apprehensive that if the distinction between their property and rebel property becomes overlooked, the distinction between their persons and those of rebels will be overlooked next.

(g) On 9 November 1863, the *Daily Southern Cross* reported that, a few days prior, "rebel natives" had cut down a flag-staff at the Paratutae Island signal station and completely demolished the Manukau signal station.[89] In the course of a search, Captain Lloyd and his men visited a "small settlement in the occupation of a small

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88 "Waiuku." *Daily Southern Cross* (Auckland, 6 November 1863).

89 "Maori Outrage at Manukau Heads." *Daily Southern Cross* (Auckland, 9 November 1863).

detachment of the Waiuku tribe", and "took with fixed bayonets nine men of the tribe, who offered no resistance".[90] On 13 November 1863, Captain Lloyd was reported as referring to all or some of the men as "friendly natives".[91] They were released two days after capture.

(h) The *Daily Southern Cross* reported that, on 9 November 1863, Mr Puckey and 20 armed Māori visited the deserted settlement at Ruhina "on the Waikato, near the heads" where they found a large number of waka and destroyed 17 of them belonging to "friendly natives" and two which were "rebel property".[92]

(i) On 13 November 1863, the Resident Magistrate at Waiuku wrote to the Native Department, recording that: "The friendly Natives wish to know what measures the Govt. intend [on] taking to prevent any more ill-treatment befalling them."

(j) On 18 November 1863, Thomas Russell ordered Major General Galloway to write to Captain Lloyd and inform him that "certain complaints" had been made regarding his conduct towards Māori, that the Government were determined to investigate these charges, and that Captain Lloyd should proceed to Auckland to answer to the complaints. A letter was sent to this effect to Captain Lloyd on 19 November 1863.

(k) Also on 18 November 1863, Mr Puckey wrote to the Native Department, stating that friendly Māori remained afraid following the arrest of some of them. On 5 December 1863, the Resident Magistrate at Waiuku forwarded to the Native Department a list of property belonging to friendly Māori that had been destroyed or taken away by the Waiuku force on 10 November 1863.

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90 "Waiuku." *Daily Southern Cross* (Auckland, 11 November 1863).
91 "Drury." *Daily Southern Cross* (Auckland, 13 November 1863).
92 "Waiuku." *Daily Southern Cross* (Auckland, 11 November 1863), above n 90.

The lead up to the Waiuku Deed

[144] Of the following period, Fitzgerald J said:[93]

> [86] There is no contemporaneous (direct) evidence of the particular basis upon which the Waiuku North and South Blocks were purchased by the Crown in November 1864 and then confiscated one month later in any event. This is a confusing aspect of the history of the Crown's acquisition of the land, and an example of the impact the effluxion of time has on establishing precisely what occurred. Nevertheless, to attempt to put these events in context, it is necessary to trace through what does remain of the contemporaneous record about the lead up to the Waiuku Deed and subsequent Confiscation.

[145] On 27 July 1863, Alfred Domett, the Colonial Secretary, wrote to the Superintendent of Auckland stating that the Government had resolved to bring in "a large body of men from Australia and elsewhere" in light of pressure resulting from the conflicts in the Waikato. These men were to be located in settlements:[94]

> … along a frontier line through the heart of the country, on lands to be taken from the tribes now in arms against us, and given on conditions of Military tenure to the immigrants in question.
>
> The formation of such a line of settlements will probably require the acquisition of some lands, the property of friendly Natives, *which must be bought in the usual way*.

[146] A memorandum dated March 1864 from Charles Heaphy, the Government's Chief Surveyor, informed a surveyor that he should "proceed to the land about to be purchased at Waiuku". Mr Parker gave evidence that it is unlikely that the Crown would have been able to survey lines of road on the Waiuku No 2 Block without the agreement of loyal Ngāti Te Ata.

[147] The statement of agreed facts records that between May and November 1864, surveyors were active on the Waiuku No 2 Block, including at Maioro. They were marking out boundaries, reserves for Māori use and occupation, and roads and sections for settlers in preparation for Crown acquisition.

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93 Judgment under appeal, above n 1.
94 Emphasis added.

[148] Mr Harris contended that surveying of Maioro began nine to ten months before the Waiuku Deed was executed on 2 November 1864, referring us to the following paragraphs of Mr Walzl's report:[95]

> 5.45 Prior to the passing of the [New Zealand Settlements] Act, the Government had already begun to take the initial steps needed to acquire the land. On 18 November 1863, surveyor Charles Heaphy was instructed to proceed to the Waikato Heads and select a site there best adapted for a future military settlement. Heaphy may also have been asked to generally assess the situation in the area as far as settlement needs were required. At some time in December 1863 Heaphy wrote a memorandum from the Waikato about the urgent requirements for surveys in the district. In addition to a proposal to lay out a town at Ngarauwahia and a main [truck] roadline, he also pointed out the need for: "A [reconnaissance] survey to ascertain approximately the amount of serviceable land in any locality likely to be required for a military settlement.["]
>
> 5.46 That things were happening within Ngati Te Ata's rohe at this time is indicated by a 27 January 1864 [letter] from Defence and Native Minister Russell to Charles Heaphy, who was then at Ngarauwahia, asking that he come in to Auckland as soon as possible: "The Government wish to make arrangements for the survey of land at Awitu … "
>
> 5.47 For the moment, no further details of what this instruction related to are available. By the end of February 1864, Heaphy was appointed by the Minister to the position of Chief Surveyor.
>
> 5.48 On 12 March 1864, Heaphy wrote to Russell that it was impossible for surveyors doing the Waikato work to get anywhere close to areas where military action was still occurring. Aside from this problem, however, Heaphy believed he needed three surveyors for the "country work" and one for Ngaruawahia. His focus at this time appears to be on the building of bridges across the Waikato and the clearing of [tree] stumps from the riverbed to make it more navigable.

[149] Mr Walzl then referred to a note which he contends was an attachment to a letter sent by Thomas Russell to an official named Seed, asking him to request Mr Heaphy "divide the whole Waiuku Block into convenient lots for sale and occupation".[96] The Judge found that the note was most likely authored by Frederick Whitaker (the presumptive Premier and Attorney-General) in May 1864.[97]

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95 Walzl, above n 72 (footnotes omitted).
96 At [5.50].
97 Judgment under appeal, above n 1, at [92].

In Mr Parker's view, it is the "most revealing piece of evidence" that an arrangement had been made between Ngāti Te Ata and the Crown.[98] It reads:[99]

> The arrangement made with Ahipene Kaihau & his party was this.
>
> The whole block of land at Waiuku to be surveyed & the necessary & convenient roads laid off. The land then to [illegible] divided into convenient Lot[s] for sale & occupation.
>
> Ahipene & his party to be allowed to select out of their own land such Lot[s] as they require for their own use & to receive crown grants. The Rebel land to belong to the Government & Ahipene & party to be paid for all the land belonging to them which they do not require for their own use & give up to the Government.
>
> [illegible] F.W.

[150] On 2 May 1864, Henry Turton was appointed Commissioner for the Investigation of Native Titles. Turton was tasked with negotiating the purchase of the Waiuku No 2 Block from Ngāti Te Ata. He reported, on 25 June 1864, that he had visited Waikato Heads, in part to speak to Ahipene Kaihau and Hori Tauroa to:[100]

> … arrange with them for a final meeting of the whole tribe at Waiuku. They would like to have the question [of the transaction] settled, with themselves alone, at Auckland, without regard to the rest of the Tribe: but to that proposal I would not agree, for a moment, and therefore obliged them to consent to meet me on the ground, with the rest of the people, as soon as possible ...
>
> As soon as Mr Rogan [a New Zealand Company surveyor] has returned from Whangarei… I shall request of the Government, that he may be allowed to accompany me to Waiuku, for the final settlement of the case, since he has been associated with the whole transaction from the commencement.
>
> In the meantime, I will search out, & look over the various Maps, Papers etc to be found in the Public Offices, in reference to that Block, so as to enable me to recommend to the Government a reasonable and equitable sum to be paid over to the non-belligerents of the Ngatiteata Tribe …

[151] Mr Parker points to a number of events which he considered showed that a purchase of land was, at that stage, in contemplation:

(a) On 4 July 1864, the Native Secretary responded to a member of Ngāti Te Ata, who was later one of the signatories to the Waiuku Deed,

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98 Mr Parker states the note is dated "circa May 1864", however the copy of the note in evidence is not dated.

99 Emphasis in original.

100 Footnote omitted.

requesting a payment of £40, which Mr Parker inferred would have been a request for an advance on the purchase money.

(b) The list of entries in the Native Department's inward correspondence register records a number of letters written to the Department from members of Ngāti Te Ata requesting advances of monies, more land, and Crown grants.[101]

(c) An editorial in the *Daily Southern Cross* dated 1 August 1864 indicated that Mr Rogan had visited Waiuku and, according to Mr Parker, showed that Mr Rogan had largely concluded the purchase negotiations:[102]

> [Mr Turton and Mr Rogan] arrived in town on Friday last, having successfully carried out the instructions of the Government. Instead of seizing the whole block of 47,000 acres, one-half only is confiscated, and the other half is purchased at an unusually high price. The natives are also permitted to select 3,000 acres, in five separate blocks, for their own occupation. These they have chosen, not taking the worst of the land, as may be imagined. They have secured to them an easy access to the sea, and to the river and creek. A lake or two has been reserved for them for eel-fishing. They will be paid in five yearly instalments, thus ensuring their good behaviour for that period. The first instalment will be the largest, to enable them to pay off their debts and make a start under their altered and improved circumstances.

Some details in the above passage differ materially from the final form of the Waiuku Deed but the editorial appears to indicate that the negotiations were largely complete.

(d) On 13 October 1864, the Acting Native Secretary sent a reply to what he called a "private letter" from Turton, which stated:

> … in reply to inform you that as the Natives appear to be so exorbitant and unreasonable, the Government will not at present go on with the purchase.
>
> Mr Fox wished you to communicate the above to the natives, and then return to Auckland.

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101 The letters themselves have not been found and are presumed to have been destroyed.
102 Editorial *Daily Southern Cross* (Auckland, 1 August 1864).

Mr Parker was not able to find Turton's "private letter", and any further response to it has also not been located.

The New Zealand Settlements Act 1863

[152] The Bill that became the New Zealand Settlements Act was introduced on 5 November 1863 and came into force, having passed in both the House of Representatives and the Legislative Council, on 3 December 1863. It provided the powers to confiscate land that were subsequently deployed by the Governor in respect of the Ngāti Te Ata land at Āwhitu. We consider it may be inferred that the use of the powers would have been part of the Government's intention during the surveying work and negotiations that led to the execution of the Waiuku Deed.

[153] The long title identified the purpose of the Act as being "to enable the Governor to establish Settlements for Colonization in the Northern Island of New Zealand".[103] It is plain from the preamble of the Act that the settlements were to be established for a particular reason, namely to facilitate settlement of sufficient numbers of persons for the protection and security of the "well-disposed Inhabitants of both races for the prevention of future insurrection or rebellion". This would further the "maintenance of Her Majesty's authority and Law and Order throughout the Colony".

[154] Section 2 enabled the Governor to declare a district subject to the provisions of the Act if certain conditions were met:

> II. Whenever the Governor in Council shall be satisfied that any Native Tribe or Section of a Tribe or any considerable number thereof has since the first day of January 1863 been engaged in rebellion against Her Majesty's authority it shall be lawful for the Governor in Council to declare that the District within which any land being the property or in the possession of such Tribe or Section or considerable number thereof shall be situate shall be a District within the provisions of this Act and the boundaries of such District in like manner to define and vary as he shall think fit.

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103 New Zealand Settlements Act, long title.

[155] Sections 3 and 4 contained the powers to set apart and take land for settlements, deeming the land so taken to be Crown land. They provided:

> III. It shall be lawful for the Governor in Council from time to time to set apart within any such District eligible sites for settlements for colonization and the boundaries of such settlements to define and vary.
>
> IV. For the purposes of such settlements the Governor in Council may from time to time reserve or take any Land within such District and such Land shall be deemed to be Crown Land freed and discharged from all Title Interest or Claim of any person whomsoever as soon as the Governor in Council shall have declared that such Land is required for the purposes of this Act and is subject to the provisions thereof.

[156] Section 5(1) provided that compensation would be granted to all persons except those "engaged in levying or making war or carrying arms against Her Majesty the Queen or Her Majesty's Forces".[104] Claims for compensation had to be submitted within six months of the notice taking the land being made.[105] The Act provided for the establishment of a Compensation Court to determine claims for compensation for land taken pursuant to the Act.[106]

[157] In January 1864, Governor Grey sent a copy of the New Zealand Settlements Act to London for ratification by the Queen, as was required by s 58 of the New Zealand Constitution Act 1852 (Imp).[107] Together with the New Zealand Settlements Act, Governor Grey enclosed a memorandum written by Mr Whitaker, in which he said:

> The complete defeat of the rebels would have but little effect in permanently securing the peace of the colony, unless some ulterior measures are adopted for that object. In former wars in New Zealand, the natives have been permitted to leave off fighting when they thought fit; to keep all the plunder they had obtained; and they have not been subjected to any kind of punishment for disturbing the peace of the country … If native wars are to be prevented for the future, some more effective mode of dealing with those who create them must be adopted. …

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104 Section 5 also provided that no compensation would be granted to any person who had adhered, aided, assisted or comforted any persons who were described in s 5(1) (those who had made war or carried arms against Her Majesty), or assisted such persons, or who had counselled, advised, induced, enticed, persuaded or conspired with any other person to make or levy war against Her Majesty.

105 Section 7.

106 Section 8.

107 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 58.

> … What they have most dreaded in their own wars has been slavery and the permanent loss of their landed possessions. There is no doubt that the native lands afford the most effectual means of securing the object the Government has in view. They may be made, by affording a striking example, the means of deterring other tribes for the future from engaging in rebellion, and at the same time of securing the rebellious districts against future outbreaks.
>
> The object of the Settlements Act is to give effect to these views. …

The Waiuku Deed

[158] On 2 November 1864, the Crown entered into a transaction with members of Ngāti Te Ata, including their acknowledged Rangatira. This transaction was documented in the Waiuku Deed, and encompassed all of the land located west of Waiuku, the Manukau Harbour and the Awaroa River (a Waikato River tributary), as shown outlined in blue on the map at [7] above.

[159] The Waiuku Deed was written in te reo Māori, with an English translation. The Deed was:

> [A] full and final sale conveyance and surrender [of the relevant land] by us the Chiefs and People of the Tribe Ngatiteata whose names are hereunto subscribed And Witnesseth that on behalf of ourselves our relatives and descendants we have by signing this Deed under the shining sun of this day parted with and for ever transferred [the land] unto Victoria Queen of England Her Heirs the Kings and Queens who may succeed Her and Her and their Assigns for ever in consideration of the sum of five thousand two hundred and fifty Pounds (£5250.0.0) to us paid by Henry Hansen Turton Special Commissioner on behalf of the Queen Victoria … all that piece of our Land situated at Waiuku and named Waiuku the boundaries whereof are set forth at the foot of this Deed and a plan of which Land is annexed thereto with its trees, minerals, waters, rivers, lakes, streams, and all appertaining to the said Land or beneath the surface of the said Land … And in testimony of our consent to all the conditions of this Deed we have hereunto subscribed our names and marks.

[160] The "Chiefs and People of the Tribe" consisted of 30 people listed in the Deed. Twenty-seven were signatories and Ahipene Kaihau had signed on behalf of the remaining three. The vendors were as follows:[108]

> Aihepene Kaihau
> Hori Tauroa
> Paora te iwi
> Paora te Kohe x tona tohu
> Hoera te Oro x tona tohu

[108] "Tona tohu" means "the sign of".

Hemi Rahe x tona rahu
Paora Katuhi
Rapata Kaihau
Hemi Manu
Te Kaha x tona tohu
Noha Piri x tona tohu
Epiha Kaihau
I Raia Whiti
Kerei Tamana
Wiremu Tauroa
Waata Paora
Eparaima Rairai
Riria Kaihau x tona tohu
Piti Paretai x tona tohu
Mata Tawai x tona tohu
Riria Tawai x tona tohu
Te Hira Ka Wau
Wi Ngaruawahia
Matena Raketonga
Paora Ka tipa
Mata Ngaruawahia
Na Aihepene Kaihau mo Karauria Waiti
Na Aihepene Kaihau mo Erueti Ponui
Na Aihepene Kaihau mo Aperahama Amio
Mohi tehatoitoi

[161] The Waiuku Deed covered approximately 37,444 acres (comprising the Waiuku No 2 Block less a number of wāhi tapu and "habitation reserves").

[162] A memorandum attached to the Waiuku Deed listed 18 reserves or "places of abode", for those members of Ngāti Te Ata who "have not been engaged in rebellion", totalling some 5,153 acres.[109] The memorandum recorded that these reserves were included in the purchase, and were to be revested in the owners by way of Crown grants. The grants would be given to "[Ngāti Te Ata] and their children in perpetuity", but the habitation reserves set apart for named individuals (including Ahipene Kaihau and Hori Tauroa) would be the subject of special grants to them personally.

[163] In addition, the memorandum recorded that 15 "burying grounds (Wahi Tapu)" were excluded from the purchase, including the four wāhi tapu areas at issue in this proceeding, totalling some 1,253 acres.

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[109] Two of these were for fishing (and had no acreages), and one was for a landing place (five acres).

[164] On the day the Waiuku Deed was signed, the Crown made an initial payment of £1,287. In total, including an amount paid to cover debts owed by members of Ngāti Te Ata, and three future instalments of £1,050, the Crown was to pay a sum of £5,250.

The Confiscation

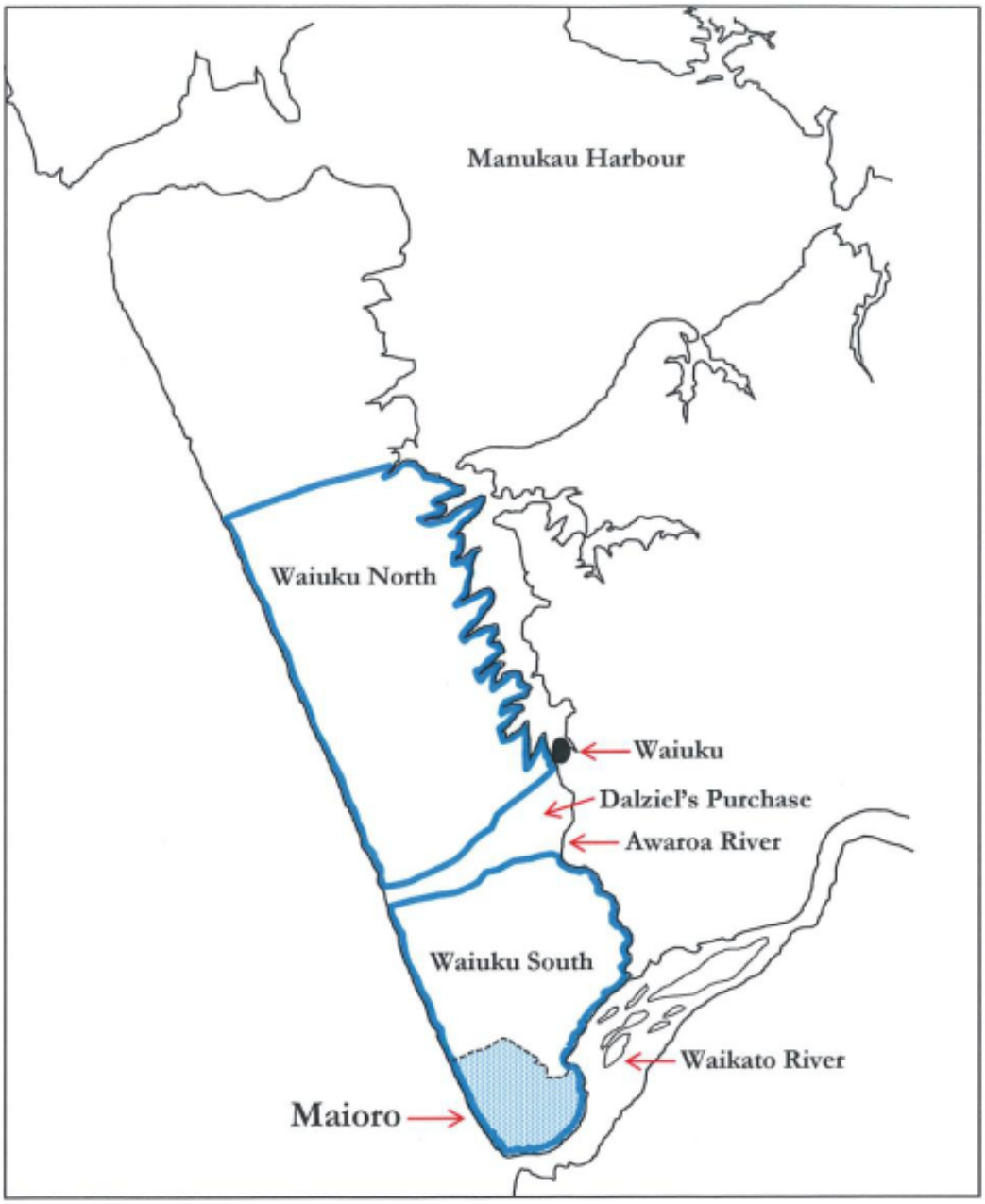
[165] As the Judge found, there is little contemporaneous evidence now available about the Confiscation.[110]

[166] On 29 December 1864, an Order in Council was issued proclaiming the confiscation of a number of blocks of land in the South Auckland District under the New Zealand Settlements Act. Both the Waiuku South Block (approximately 16,500 acres), containing Maioro and the four wāhi tapu areas, and Waiuku North Block (approximately 27,350 acres) were included within the land confiscated, together totalling 43,850 acres.

[167] For ease of reference, we again insert the map given at [10] above showing the outline of the area confiscated:[111]

[110] Judgment under appeal, above n 1, at [110].

[111] At [101]. Alexander Dalziel had previously purchased the strip between Waiuku North and South Blocks.



Later events

The immediate aftermath

[168] On 21 January 1865, Ahipene Kaihau and Hori Tauroa wrote two letters to Major Speedy. The first letter sought 500 acres of land be set aside for a number of people. Mr Parker inferred these were "rebels" returning from Waikato given Ahipene Kaihau and Hori Tauroa suggested a particular location for the land that would allow them to watch over those people. The second letter sought 200 acres be made available for an individual called "Perereka" and his wife. Major Speedy annotated the second

letter, stating that he had told Ahipene Kaihau and Hori Tauroa that their application for large amounts of land "for their friends who have been in arms against the Govt was unreasonable" and that he had recommended a small quantity be set aside for those Māori who had lost their land through confiscation.

[169] On 20 April 1865, Mr Heaphy wrote to Charles Knight, the Auditor of the Public Accounts, who had been required to report on the progress of the surveys of the Waikato and South Auckland confiscated land. Mr Heaphy enclosed schedules of land available for cash sales to settlers. One of those schedules was headed:

> SCHEDULE of Allotments available for Sale in the Block of Land, recently purchased from the Ngatiteata Tribe, Waiuku West. — MAIORO BLOCK.

[170] On 13 May 1865, Mr Heaphy publicly announced that land within the Maioro and Waipipi blocks would be offered for sale by public auction on 17 June 1865. The Waipipi block, like the Maioro block, was included in the Waiuku No 2 Purchase and was also a part of the land included in the confiscated Waiuku North and South blocks. Crown grants were later issued to European purchasers of land within the confiscated area. This includes land now within the north-eastern border of Maioro (or what is today part of the Waiuku State Forest).

[171] Between February and October 1865, £980 was advanced by the Crown to members of Ngāti Te Ata in respect of the £1,050 instalment of the Waiuku Deed purchase price due on 2 November 1865.

[172] In June 1865, Mite Kerei Kaihau, the daughter-in-law of Ahipene Kaihau, wrote to a Crown official of the suffering that Ngāti Te Ata had endured, and asking how their land could have been taken:

> … I have a question to ask you as I have heard the Government have taken Ihumatao and Puketapapa if so it will not be right, because there is no cause to enable the Governor to take my land, because I still reside in your presence. I did not go to the King. I did not kill men or plunder the Europeans or do anything to justify the taking of my land. I was residing with my father (in law) Aihipene at Waiuku, we were also the party who resided peacefully and courageously when our property was plundered by the Europeans and our canoes destroyed and the men imprisoned. There was no cause for punishing us with so many sufferings, as we had sworn truthfully to the Queen. From this I ask on what grounds my land was taken.

[173] We refer to this letter, which appears not to relate to the land subject to the Waiuku Deed and the Confiscation, because it illustrates the tensions that existed between the Government and different sections of Ngāti Te Ata, and the ongoing adherence to the Crown of those who remained with Ahipene Kaihau at Waiuku.

The Compensation Court

[174] The Compensation Court was established in January 1865 for the purpose of determining claims for compensation under the New Zealand Settlements Act.[112]

[175] On 31 January 1865, notice was given in *The New Zealand Gazette* (in English and te reo Māori) directed at persons with claims to compensation for land confiscated under the 29 December 1864 Order in Council. Claimants were to send their claims in writing to the Colonial Secretary at Wellington, within six months if residing within New Zealand or within 18 months if not.[113]

[176] The Compensation Court began its proceedings on 24 April 1865. Mr Parker stated that the Court completed its investigations into claims made under the 29 December 1864 Order in Council at the end of April 1866.

[177] Mr Parker also stated that the Court heard no claims relating to the confiscated Waiuku North and South Blocks, because no claims within those blocks were ever submitted to it. There was no challenge to this evidence.

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112 New Zealand Settlements Act, s 8.

113 "Notification to Claimants for Compensation under authority of 'The New Zealand Settlements Act, 1863'" (31 August 1865) 6 *New Zealand Gazette* 20 at 20–22. The *Gazette* records the date of notification itself as 25 January.

The October 1865 Crown grants

[178] On 21 October 1865, Crown grants were created for habitation reserves, as described in the Waiuku Deed, and for the wāhi tapu. The grants were issued under the New Zealand Settlements Act. The grants for the four wāhi tapu were as follows:

(a) the Tangitanginga grant (then Allotment 10, later Lot 100) stated that it contained a grant of approximately 63 acres;

(b) the Te Kuo grant (then Allotment 12, later Lot 99) stated that it contained an area of approximately 123 acres;

(c) the Waiaraponia grant (then Allotment 11, later Lot 98) stated that it contained an area of approximately 30 acres; and

(d) the Te Papawhero grant (then Allotment 14, later Lot 97) stated that it contained approximately 509 acres.

The New Zealand Settlements Acts Amendment Act 1866

[179] The New Zealand Settlements Acts Amendment Act was enacted on 8 October 1866. Section 6 purported to validate all proceedings under the various New Zealand Settlements Acts, and read as follows:

> VI. All orders proclamations and regulations and all grants awards and other proceedings of the Governor or of any Court of Compensation or any Judge thereof heretofore made done or taken under authority of the said Acts or either of them are hereby declared to have been and to be absolutely valid and none of them shall be called in question by reason of any omission or defect of or in any of the forms or things provided in the said Acts or either of them.

Waiuku No 3 Deed

[180] On 1 January 1867, a document known as the Waiuku No 3 Deed was drawn up by the Crown in te reo Māori and English to record advance payments to Ngāti Te Ata of the instalments under the Waiuku Deed. The statement of agreed facts noted that the Waiuku No 3 Deed did not represent a new purchase, but a completion

of the Waiuku Deed. The Waiuku No 3 Deed recorded that the full purchase price under the Waiuku Deed had been paid by the Crown.

Issue of new grants in 1878

[181] A number of problems arose in relation to the October 1865 grants, the flavour of which is illustrated by the following report by Mr Heaphy in 1872:[114]

> After the confiscation of the Waikato lands, Crown Grants were given to the loyal Natives of the Ngatiteata tribe for very extensive blocks of land, out of the territory so taken, at the West Waiuku, between the Waikato and Manukau Harbours. These grants were issued in pursuance of recommendations made by Mr. Commissioner Turton, and were confirmed by "The Friendly Natives Contracts Confirmation Act, 1866."
>
> The Grants conveyed the land in some cases absolutely to several Natives, and in others in Trust to the Chiefs for the loyal Natives of the tribe. The interests in the lands were of a very varying character: occasionally the grantees were almost the sole owners, while in other cases they possessed but a moderate interest in the land. Some of the lands were for cultivation, some were *wahi tapu*, and some were fishing stations, or landing places.
>
> From not understanding, in some cases, the nature of the responsibility attaching to the Trusts, and in others from cupidity, the grantees mismanaged the administration of these lands. They are stated to have illegally sold some, and to have misappropriated the rents of other of the reserves.
>
> Under these circumstances they applied to the Government to extricate them from their difficulties, which had reached to such a height that the grantees, whose acts were loudly complained of by the inferior owners, were, themselves, anxious to hand over the Estates to Government Agents, for partition, either of area or interest, amongst the parties entitled to share in the respective Grants.
>
> With this view, 103 pieces of land are being handed over by the Natives interested, in Trust, to Mr. John White and myself. This refers to the lands for which there are absolute grants. Where the Grants are in trust to the Chiefs, the latter are giving their consent to such an allocation of the land as will admit the inferior men, whose interests were before ignored, and are asking the Commissioner of Native Reserves to act on their own behalf. This work, which Mr. John White appears to be carrying out to the satisfaction of the Natives of both interests, will be very tedious, and will further involve some expense in surveying.

[182] Mr Heaphy's report of 1874 indicated these issues remained unresolved. The thrust of a further report by Mr Heaphy in 1875 was that all owners but two had

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114 Emphasis in original.

agreed to the subdivision of the reserves, the cancellation of the old grants, and the issue of new grants.

[183] On 14 October 1876, the Waiuku Native Grants Act 1876 was enacted. It provided for the grants made in October 1865 to be cancelled and for new grants to be issued in their place.[115] The grants for the four wāhi tapu areas were included in the list of grants to be cancelled.[116] On 11 May 1877, an Order in Council was issued, cancelling the original grants listed in sch 1 of the Waiuku Native Grants Act. This took effect on 1 June 1877. On 4 June 1877, a further Order in Council was issued listing the new Crown grants to be created, the names of the grantees and the alienation restrictions in respect of each grant. The four wāhi tapu areas were included in the list, to be granted with restrictions on sale, lease and mortgage.

[184] On 18 February 1878, Crown grants for the four wāhi tapu areas were issued under the Waiuku Native Grants Act. All of them were antedated to 21 October 1865. Each of the grants was issued to named members of Ngāti Te Ata. The grantees of the Papawhero, Te Kuo and Tangitanginga wāhi tapu areas were to hold them as tenants in common in equal shares, as well as "their heirs and assigns forever". The sole grantee of Waiaraponia was to hold it for himself and "his heirs and assigns forever". All of the grants contained restrictions on sale, lease and mortgage.

[185] The parties agree that after 1878, many lands subject to the new Crown grants were leased to settlers for 21-year periods, in accordance with the restrictions on longer leases or outright sale specified in the grants. The four wāhi tapu areas were not leased.

Was the sale under the Waiuku Deed vitiated?

[186] The appellant contends the sale under the Waiuku Deed was voidable as an unconscionable bargain, or voidable for duress or undue influence. In the High Court, the focus of the Judge's analysis was largely on duress. However, on appeal, the appellant based his argument primarily on unconscionable bargain and contended that

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115 Waiuku Native Grants Act 1876, s 2.
116 Schedule 1.

the issues addressed by the Judge in dismissing that claim apply equally to all three vitiating doctrines. The appellant does not dispute the legal tests applied by the Judge, but rather, challenges her application of them and her factual findings.

[187] The overarching submission for the Crown is that the evidence does not demonstrate that the Waiuku Deed was unconscionable or exploitative, nor does it point to a conclusion that the consent of the vendors was overborne by duress or undue influence.

[188] We first summarise the key findings of the Judge on the vitiating doctrines, before summarising the submissions of the appellant and the Crown. We then analyse the claims together.

Judgment under appeal

Duress

[189] The Judge noted that the parties did not dispute the relevant test for duress.[117] This requires that there be: (1) an exertion of illegitimate pressure on a victim; and (2) the imposition of that pressure must have compelled the victim to enter into the contract, that is, that there was coercion in fact.[118]

[190] The Judge assessed the claim at an individual, rather than a "representative" or "global" level,[119] and was not persuaded that the claim for duress had been made out for the following reasons.

[191] First, the Judge found the evidence did not support the existence of illegitimate pressure or coercion. Evidence of arrangements between Ahipene Kaihau and the Crown suggested a consensual arrangement, especially against the backdrop of 39 prior sales of Ngāti Te Ata's interests to either settlers or the Crown.[120] The

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117 Judgment under appeal, above n 1, at [143].
118 At [144], citing *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [20].
119 Judgment under appeal, above n 1, at [152].
120 At [158].

evidence suggested the Waiuku Deed was preceded by a lengthy set of negotiations, which pointed away from illegitimate coercion.[121]

[192] Although evidence showed that the actions of Captain Lloyd, an agent of the Crown, and his men were a source of harassment and concern to Ngāti Te Ata, there was no evident linkage between these actions and the negotiations which took place the following year.[122]

[193] The Judge did not consider that illegitimate pressure and coercion arose from the ability of the Crown to confiscate land because "the Confiscation was the lawful exercise of a statutory power as it stood in 1864".[123] She considered that although lawful acts can give rise to illegitimate pressure, land confiscations did not because they were not contrary to public policy at the time:[124]

> [161] … I proceed on the basis that there was some harassment of loyal Ngāti Te Ata who remained at Waiuku in mid to late 1863, and that harassment was illegitimate in the sense it was contrary to prevailing Government instructions. I also proceed on the basis that the Waikato Wars generally introduced a climate of fear and uncertainty. But I am not persuaded that this environment, or the particular events relied on by the plaintiffs, amounted to illegitimate pressure or coercion at law, particularly in the context of the Ngāti Te Ata vendors *entering into the Waiuku Deed.*
>
> …
>
> [163] I consider there to be more merit in the plaintiffs' argument that illegitimate pressure and coercion arose from an understanding on the part of the vendors that their interests in the Waiuku North and South Blocks could be extinguished by confiscation in any event. But as set out in the following section of this judgment, I have concluded that the Confiscation was the lawful exercise of a statutory power as it stood in 1864. And while lawful acts *can* give rise to illegitimate pressure, the Confiscation, at least at the time it was exercised, was not contrary to public policy and thereby illegitimate. …

[194] The Judge then distinguished the current case from that in *Semiahmoo Indian Band v Canada*, in which the Canadian Federal Court of Appeal held that the Crown had breached its pre- and post-surrender fiduciary duty to the Semiahmoo First Nation peoples.[125] Key to this determination was Isaac CJ's finding that the Semiahmoo's

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121 At [159].
122 At [161]–[162].
123 At [163].
124 Emphasis in original.
125 At [173], referring to *Semiahmoo Indian Band v Canada* [1998] 1 FC 3 (FCA).

ability to give or withhold consent to the surrender of land was fettered by their knowledge of the respondent's power to expropriate.[126]

[195] In contrasting the present case, the Judge stated she could not find that the vendors under the Waiuku Deed would not have sold their interests in land to the Crown in the normal course of events.[127] Further, there was no evidence that the decision to sell was improvident or foolish, nor was there any evidence that the price paid was below the market value at the time.[128] Finally, there was no evidence that the vendors actively protested the sale.[129] For these reasons, she dismissed the claim based on duress.[130]

Unconscionable bargain

[196] The Judge stated that for equity to intervene on the basis there had been an unconscionable bargain, the party seeking to avoid the contract must have been "at a serious disadvantage vis-à-vis the other", the key factor being that the disadvantaged party was unable to make proper judgments in their own interest.[131]

[197] She was not persuaded that the vendors were suffering a special disadvantage, as members of Ngāti Te Ata frequently engaged in the sale of their land, and their requests made in negotiations towards the Waiuku Deed appear to have been accommodated.[132] Neither was she persuaded that the vendors had been taken advantage of by the Crown: there was evidence of negotiations, no suggestion that the compensation was inadequate; and an absence of complaint at the time.[133] She therefore rejected the claim.[134]

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126 Judgment under appeal, above n 1, at [171], citing *Semiahmoo Indian Band*, above n 125, at [44].
127 Judgment under appeal, above n 1, at [173].
128 At [176].
129 At [177].
130 At [178].
131 At [191], citing James Every-Palmer "Unconscionable Bargains" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 717 at [23.2.1].
132 Judgment under appeal, above n 1, at [192].
133 At [193].
134 At [194].

Undue influence

[198] The Judge applied the legal principles set out in *Green v Green*.[135] She noted that the claim was not pleaded or argued on the basis of presumed influence, so it was not appropriate to express any view on that.[136] She considered her conclusions on duress applied equally to the claim of actual undue influence, and the evidence fell short of demonstrating that the vendors' consent to enter into the Waiuku Deed was obtained by unacceptable means.[137] The claim was dismissed.[138]

[199] We turn now to the arguments on appeal.

Unconscionable bargain

[200] Mr Harris submitted that unconscionable bargain is the most appropriate lens through which to review the Waiuku Deed.

[201] He submitted that the Judge erred in relying, in her dismissal of the claim, on the fact that Ngāti Te Ata had sold land to the Crown in the past—prior to war and the Confiscation. This erroneously assumed that those factors had little or no impact. She also erred in finding that the threat of confiscation did not amount to illegitimate pressure. As set out above, the Crown had apologised for the confiscations of land in the Waikato in the recitals to the Waikato Raupatu Claims Settlement Act:[139]

> R the Crown now acknowledges that grave injustice was done to Waikato when the Crown, in breach of the Treaty of Waitangi, sent its forces into the Waikato, occupied and subsequently confiscated Waikato land, and unfairly labelled Waikato as rebels:

Mr Harris submitted that the Confiscation was wrong then and is wrong now, as acknowledged by the Crown.

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135 At [179], citing *Green v Green* [2015] NZHC 1218, (2015) 4 NZTR 25-017 [*Green* (HC)] at [100], upheld by this Court on appeal in *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 [*Green* (CA)] at [35], [44] and [48].

136 Judgment under appeal, above n 1, at [183]. The Judge noted the discussion of a possible presumption of undue influence mentioned by Elias CJ in respect of land transactions between the Crown and Māori at the relevant time in *Paki (No 2)*, above n 54, but expressed no view on the issue in the absence of an appropriate pleading and argument raising the issue.

137 Judgment under appeal, above n 1, at [185].

138 At [186].

139 Waikato Raupatu Claims Settlement Act 1995, preamble. Again, we reproduce the English version.

[202] Further, Mr Harris pointed to the contemporary opposition to the New Zealand Settlements Act in New Zealand and the disquiet in the colonial office in London. Although the Secretary of State for the Colonies, the Rt Hon Edward Cardwell, who had the power to recommend disallowance of the legislation, did not take that step, he stated that he would have been justified in doing so.

[203] In combination with the threat of confiscation, Mr Harris submitted that Ngāti Te Ata faced harassment from Crown forces. Irrespective of the number of waka destroyed, or whether Crown forces were acting in line with Crown policy, this harassment created the concerns represented by the letter penned by Ahipene Kaihau and Hori Tauroa in August 1863 (set out above at [136]):

> Ngatiteata had no desire to go but they were allured by men and deceived, by which their desire to go burst forth — another cause was their envy of us both for the lands which we possess and the monies which are given to us (by the Government) from that cause they went that you might have grounds against us to punish us — then would their hearts be satisfied.

[204] Mr Harris also pointed to a further passage in that letter as evidence of the concerns held by Ahipene Kaihau and Hori Tauroa as to how they would continue to support their people:

> O friend, great is our darkness through their going away — now they are separated from us and the remainder of the tribe have joined themselves to us — altogether those who left are 18 men … and the women who went with them would make the number thirty, those who remain with us are thirty men and forty one women numbering together seventy one — not counting the children.
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> O friend this is a question of ours to you — What are we to do? The people who have remained under your assurances — it rests with you to arrange for us. The place at which we now reside is Huarau — better for you to inform us what your wishes are, we should like to remain at Huarau …

[205] Mr Harris claimed that, with the threat of confiscation looming, Ngāti Te Ata were afraid of being labelled as rebels and of losing their land. As evidence of this,

he pointed to a November 1863 newspaper report prompted by the activities of Captain Lloyd (as set out at [143(f)]:[140]

> The natives … are apprehensive that if the distinction between their property and rebel property becomes overlooked, the distinction between their persons and those of rebels will be overlooked next.

[206] Alongside the threat of confiscation, Ngāti Te Ata suffered harassment, poverty and starvation. These pressures were such that Ngāti Te Ata could not look after their own interests fairly. It was unconscionable for the Crown to accept such an improvident transaction, which ran counter to the instructions that Lord Normanby gave to Hobson in 1839 directing the Crown not to enter into exploitative contracts with Māori for the purchase of land.[141] The instructions showed, Mr Harris submitted, that the Crown recognised it had to apply high standards of conduct in dealing with Māori for the purchase of their land.

[207] Also, as Treaty partners, the negotiators owed each other obligations of good faith. But the Crown and Ngāti Te Ata were not engaging on an equal or fair footing: the Crown held the "whip hand". Negotiators for Ngāti Te Ata knew that what they could not save under the purchase would be confiscated. There was no evidence Ngāti Te Ata was looking to sell Maioro before 1864 or that it could have been sold to anyone other than the Crown. A sale made in anticipation of confiscation must be an unconscionable bargain unless conspicuously fair in spite of those circumstances. The transaction was exploitative regardless of price.

[208] In addressing the "extended period" between the harassment and when the Waiuku Deed was signed in November 1864, Mr Harris submitted the only evidence was the "private letter" responded to by the Acting Native Secretary, which stated that "the Natives appear to be so exorbitant and unreasonable, the Government will not at present go on with the purchase".[142] The Judge was in error, Mr Harris submitted, to take from this that the negotiation was "hard fought" and that the transaction could not be impugned. Rather, the fact that Ngāti Te Ata entered the transaction under the threat of confiscation in circumstances of great want and was left

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140 "Waiuku." *Daily Southern Cross* (Auckland, 6 November 1863), above n 88.
141 Referred to above at [126].
142 Referred to above at [151(d)].

with “very little land” meant the transaction was improvident, regardless of the price paid.

[209] Mr Harris submitted that even the market price would not be sufficient where there was an improvident transaction, entered into in circumstances of want, at a time of war, and against a threat of confiscation. It was not realistic for Ngāti Te Ata, if not satisfied with the price offered, to walk away from the bargain.

[210] For the Crown, Mr Kinsler submitted that the factual foundation underlying the appellant’s claims was extremely thin, and that the Crown inevitably faced very significant forensic challenges in defending the claims on the merits.

[211] The known facts were the identities of the vendors; that the purchase had been the subject of reasonably long-running negotiations; and that Ngāti Te Ata had allowed the relevant Crown surveyors onto the Waiuku Blocks. It was also known that in the period leading up to the execution of the Waiuku Deed, there were requests from Ngāti Te Ata for advances, Crown grants, and more land. However, this evidence was limited to sparse information acquired from the “Inwards Correspondence Register”, which only recorded the subject of correspondence.

[212] Mr Kinsler submitted the available evidence does not support the “image of an overbearing Crown taking advantage of powerless iwi”. What remains of the record indicates that land was sold for valuable consideration following lengthy negotiations.

[213] Mr Kinsler argued a conclusion of unconscionable bargain could not properly be reached on the basis of a broad assertion, such as the one made by Mr Harris that no transaction could be fair in the shadow of confiscation. Although there is no doubt that the transaction covered an extensive area, no complaints were subsequently made to the Compensation Court. There was no evidence that any threat was made in the course of negotiations, nor that confiscation would have occurred if the Waiuku Deed had not been agreed.

[214] Mr Kinsler also claimed there was no evidence of any special disadvantage. The appellant focussed on the wider circumstances of the transaction, but could not

establish the vendors were under a special disadvantage making them incapable of assessing their own best interests or understanding the implications of the transaction. The evidence of poverty or anxiety stemming from the backdrop of war was not sufficiently proximate or connected to the entry into the Waiuku Deed to satisfy the relevant legal test. Rather, the evidence establishes the vendors were in a position to propose and reject terms offered by the Crown.

[215] Further, Mr Kinsler submitted that even if the vendors were at some special disadvantage, it could not be inferred that the Waiuku Deed was unfair, inadequate or exploitative. There was evidence of lengthy negotiations, 5,153 acres were reserved as "places of abode", 15 wāhi tapu were excluded from the Waiuku Deed, there was no suggestion compensation was below market value, and there was evidence of previous sales.

[216] While as the Judge found, the relationship between the Waiuku Deed and the Confiscation one month later is a "confusing aspect" of the history,[143] the existing evidence did not support the appellant's assertion that confiscation was an unconscionable threat that forced or manipulated Ngāti Te Ata to give up its land. Viewed in its proper context, Governor Grey's notice dated 15 July 1863 was not an express threat of that.

[217] *Semiahmoo Indian Band* was correctly distinguished by the Judge.[144] In addition, that was a case about a unique fiduciary duty. This unique duty was first recognised in *Guerin v R* as arising from the scheme of the Indian Act 1952.[145] The concept of an "exploitative bargain" in *Semiahmoo Indian Band* stems from the *Guerin*-style fiduciary duty which does not exist here. It cannot be fully equated with the doctrine of unconscionable bargain.

Undue influence

[218] Mr Harris drew our attention to *Paki (No 2)*, in which Elias CJ referred to the possibility that in cases of land transactions between the sovereign and indigenous

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143 Judgment under appeal, above n 1, at [86] and [153].
144 *Semiahmoo Indian Band*, above n 125.
145 *Guerin v R* [1984] 2 SCR 335; and Indian Act RSC 1952, c 149.

peoples, the circumstances might give rise to an inferred presumption of undue influence.[146] He submitted that although presumed undue influence was not pleaded or argued in the High Court, the factors which could found a presumption are also relevant to a claim of actual undue influence.

[219] Mr Harris submitted it is unnecessary here to determine that land transactions between the Crown and Māori in the 1800s should be another presumptive category of undue influence. It merely needs to be recognised that the sale of a large block of land to save "something" from confiscation is a transaction vulnerable to the undue influence of the sovereign power.

[220] Mr Kinsler submitted that there is no evidence that the actions of the Crown, either during the Waikato War or during negotiations, unduly influenced the vendors into entering the Waiuku Deed.

Duress

[221] Mr Harris submitted that the critical question is whether the agreement was entered into under pressure "of a kind which the law does not regard as legitimate".[147] He submitted that, for Treaty partners owing obligations of good faith to each other, the threshold for illegitimacy must be lower.

[222] Mr Harris submitted the Judge erred in concluding the pressure arising from the threat of confiscation was not illegitimate because it was not contrary to public policy at the time. The Crown's actions were not justified, as it has acknowledged in the Waikato Raupatu Claims Settlement Act. The apology in that Act acknowledged the Crown's conduct was wrongful *at the time*.

[223] Mr Kinsler pointed out that Mr Harris cited no authority for the proposition that the threshold for illegitimacy is lower for Treaty partners and submitted that a lower threshold should not be applied. In the present case, the available evidence does

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146 *Paki (No 2)*, above n 54, at [151] per Elias CJ.

147 Citing *Barton v Armstrong* [1976] AC 104 (PC) at 121 per Lord Wilberforce and Lord Simon dissenting.

not support a conclusion that there was any threat against, or illegitimate pressure on, the vendors by the Crown.

[224] Mr Kinsler submitted that, while the Waikato Raupatu Claims Settlement Act apology recognised and acknowledged that the Crown's actions were wrongful and a breach of the Treaty of Waitangi, it did not represent a definitive assessment of legality as a matter of historical fact.

[225] Mr Kinsler argued the evidence does not indicate the vendors had no alternative to signing the Waiuku Deed. The Judge was correct in identifying negotiations and compromise as factors negating duress. The possibility of confiscation was not illegitimate in the absence of a threat to use the power improperly and against public policy. There was no express threat or ultimatum. Even if confiscation was inevitable, the vendors could have refused to sign the Waiuku Deed and sought compensation through the Compensation Court. The "climate of fear and uncertainty" in the aftermath of the Waikato Wars and the harassment of members of Ngāti Te Ata did not amount to illegitimate pressure, as they occurred a year before the Waiuku Deed was signed, and there is no evidence that they influenced the transaction in any way.

Our view

Our approach on appeal

[226] As the Judge recognised, claims that an agreement has been vitiated by reason of unconscionable conduct, duress or undue influence are normally analysed on the basis of a close scrutiny of the facts said to constitute the impugned conduct.[148] As the majority of the High Court of Australia observed in *Thorne v Kennedy*:[149]

> [41] In any case where a transaction is sought to be impugned by the operation of vitiating factors such as duress, undue influence, or unconscionable conduct, it is necessary for a trial judge to conduct a "close consideration of the facts … in order to determine whether a claim to relief has been established". On appeal, it is also essential for the appellate court to

148 Judgment under appeal, above n 1, at [138]–[141].

149 *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85 per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ (footnote omitted), quoting *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, (2013) 250 CLR 392 at [14].

> scrutinise the trial judge's findings and assess any challenge to the trial judge's conclusions in light of the advantages enjoyed by that judge.

[227] This formulation of the proper appellate approach to findings concerning vitiating factors drew on a number of observations in earlier decisions of the High Court of Australia.[150] In *Kavakas v Crown Melbourne Ltd*, the Court had affirmed the observations in *Louth v Diprose* that:[151]

> … proof of the interplay of a dominant and subordinate position in a personal relationship depends, "in large part, on inferences drawn from other facts and on an assessment of the character of each of the parties".

[228] In *Louth*, Toohey J also observed that the "formidable obstacles" involved in an attack on a trial judge's factual findings "may be enhanced where issues of undue influence and unconscionability are involved".[152]

[229] The majority in *Thorne* expanded on why this is so:[153]

> [43] Related to the fact finding advantage of the trial judge is the evaluative nature of the judgment involved in determining whether the vitiating factors have been established. For example, in undue influence there will be questions of evaluative judgment involved in assessing whether the extent to which a person's will has been subordinated to another's is sufficient to characterise the person as lacking free will. ...

[230] There was then a reference to *Jenyns v Public Curator (Qld)* in which it was emphasised that the application of equitable principles:[154]

> … calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [other party].

[231] This Court's judgment in *Green v Green* reiterated the advantages enjoyed by the trial judge, particularly where the case involves assessments of credibility and

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150 *Kakavas*, above n 149; *Louth v Diprose* (1992) 175 CLR 621 (HCA); *Wilton v Farnworth* (1948) 76 CLR 646 at 654 per Rich J (Dixon and McTiernan JJ agreed); and *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118–119.

151 *Kakavas*, above n 149, at [144], quoting *Louth*, above n 150, at 639–640 per Dawson, Gaudron and McHugh JJ. The Court in *Thorne*, above n 149, at [42] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ also affirmed this observation.

152 *Louth*, above n 150, at 650 per Toohey J, citing *Dawson v Westpac Banking Corp* (1991) 104 ALR 295 (HCA) at 314–315; and *Baburin v Baburin (No 2)* [1991] 2 Qd R 240 at 243.

153 *Thorne*, above n 149, per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

154 *Jenyns*, above n 150, at 118–119, per Dixon CJ, McTiernan and Kitto JJ.

reliability.[155] Although the appellate court must form its own independent judgment on the merits of an appeal by way of rehearing, it remains axiomatic that:[156]

> … in determining whether the judgment was wrong the appellate court will take into account any particular advantages enjoyed by the trial court. The advantages possessed by a trial judge in determining questions of fact are obvious, especially where assessments of credibility and reliability are involved.

[232] It is clear that in a case such as the present, where all of the parties involved in the relevant claims have been deceased for many years, the normal approach that would be taken where it is asserted that an agreement should be vitiated because of unconscionable conduct, duress or undue influence is unavailable. The trial judge could not engage in the normal close assessment of the conduct of the parties and its effect, because none of the witnesses who could give the relevant evidence was available.

[233] Obviously, this Court is similarly hampered on appeal. It is not a case where we can say that we have formed a different view to that of the Judge on the inferences that should be drawn from the conduct of the parties: in the absence of a direct account from the witnesses as to why they acted as they did, it has not been possible, either at first instance or on appeal, to trace the influence of the context on the conduct of the parties.

Analysis—unconscionable bargain

[234] An unconscionable bargain is one where a party in entering into a transaction unconscientiously takes advantage of the other—this will be so when the stronger party knows or ought to know that the weaker party is unable to adequately look after their own interests and is acting to their detriment.[157] In such circumstances, equity will intervene. As Tipping J put it in *Attorney-General for England and Wales v R*:[158]

> … for a bargain to be characterised as unconscionable, and thus able to be set aside, there will necessarily be: (1) serious disadvantage on the part of the weaker party known to the stronger party; and (2) the exploitation of that

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155 *Green* (CA), above n 135, at [29]–31], referring to *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

156 *Green* (CA), above n 135, at [31].

157 *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 [*Gustav* (SC)] at [6].

158 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [89] per Tipping J.

> disadvantage by the stronger party in circumstances amounting to actual or equitable fraud. Associated with (1) and (2) will usually, but not necessarily be: (3) some procedural impropriety, established or presumed, and attributable to the stronger party; and (4) a substantial inadequacy of consideration.

[235] In accordance with this, our assessment of whether the Waiuku Deed was an unconscionable bargain turns on whether Ngāti Te Ata was at a serious disadvantage such that the bargain was unconscionable. A qualifying serious disadvantage is "a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests".[159]

[236] The thrust of Mr Harris's argument is that, given the threat of confiscation, harassment, poverty and starvation, Ngāti Te Ata could not look after their own interests fairly. A sale made in anticipation of confiscation must be conspicuously fair. Even the market price would not be sufficient where an improvident transaction is entered into in circumstances of want, at a time of war, and against a threat of confiscation.

[237] What is known about the relevant history has been set out earlier in full. We think it is important to recognise that in the mid-1800s, Ngāti Te Ata were at the centre of trade in the Auckland region, and held rangatiratanga and kaitiakitanga in respect of significant areas of land including the Āwhitu Peninsula, where, during the 1860s, about 100 Ngāti Te Ata whānau resided.

[238] Ahipene Kaihau was a person of great mana and influence. As mentioned, in 1858 he was appointed as the Superintendent of Police for the Kīngitanga movement. In February 1861, he was asked to lead a delegation of chiefs to meet Governor Browne in an attempt to seek a peaceful resolution of the hostilities in Taranaki, after which there was a truce in March 1861.

[239] The Government was aware that Ngāti Te Ata, under Ahipene Kaihau's leadership, intended to maintain "friendly relations" with settlers and an attachment to the Government. Governor Grey's visit to meet with Ngāti Te Ata at a "tastefully

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159 *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 [*Gustav* (CA)] at [30], affirmed in *Gustav* (SC), above n 157, at [6].

arranged tent" at their "headquarters", where he was "welcomed by a large party", on 10 December 1861 is consistent with that.

[240] Before execution of the Waiuku Deed, Ngāti Te Ata had entered into 39 agreements to sell land whether to private persons (on eight occasions prior to 1840) or to the Crown. According to Mr Walzl's report, however, they were careful about what land was transferred, retaining ownership of most of their land.[160]

[241] Governor Grey's notice of 9 July 1863, requiring Māori to swear an oath of allegiance to the Crown and hand over their arms, was not taken to Ngāti Te Ata settlements. This was so because of the circumstances recorded in the *Daily Southern Cross* newspaper, as noted above, on 17 November 1863: Ngāti Te Ata were not required to give up their arms "having taken the oath of allegiance before the present war".[161]

[242] We have no reason to differ from the Judge's conclusion that, at some time in the latter part of 1863, a number of Ngāti Te Ata waka were seized and destroyed, and a number of elderly Ngāti Te Ata men were taken as prisoners (although they were soon released). We also accept her findings as to the actions of Captain Lloyd and the men he led.

[243] Even at this distance in time, it is possible to give credence to the complaints about Captain Lloyd's conduct forwarded by the Resident Magistrate on 24 August 1863 to Mr Fenton at the Colonial Defence Office. We are also sceptical about General Galloway's euphemistic description of Captain Lloyd's conduct as overly energetic. This is particularly so given the list, forwarded by Mr Puckey to the Native Department on 6 November 1863, said to be of property belonging to "friendly Natives" that had been destroyed by volunteers under Captain Lloyd's command. We can note also Hori Tauroa's contemporary written complaint, and the account given in the *Daily Southern Cross* of 6 November 1863.[162] But the

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160 Walzl, above n 72, at [1.213].
161 "Waiuku." *Daily Southern Cross* (Auckland, 17 November 1863), above n 75.
162 "Waiuku." *Daily Southern Cross* (Auckland, 6 November 1863), above n 88.

various events show that Ngāti Te Ata complained to the Government representatives and were listened to, achieving some redress.

[244] As noted earlier, it seems from Mr Walzl's report that, prior to the enactment of the New Zealand Settlements Act on 3 December 1863, the Government was interested in acquiring land at Āwhitu for a future military settlement.[163] The Government's intentions from at least 27 July 1863 were to establish settlements of men coming "from Australia and elsewhere" in light of the conflicts in the Waikato. As the extracts from the report set out earlier indicate,[164] Mr Heaphy was instructed to proceed to find a site in the vicinity of the Waikato Heads for a future military settlement. In a letter written on 27 January 1864, Thomas Russell asked Mr Heaphy to come to Auckland, advising him of the Government's desire to make arrangements for the survey of land at Āwhitu. Shortly after that, on 12 March 1864, Mr Heaphy complained of the difficulty of doing survey work in the Waikato close to areas where military action was ongoing.

[245] However, by approximately May 1864, Thomas Russell had directed that the whole of the Waiuku Block should be divided into convenient lots for sale and occupation. The note signed "F.W.",[165] which Mr Walzl states was attached to Thomas Russell's letter, reasonably justifies an inference that a broad arrangement had been made between Ngāti Te Ata and the Crown by this point—with the purpose of facilitating the Government's intent of establishing a settlement at Āwhitu.

[246] The evidence also tends to establish that there were negotiations during the months prior to the execution of the Waiuku Deed which the Government representatives at one stage considered breaking off because of their perception that Ngāti Te Ata was being "exorbitant and unreasonable".[166] This is not consistent with the idea that Ngāti Te Ata were pressured by the context of the negotiations and the threat of possible confiscation. Evidence of resistance can negate a finding of illegitimate pressure. However, in this case, there is no direct evidence establishing the application of illegitimate pressure.

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163 Walzl, above n 72, at [5.45]–[5.48].
164 See above at [148].
165 Indicating that it was likely written by Frederick Whitaker.
166 See above above at [151(d)].

[247] Mr Harris did not advance a submission that the Government acquired the land under the Waiuku Deed at below a proper value. Indeed, Fitzgerald J accepted Mr Parker's view that the "price was probably somewhat high for the times".[167] Mr Harris acknowledged this—his argument was that the transaction was exploitative irrespective of the price paid. We note that in *Gustav*, this Court held that marked imbalance in consideration is not a prerequisite for relief.[168] However, it also noted that if there is no significant imbalance in consideration, it is unlikely that any issue of unconscionability will arise.[169]

[248] We have earlier given a brief summary of the key elements of the Waiuku Deed.[170] As we recorded above, a memorandum was attached to the Waiuku Deed (which, like the Waiuku Deed, was in both English and te reo Māori).

[249] The first clause of the memorandum set aside 18 reserves or "places of abode" and their respective acreages. These varied between five and 1,700 acres, and totalled 5,153 acres.[171]

[250] The second clause of the memorandum listed 15 "burying grounds (Wahi Tapu)" which were "excepted from [the] purchase", including Tangitanginga, Te Kuo, Waiaraponia and Te Papawhero. The total area comprised in the scheduled wāhi tapu was over 1,253 acres.

[251] The third clause contained a schedule of the payments ("purchase money") that were to be made by the Crown under the Waiuku Deed. The first payment of £2,100 was to be paid on 2 November 1864, and receipt of that amount was in fact acknowledged in the text of the Waiuku Deed. There would be three further payments each of £1050 payable on 2 November in 1865, 1866 and 1867.

[252] Clause 4 of the memorandum was in the following terms:

> If any person shall hereafter arise, asserting that a portion of this land belongs to him, and if his claim be proved to be correct, his demand shall be settled

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167 Judgment under appeal, above n 1, at [193].
168 *Gustav* (CA), above n 159, at [30]–[31].
169 At [31].
170 See above at [154]–[164].
171 No acreages were given for the two fishing reserves.

> out of the Purchase money above named. But this will have no reference to the persons who continue in rebellion, nor to the Ngatitipa in regard to their claim on the Awaroa. It will be for the Government to arrange with them.

[253] Finally, the fifth clause of the memorandum was in these terms:

> The lands above recounted and which have been surveyed as a perpetual residence for the people, and which are described on the plan annexed, shall be settled by a Crown Grant upon the Ngatiteata and their children in perpetuity. But the Crown grants to Aihepene Kaihau, to Hori Tauroa, and to Paora te Iwi, for the five hundred acres (500 acres) granted to them, shall be conveyed to them personally (i.e., by Special Grant).[172]

[254] We have set out the terms of the Waiuku Deed in more detail here to demonstrate that there is nothing on the face of it to suggest it was not freely entered into. We appreciate that does not mean it was—but the point is there is nothing about it that would support such a conclusion. The detail of it clearly demonstrates that its terms were comprehensively negotiated. The Waiuku Deed could not have taken the form it did without the active input of Ngāti Te Ata, and cooperation in respect of the delineation of the land to be set apart as "places of abode for the tribe" and wāhi tapu. The fact that the signatories included the acknowledged leaders of Ngāti Te Ata at the time, and that some land was specifically to be granted to them personally may be taken as a further indication that this was a consensual arrangement.

[255] We consider there can be no doubt that the actions of the colonial Government, particularly the enactment of the legislation used to quash "rebellion",[173] would have been a cause of great anxiety and stress to the members of Ngāti Te Ata. The fact that some of their members had joined what the Government regarded as a rebellion only added to the stress. There is evidence of this. Of particular note is the letter penned by Ahipene Kaihau and Hori Tauroa on 15 August 1863, which for ease of reference we quote again:

> Now O friend our tribe left in an evil way because we listened to your policy for which we have shut them outside for persisting to go, and for their continuing to trample on the law and on your words also.
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> …

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172 The special grants to to Ahipene Kaihau, Hori Tauroa, and Paora Te Iwi were listed in the first clause of the memorandum, being of respectively 200 acres each for Ahipene Kaihau and Hori Tauroa, and 100 acres for Paora Te Iwi.

173 Being the New Zealand Settlements Act and the Suppression of Rebellion Act 1863.

> O friend this is a question of ours to you — What are we to do? The people who have remained under your assurances — it rests with you to arrange for us. …

[256] However, we consider there is no evidence demonstrating that Ngāti Te Ata and the vendors were unable to assess their best interests, and accordingly were subject to a special disadvantage. Rather, the evidence paints a picture of Ngāti Te Ata as a commercially sophisticated iwi with strong rangatira who were alive to and protective of the interests of the iwi, as well as seeking to maintain good relations with the Government.

[257] Further, in establishing an unconscionable bargain, a mere inequality of bargaining power will not suffice.[174] A party must demonstrate that they were in a position of special disadvantage, *and* that the stronger party knew or ought to know this, *and exploited or victimised the complaining party*.[175] We have not been referred to any case where the doctrine of unconscionable bargain has been engaged where the "sole allegation was contractual imbalance with no undertones of constructive fraud".[176] The scant evidential record is a formidable obstacle to the appellant's claim: there is no evidence of what William Young J described in *Paki (No 2)* as "overreaching behaviour of the kind that the most recent authorities on unconscionable bargains establish must be shown before a requirement of retrospective justification arises".[177]

[258] During the period when the Waiuku Deed was under negotiation, Ngāti Te Ata, led by Ahipene Kaihau and Hori Tauroa, maintained their protective stance towards Pākehā living in the local area. Harassment at the hands of Captain Lloyd did not cause them to abandon that stance; instead, complaints were made to the appropriate Government representatives. And the first clause of the Waiuku Deed as negotiated showed apparent acceptance of the fact that those whom the Government considered to be in rebellion would not benefit from the negotiated terms.

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174 *Fa'agutu v Derhamy* [2020] NZHC 404, [2020] 2 NZLR 774 at [88].
175 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (online ed, LexisNexis, 2022) at [12.5.2].
176 *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 171.
177 *Paki (No 2)*, above n 54, at [280] per William Young J.

[259] Entering into the Waiuku Deed can be seen as Ngāti Te Ata furthering their policy of remaining loyal to the Crown. As Mr Parker said in his evidence to the High Court:

> The Crown engaged in a long negotiation with the loyal members of the tribe to acquire their interests and to confiscate the interests of those members who had gone into rebellion. There is no evidence that the loyal members of Ngāti Te Ata, including their rangatira, objected to that arrangement.

[260] This is consistent with the terms of the letter of 15 August 1863, noted above, written to the Governor by Ahipene Kaihau and Hori Tauroa, informing him of the 18 men and 12 women who had "gone to Waikato". The letter effectively said these members of the tribe had been deceived and lured away. It claimed, as well, that those members were envious of land possessed by and money given to the rest of Ngāti Te Ata by the Government. Ngāti Te Ata were clearly riven by the events associated with the hostilities that had broken out; but it seems that a substantial number wished the arrangements represented by the Waiuku Deed to proceed. At the very least, there is no evidence establishing otherwise.

[261] We have not been persuaded that the Judge was wrong to conclude that the Waiuku Deed was not an unconscionable bargain. We are left with the impression that it is likely Ahipene Kaihau and the other members of Ngāti Te Ata who signed the Waiuku Deed did so because they saw an advantage for themselves and the iwi in doing so. They engaged in commerce. They were familiar with the process of selling land having done so on many occasions before. They bargained over the price. They were left with extensive land holdings under the Waiuku Deed. The wāhi tapu were excepted from its provisions. In the absence of evidence establishing that the Crown took advantage of Ngāti Te Ata, for example though a marked imbalance in consideration, we do not consider it can be said that the Waiuku Deed was unconscionable.

Analysis—undue influence and duress

[262] As has been seen, Mr Harris argued the case on the basis that the facts on which the claim of unconscionable bargain were based applied equally to the claims of undue influence and duress.

[263] As Winkelmann J wrote in the High Court in *Green*, the question of whether a transaction was brought about as a consequence of undue influence is a question of fact.[178] The appellant's claim was pleaded and argued on the basis there was actual undue influence, rather than presumed undue influence.[179] Actual undue influence is proven by recourse to an evidential presumption which arises where it is established that:[180]

(a) the person said to have been subject to undue influence placed trust and confidence in the other; and

(b) the transaction calls for an explanation.

[264] Essentially for the reasons we have already addressed in respect of the claim of unconscionable bargain, we do not consider there was actual undue influence in the present case. There is no reference to facts that could be said to give rise to undue influence. In fact, Mr Walzl's report stated that there is "regret[t]ably little specific information uncovered to date on this enigmatic transaction".[181]

[265] As Mr Walzl noted, the main difference between the Waiuku Deed and previous land dealings of Ngāti Te Ata is the "troubled times" during which the transaction took place.[182] Apart from the timing of the transaction, Mr Walzl stated that it was "in the same mould as earlier transactions with the Crown".[183] The possibility that the "troubled times" in which the Waiuku Deed was executed meant it was "possible", alongside other possibilities, that "Ngati Te Ata were coerced into the transaction with the looming threat of confiscation".[184] However, he was unable to identify any direct evidence of that and he did not make any assertions that had in fact occurred. He continued that the timing of the agreement made it "likely

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178 *Green* (HC), above n 135, at [100(d)].

179 In these circumstances, it is not appropriate to express any concluded view on whether it would be appropriate to adopt a presumption of influence in land transactions between the Crown and Māori in the late 1800s, with the result that the burden of proof would then shift to the Crown. This was the possibility touched on in *Paki (No 2)*, above n 54, at [151] per Elias CJ, and [256] and [286]–[287] per William Young J.

180 *Green* (HC), above n 135, at [100].

181 Walzl, above n 72, at [6.21].

182 At [6.22].

183 At [6.21].

184 At [6.22].

that the land transaction was not divorced from [the] contemplated confiscation policy" and that "this may have affected the way in which negotiations proceeded", but did not go further than that.[185] We consider Mr Roimata Minhinnick's evidence also fell short of establishing the Waiuku Deed was entered into as a result of undue influence.

[266] We are satisfied in the circumstances that the Judge was right to reject the claim of undue influence.

[267] We reach the same view in respect of the claim based on duress. As noted earlier, this was prominent in the argument addressed in the High Court, but less so in this Court. An agreement may be vitiated on the ground it was procured by duress where illegitimate pressure was exerted on a party, and the illegitimate pressure compelled the party to enter into the agreement.[186] Fitzgerald J referred to observations in the judgment of Lord Wilberforce and Lord Simon in *Barton v Armstrong* that:[187]

> … in life … many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate.

[268] The Judge essentially reasoned that there was no illegitimate pressure in this case because she thought it likely that the members of Ngāti Te Ata who signed the Deed did so voluntarily:[188]

> [153] Turning to the substantive question of duress, as noted earlier, a confusing aspect of the historical narrative is the interaction between the Waiuku Deed and the Confiscation, particularly given the two events were only a few weeks apart. One possibility is that the two events were unrelated and, to put it colloquially, "the left hand didn't know what the right hand was doing". But on balance, I conclude that the two events were part of a negotiated arrangement between the Crown and those members of Ngāti Te Ata who signed the Waiuku Deed. The "FW" note describing the

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185 At [6.23].

186 *McIntyre*, above n 118, at [20], citing *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) [*The Universal Sentinal*] at 400; *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577 at [15]; and *Haines v Carter* [2001] 2 NZLR 167 (CA) at [108] and [112].

187 Judgment under appeal, above n 1, at [145], citing *Barton*, above n 147, at 121 per Lord Wilberforce and Lord Simon dissenting.

188 Judgment under appeal, above n 1 (footnotes omitted).

"arrangement with Ahipene Kaihau and his party" is particularly instructive. Mr Parker stated:

> Obviously, in cases such as Ngāti Te Ata's where part of the tribe had gone into rebellion, but the other part had remained loyal to the Crown, it would have been an extremely complex task to unravel the interests of the rebels from the loyal members. The answer was to seek to purchase the interests of the loyal members and to ensure they retained adequate land for their future needs.
>
> This is what occurred in the case of Ngāti Te Ata. The Crown engaged in a long negotiation with the loyal members of the tribe to acquire their interests and to confiscate the interests of those members who had gone into rebellion. There is no evidence that the loyal members of Ngāti Te Ata, including their rangatira, objected to that arrangement. Those people had had a long history of selling land to the Crown … and knew what was happening.

[154] And in responding to a question on this topic from the Court, Mr Parker said:

> Q. … Do I understand you correctly that you say as part of that arrangement the loyal members of Ngāti Te Ata understood that the land would be confiscated?
>
> A. Yes I mean it's pretty clear that, that – that idea was before Ngāti Te Ata from a pretty early date in 1864, and the arrangement, the FW arrangement indicates that that was what was going to happen. I don't think, I think it's pretty clear that, the leaders of Ngāti Te Ata, wanted to keep the members of the tribe who had gone into rebellion out.

We are not in a position to say the Judge erred in adopting this approach, and we agree with it.

[269] In sum, it is not clear to us that the evidence establishes there was pressure on Ahipene Kaihau and the others who signed the Waiuku Deed of a kind that in fact meant their will was overborne and they effectively had no choice but to sign it. We accept there must have been some pressure on them arising out of the context and circumstances, but we also think it clear for reasons already discussed that the arrangements represented by the terms of the Waiuku Deed were arrangements they wanted to agree.

[270] For completeness, we accept that it may be arguable in some circumstances that the threat of confiscation, where sufficiently crystallised, could constitute illegitimate pressure where it was used as an instrument of coercion *and actually*

caused iwi or hapū to enter into transactions. However, this is not established on the facts of this case.

[271] Accordingly, we reject the claim based on duress.

[272] As a consequence, the grounds of appeal alleging that the High Court erred by holding that the sale of Ngāti Te Ata land to the Crown under the Waiuku Deed was not an unconscionable bargain and was not vitiated by duress or undue influence, cannot succeed.

[273] We turn next to consider the lawfulness of the Confiscation of the land under the New Zealand Settlements Act.

Was the Confiscation lawful?

[274] Section 2 of the New Zealand Settlements Act empowered the Governor in Council to declare a district to be subject to the provisions of the Act if he was "satisfied that any Native Tribe or Section of a Tribe or any considerable number thereof" had, since 1 January 1863, been "engaged in rebellion against Her Majesty's authority".[189] Such a declaration would have the consequence that the Governor in Council could "set apart within any such Districts eligible sites for settlements for colonization".[190] For the purposes of such settlements, the Governor in Council could then take any land within such district. Land taken in this way was deemed to be Crown land, which was:[191]

> … freed and discharged from all Title Interest or Claim of any person whomsoever as soon as the Governor in Council shall have declared that such Land is required for the purposes of this Act and is subject to the provisions thereof.

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189 The words "iwi" and "hapū" do not appear in the statute. We proceed on the assumption that the intention must have been to use the words "Tribe" and "Section" as the respective English language equivalents. In the High Court there was agreement that "Section" should be taken as referring to hapū: see judgment under appeal, above n 1, at [257].

190 New Zealand Settlements Act, s 3.

191 Section 4.

[275] Mr Harris submitted that the High Court erred in its conclusions that a "considerable number" of Ngāti Te Ata were "in rebellion" for the purposes of the New Zealand Settlements Act, and the Confiscation was otherwise lawful.

[276] In impugning the Confiscation, Mr Harris raised a number of issues which he said we would need to determine:

(a) What is the correct interpretation of the word "rebellion" under the New Zealand Settlements Act?

(b) Was Ngāti Te Ata, or a section of it, or any considerable number thereof, in rebellion?

(c) Is the Crown entitled to justify the Confiscation on the basis that a "considerable number" of Ngāti Te Ata were in rebellion when the Confiscation wrongly stated that Ngāti Te Ata was an iwi in rebellion?

(d) Even if there was jurisdiction for him to act under the New Zealand Settlements Act, did the Governor exceed his statutory power by declaring all the land in the district confiscated?

(e) Did the New Zealand Settlements Acts Amendment Act validate any illegality in the Confiscation?

(f) Did the Waiuku Deed and Confiscation breach a fiduciary duty to consider and protect the interests of Ngāti Te Ata?

[277] In the discussion that follows, we summarise the Judge's conclusions and the submissions of the parties on each of these issues, before setting out our views.

What is the correct interpretation of the word "rebellion" under the New Zealand Settlements Act 1863?

Judgment under appeal

[278] The Judge dealt relatively briefly with the meaning of rebellion. She reasoned that irrespective of the causes of the Waikato War, there was no doubt that a war had taken place. In the context of the New Zealand Settlements Act, the Judge said "rebellion" would "naturally encompass those engaged in hostilities against, or in conflict with, Crown forces, irrespective of whether these steps were originally a defensive or offensive engagement".[192] The Judge concluded that the evidence showed there were approximately 30 to 40 members of Ngāti Te Ata had been engaged in the conflict since 15 August 1863.[193]

Appellant's submissions

[279] Mr Harris submitted that, although the word "rebellion" was not defined in the New Zealand Settlements Act expressly, s 5(1) excluded from compensation those who had been "engaged in levying or making war or carrying arms" against the Sovereign or her forces.

[280] Mr Harris submitted that the Judge erred in proceeding on the basis that, irrespective of how the Waikato War have come to be viewed in contemporary times, "in rebellion" naturally encompassed those in hostilities against, or in conflict with, Crown forces *irrespective of whether those steps were defensive or offensive*.[194] Rather, Mr Harris argued, a defensive engagement did not amount to rebellion.

[281] Mr Harris referred the Court to the opinion of Professor Frederick Brookfield about the concept of rebellion for the Waitangi Tribunal in the context of its 1996

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192 Judgment under appeal, above n 1, at [236].
193 At [252].
194 At [252].

Taranaki inquiry.[195] It appears the Judge was not referred to the opinion in argument, despite it being referenced by Messrs Roimata Minhinnick and Parker.

[282] Relying on Professor Brookfield's opinion, Mr Harris submitted that the Crown could not declare war inside its own dominions: it could meet force with force through the exercise of martial law; or by proceeding with either or both of the Suppression of Rebellion Act 1863 or the New Zealand Settlements Act. But, "it could not lawfully be the aggressor, attacking Maori" and forcing them from their lands.[196]

[283] Mr Harris argued for the adoption of Professor Brookfield's definition of rebellion (which was affirmed by the Waitangi Tribunal—see [287] below): "concerted action against the Crown, engaged in for the purposes of 'subverting', or overthrowing, [by armed force or the threat of armed force,] 'the authority of Her Majesty or Her Majesty's Government'".[197]

[284] Mr Harris submitted that, in accordance with Professor Brookfield's opinion, if Māori were faced with "unlawful armed invasion by the forces of the Crown", they were "entitled to meet force with force, by applicable standards of reasonableness (in self-defence) or necessity (in defence of their dwellings)".[198] Whether force employed by the Crown was necessary or excessive is not for the Crown to decide, but for a judge or jury.[199] The Waitangi Tribunal has noted the test is not merely one of reasonableness, but whether Crown actions were "reasonably *necessary*".[200]

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195 F M Brookfield *Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty)* (26 January 1996) [Brookfield opinion], prepared for, cited and relied upon in the Wai 143 report, above n 71, at 124–131; adopted in Waitangi Tribunal *Ngāti Awa Raupatu Report* (Wai 46, 1999) at 64–70; and reviewed in Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at 108–116; and *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) vol 1 at 116–118.

196 Brookfield opinion, above n 195, at [4.2], citing *R (Ronayne and Mulcahy) v Strickland* [1921] 2 Irish Reports 333 at 334 per Molony CJ.

197 Brookfield opinion, above n 195, at [4.3]. In formulating his definition, Professor Brookfield affirmed (with amendments) a definition given by counsel for Ngāti Tūwharetoa. His amendment is the addition in square brackets. He caveated that he would potentially omit the reference to "subverting".

198 Brookfield opinion, above n 195, at [4.4].

199 Albert V Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, London, MacMillian and Company Ltd, 1915) at 286–287.

200 *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, above n 195, at [3.5.3(1)] (emphasis in original), referring to Dicey, above n 199.

[285] Mr Harris argued the definition proffered by Professor Brookfield is further supported by the purpose of the New Zealand Settlements Act as stated in its preamble: the promotion of security. He referred us to the Waitangi Tribunal's *Ngāti Awa Raupatu Report* in support of this:[201]

> The Act gave as its purpose the placement of a sufficient number of settlers on the land in order to maintain peace. To us, this means that the only land to be taken was that which was necessary to keep the peace by placing military settlers thereon.

[286] Mr Harris also mentioned the Waitangi Tribunal's *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, which stated:[202]

> Section 2 empowered the Governor in Council to embark on the confiscation and settlement process whenever he was 'satisfied' that any tribe, section, or considerable number of a tribe had been engaged in rebellion after 1 January 1863. Brookfield concludes that, under the law of judicial review of administrative action, the basis of the Governor in Council's 'satisfaction' could be challenged in, and examined by, a superior court. While acknowledging that the courts are reluctant to invalidate administrative action taken in an emergency and authorised by a statutorily conferred discretion, Brookfield concludes that the Governor in Council's action would be invalidated in at least three situations: where there was no evidence at all of rebellion; where the evidence showed that Maori were acting in self-defence within the limits of the common law; and where the number of Maori involved in allegedly rebellious conduct was too small to constitute any conceivable threat to national security or public peace: Brookfield, paras 16.1–16.5.

[287] Mr Harris also drew attention to the *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, where the Tribunal referred to Professor Brookfield's definition of rebellion and said:[203]

> There was no serious challenge to that definition. As we have indicated, the Crown sought to supplement or sharpen the definition, but in our view the reference to the Crown pleas text serves merely to particularise the broad propositions provided by Professor Brookfield. It is our view, for example, that resisting the Crown through the erection and operation of a pa or fort is evidence of rebellion only if designed for the purposes described by Professor Brookfield. A pa erected for the purpose of self-defence, as described below, would not be evidence of rebellion.
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> …

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201 *Ngāti Awa Raupatu Report*, above n 195, at [6.5].

202 *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, above n 195, at [4.8], n 126.

203 *Turanga Tangata Turanga Whenua: Report on the Turanganui a Kiwa Claims*, above n 195, at [3.5.3(2)].

> Accordingly, we adopt and apply the tests formulated by Dicey and Brookfield. The standards to be applied to the Crown are high, but in our view that is appropriate given the gravity of the subject. The Crown must reasonably apprehend that there is an intent to overturn the existing legal order, and that apprehension must be so clear as to render it necessary for the Crown to turn its guns on its own citizens. As a corollary, and again appropriately in our view, the right of the citizen to bear arms against unlawful State action is also tightly circumscribed.

[288] Finally, Mr Harris once again referred us to the Crown's apology in the Waikato Raupatu Claims Settlement Act, which recognised that it had "unfairly labelled Waikato as rebels".[204]

[289] As a result of the foregoing, Mr Harris submitted that the Judge erred in proceeding on the basis that "rebellion" encompassed all those engaged in hostilities against, or in conflict with, Crown forces, irrespective of whether those steps were originally a defensive or offensive engagement. As a result, she did not consider whether any members of Ngāti Te Ata who went to Waikato were acting defensively with justification. Accordingly, her findings on these points must be set aside.

Crown submissions

[290] On this issue, Mr Kinsler submitted that this Court's inquiry is confined to the proper interpretation of "rebellion" as it appears in s 2 of the New Zealand Settlements Act. Correctly construed in the Act, the term would encompass what Māori may have considered to be self-defence. And there was evidence in this case that Ngāti Te Ata were in rebellion.

[291] In response to Mr Harris's reliance on Professor Brookfield's opinion, Mr Kinsler submitted that the opinion was focussed on the operation of the New Zealand Settlements Act and the Suppression of Rebellion Act in Taranaki and the Bay of Plenty. The opinion was prepared in the context of issues which are only justiciable before the Waitangi Tribunal.[205] He argued that Professor Brookfield's conception of rebellion was formulated in a different and much broader context than the present case.

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[204] Waikato Raupatu Claims Settlement Act, preamble.

[205] Mr Kinsler cited *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 651 as confirming that the Waitangi Tribunal is not empowered to provide authoritative opinions of fact or law.

The opinion was directed to whether individuals in Taranaki, subject to the powers exercised pursuant to the Suppression of Rebellion Act, were acting reasonably or not. The Suppression of Rebellion Act presupposed that what was happening in New Zealand was a rebellion. This, Mr Kinsler submitted, is the context in which Professor Brookfield's opinion must be interpreted. He was engaging primarily with the common law concept of self-defence.

[292] Mr Kinsler submitted that Professor Brookfield's conception of rebellion was actually closer to the Crown's than would be suggested by reference to the Waitangi Tribunal reports referred to by Mr Harris. Mr Kinsler submitted it was clear that anything beyond the scope of common law self-defence would constitute rebellion and referred to the following extracts from Professor Brookfield's opinion:[206]

> 4.8 How far do the principles discussed above apply to the large scale hostilities that preceded the Raupatu? In my opinion application must be limited to immediate actual defence by Maori to the aggression of the Crown's armed forces in any cases where that is shown to have occurred; but not to counter-attacks (except where these occurred as part of the immediate Maori response in, and as part of, the situation created by a particular attack by the Crown) or to Maori attacks launched quite independently of the Crown's original aggression, even if ultimately consequential on it.
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> …
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> 4.10 In going beyond common law principles of self-defence, Maori would inevitably be in "rebellion", in particular in terms of the two Acts of 1863. Again, a claim that Maori were provoked into such rebellion, by the actions of the Crown's servants eager to impose in fact on the colony as a whole the sovereignty claimed in law by those Proclamations, may well involve a Treaty breach but accordingly be beyond the cognizance of the colonial Courts.
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> 4.11 In so stating, I should emphasize that the word "rebellion" is not used pejoratively. There have been many rebellions against the English or the British Crown (as against innumerable other governments), notably in more modern times those within England itself in the 17th century; in the 18th the rebellion of the American colonies; and before and since then rebellions in Ireland (even within the then Irish Free State in the early 1920s) and by many indigenous peoples in the colonies. No doubt most of the rebellions were arguably justified or in part at least provoked by the Crown's own actions; but all, in relation to the Crown, were rebellions nevertheless. If and insofar as Maori were in rebellion, they were certainly in numerous company; and, as with most other rebels, their being such depended simply on the actions they took to dispute the sovereignty that the Crown claimed and, in their case, to

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206 Brookfield opinion, above n 195.

> assert an autonomy to which they were entitled on the Maori version of the Treaty. (How much autonomy is of course the difficult question.)
>
> …
>
> 16.6 In my opinion then, difficult as the circumstances no doubt were, an Order under [s 2] of the Settlements Act and the ensuing confiscation could, in appropriate proceedings and if there were no subsequent validation, have been attacked on the ground either (i) that Maori, in terms of [s 2], had not in fact been in rebellion in the District declared or (ii) that too few of them had been to constitute any conceivable future risk to security. But, as has been seen above, "not being in rebellion" means that they either had not borne arms against the Crown at all or had acted purely in the immediate defence of themselves and their property within the common law limits (and not by way of counter aggression) against the unlawful attack of the armed forces of the Crown.

[293] Further, Mr Kinsler contended that the Waikato Raupatu Claims Settlement Act did not bear on whether Ngāti Te Ata had been in rebellion. He referred us to *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, where this was accepted by the Waitangi Tribunal:[207]

> Relying on the Crown's acknowledgements and apologies in the Waikato Raupatu Claims Settlement Act 1995, the claimants maintained that Tauranga Maori should be treated no differently. Some claimants considered — at least before the Crown's closing submissions were made — that the Crown had acknowledged in the 1995 Act that Waikato Maori were not in rebellion. That is not the case, however.
>
> In its preamble, the Waikato Raupatu Claims Settlement Act 1995 made a number of acknowledgements that are relevant here. These were that:
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> …
>
> - 'grave injustice was done to Waikato when the Crown, in breach of the Treaty of Waitangi, sent its forces into the Waikato, occupied and subsequently confiscated Waikato land, and unfairly labelled Waikato as rebels'.
>
> …
>
> Bearing in mind the difference between legal rules and Treaty principles, the effect of those statutory acknowledgements by the Crown can be stated as follows:
>
> - The Crown initiated hostilities by invading the Waikato and, in relation to the Kingitanga and Waikato Maori, this was unjust and in breach of the Treaty of Waitangi but it was not unlawful.

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[207] *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, above n 195, at [4.8] (footnotes omitted).

- Though it was unfair of the Crown to label Waikato as rebels, it was correct according to the law.

Was Ngāti Te Ata, or a section of it, or any considerable number thereof, in rebellion?

Judgment under appeal

[294] After undertaking a detailed survey of the evidence, the Judge concluded that Ngāti Te Ata had around 100 to 150 members at the relevant time and that 30 to 40 members were in rebellion.[208] She held that "a considerable number thereof" was "relative to the size of the tribe or iwi", rather than any particular security risk posed by those in "rebellion".[209] She held that the phrase meant something more significant than a de minimis number of members of an iwi, and that the requirement had clearly been satisfied.[210]

Appellant's submissions

[295] Mr Harris argued that the requirement in s 2 of the New Zealand Settlements Act that the Governor must be satisfied that a "considerable number" of Ngāti Te Ata had been engaged in rebellion conferred a discretion to be exercised in determining what number was substantial enough to be "considerable". This should have been guided by security considerations rather than a desire to punish.[211]

[296] Mr Harris submitted that the Judge erred in defining "considerable number" by reference to the size of the iwi, rather than the security risk posed. Governor Grey's description of 20 rebels as "trifling" and "of no importance" must reflect that such a small number of "defectors" from Ngāti Te Ata could not pose the kind of security threat for which the power under s 2 was conferred. The question of whether a "considerable number thereof" were in rebellion did not turn on whether one number was a considerable proportion of the whole. An additional 10 to 20 defectors, beyond a "trifling" 20 could not reasonably be characterised as a considerable number with respect to the posed security threat. Even if 30 to 40 members of Ngāti Te Ata were in rebellion, this was not a considerable number.

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208 Judgment under appeal, above n 1, at [248], [252] and [260].
209 At [258].
210 At [259]–[260].
211 Citing Brookfield opinion, above n 195, at [16.2].

Crown submissions

[297] Mr Kinsler submitted that the plain meaning of s 2 of the New Zealand Settlements Act required that "considerable" is assessed against the size of the iwi. Relative proportion was the only yardstick Parliament had provided, and accordingly, assessment must take place within that parameter.

[298] Alternatively, it was implicit that Parliament thought a "considerable" proportion of any iwi, whatever number that might be, would inherently constitute a security threat. On this approach, security threats were an implicit, rather than a separate consideration.

[299] Governor Grey's comment about 20 rebels being "trifling" needed to be assessed in the wider context in which it was made. Given the rising tensions in the Waikato, the number of Ngāti Te Ata going into rebellion may well have seemed "trifling" or unimportant in the grand scheme of things. But under the New Zealand Settlements Act what is important is the proportion of the iwi in "rebellion" to those who were not.

[300] Mr Kinsler submitted that the New Zealand Settlements Act required a proportionality assessment in relation to the whole iwi, despite the enactment having a protective security purpose. The conclusion reached by Fitzgerald J, that 30 to 40 members out of 100 to 150 members were in rebellion, can fairly be described proportionally as a considerable number.

Is the Crown entitled to justify confiscation on the basis that a "considerable number" of Ngāti Te Ata were in rebellion when the confiscation wrongly stated that Ngāti Te Ata was an iwi in rebellion?

Appellant's submissions

[301] Mr Harris submitted that even if the above issues are not determined in favour of Ngāti Te Ata, the Confiscation was unlawful because it proceeded on the basis that Ngāti Te Ata itself, as an entire group, was in rebellion—which the Crown has accepted was not the case. This is evidenced by the absence of reference to "any considerable number" in the Governor's declaration made under s 2 of the New

Zealand Settlements Act. The Governor had misdirected himself. This was manifestly wrong, and consequently unlawful.

Crown submissions

[302] Mr Kinsler highlighted the need for caution in examining historic exercises of power. He submitted that what occurred in this case, a purchase preceding a confiscation, appeared to be unusual—he had not been able to find any other examples. None of those involved can give evidence, and even with the Order in Council, the full picture is far from clear. However, the evidence does show that the Governor was aware of the requirements in s 2 and did not take the decision lightly. The evidence tells against the Confiscation being done on the basis that Ngāti Te Ata as a whole was in rebellion.

[303] Mr Kinsler submitted that there seemed to be no consistent approach in the wording of the 12 confiscation orders made under the New Zealand Settlements Act. Further, as either an entire iwi (or hapū) or a considerable number thereof being in rebellion could result in a district being confiscated, there was no substantive distinction between those categories. The omission to refer to a "considerable number" is most appropriately categorised as a technical error, in the nature of a slip. This is insufficient to render the decision invalid on its face.

Even if there was jurisdiction under the New Zealand Settlements Act 1863, did the Governor exceed his statutory power by declaring all the land in the district confiscated?

Judgment under appeal

[304] The Judge declined to accept the submission made to her that the power to confiscate was exercised to acquire land for general purposes rather than for the purpose of the New Zealand Settlements Act.[212] She did not consider it could be "inferred, merely from the fact that settlement in the traditional sense did not occur on large tracts of Maioro, that the Confiscation itself was for an unlawful purpose".[213]

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212 Judgment under appeal, above n 1, at [281]–[286].

213 At [286]. The Judge referred to Maioro but the same reasoning would apply to all the land confiscated.

Appellant's submissions

[305] Mr Harris submitted that even if the Governor's declaration under s 2 of the New Zealand Settlements Act was lawful, the taking did not comply with s 3. He submitted that confiscation was a three-step process: first, a district had to be declared and defined under s 2; secondly, any sites for settlements for colonisation in the district were to be set apart and defined under s 3; and thirdly, this land would then be reserved or taken for the purposes of settlement under s 4. Section 3 did not authorise the taking of land that was not suitable for settlement, for the purpose of punishment, or for any other purpose.

[306] Mr Harris submitted the Order in Council under which the Crown confiscated Maioro exceeded the powers granted by the New Zealand Settlements Act, because the Governor purported to take the entire district without ascertaining that the land was suitable for settlement. Nothing in the Order indicates the s 3 assessment was made. Consequently, the Confiscation of all the land in the district was invalid because it exceeded the powers in the New Zealand Settlements Act.

Crown submissions

[307] Mr Kinsler characterised the appellant's contention as an inappropriate attempt to rely on an absence of evidence to impugn a decision-making process which took place 160 years ago. It does not account for other evidence indicating the s 3 assessment did in fact take place.

Did the New Zealand Settlements Acts Amendment Act 1866 validate any illegality in the Confiscation?

Judgment under appeal

[308] It was strictly unnecessary for the Judge to address the Crown's argument that, in the event the Order in Council was ultra vires, s 6 of the New Zealand Settlements Acts Amendment Act validated the declaration.[214] But she stated that, had she found the Order ultra vires, she would have concluded that s 6 of the New Zealand

[214] At [290].

Settlements Acts Amendment Act had retrospectively validated it.[215] She rejected the argument that s 6 was only directed to matters of form rather than substance, and held that it was a validation clause that "leave[s] no room for residual illegalities".[216]

Appellant's submissions

[309] Mr Harris submitted that the Confiscation was not validated by the New Zealand Settlements Acts Amendment Act. The Act only validated omissions or defects in form, not substance. If s 6 was intended to validate defects in substance, clear words leaving no room for any illegalities were required. The defect in the Order was not in form; it was a confiscation that went wholly beyond the powers of the New Zealand Settlements Act and could not be validated.

Crown submissions

[310] Mr Kinsler invited this Court to reject the appellant's interpretation, submitting that the plain meaning of s 6 was that all Orders were valid regardless of any defect. The section was sufficiently broad to capture jurisdictional errors. It is difficult to arrive at a clear meaning of s 6, because it has a number of compound prepositions which mean that it could be read a number of different ways:

(a) any omission or defect *of any* of the forms provided in the said Acts;

(b) any omission or defect *in any* of the forms provided in the said Acts;

(c) any omission or defect of *any of the things* provided in the said Acts; and

(d) any omission or defect in *any of the things*.

[311] Mr Kinsler submitted that there were a multitude of ways in which an error might have occurred, as for example, the Governor identifying the wrong hapū or iwi. This would still be an omission or defect. Mr Kinsler confirmed that the Crown's case

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215 At [295].

216 At [294], citing *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [195].

was that everything the Governor did purporting to invoke the authority of the Act was validated by s 6, even if a decision had been made on the basis of "egregious errors of fact". However, he accepted there might be "an outer edge", such as instances of bad faith or misconduct by the Crown.

[312] Mr Kinsler submitted that it was significant that it "seem[ed]" that Professor Brookfield thought that the New Zealand Settlements Acts Amendment Act would encompass a jurisdictional error, as opposed to having application only to errors of form. He pointed to Professor Brookfield's discussion of the Orders in Council confiscating land in the Taranaki District:[217]

> 18.6 The Orders in Council made under the Act were, as already discussed … emergency measures with which Courts are reluctant to interfere … However, it is clear that where there is "internal evidence from the provisions" of the measure itself, or "external evidence of the factual situation existing at the time" … showing that the authorising Act has been misconstrued and the powers conferred by it exceeded, the measure will be held invalid. In regard to Orders in Council purportedly taking the whole of the land in a District, there is clear "internal evidence" that the Act has been misconstrued in that (1) "eligible sites for settlements for colonization" have not been (selected and) "set apart", as [s 3] required, "within" the District; and (2) that the purported taking was not restricted to land comprising such sites. That to my mind is conclusive. But appropriate external evidence could also show, at least in regard to the upper slopes of Mount Taranaki, that land included in the District was so ineligible for settlement(s) that the Executive Council, in advising the Governor, either misconstrued the Act or (if construing it correctly) could not possibly have directed its attention to the relevant facts …
>
> 18.7 I conclude that Orders in Council under the New Zealand Settlements Act purportedly taking for settlements the whole of the land in a District declared under s 2 were invalid as being beyond the powers conferred by that Act. The validation provided by [s 6] of the New Zealand Settlements Acts Amendment Act 1866 … was necessary on this account if no other.

Our view

[313] We now address the various issues going to the lawfulness of the Confiscation discussed above. This part of the case raises issues which are fundamental to the historical relationship between Māori and the Crown. It is important to

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[217] Brookfield opinion, above n 195 (citations omitted).

acknowledge at the outset that the legislation we are called to interpret was essentially an "instrument of imperialism".[218]

[314] Before us, however, is a question of law and not policy. It is not the place of this Court to "go beyond the text and impose solutions simply because they seem fair and just".[219] Rather, the meaning of the legislation must be ascertained in the normal way, from its text and in light of its purpose and context.[220]

[315] To ascertain whether the Confiscation was lawful, we must consider whether "a considerable number" of Ngāti Te Ata were in "rebellion", and whether the powers given by the New Zealand Settlements Act were otherwise properly exercised. We must then determine the extent to which the New Zealand Settlements Acts Amendment Act validated any errors or omissions in the process followed.

The correct interpretation of the word "rebellion" under the New Zealand Settlements Act 1863

Statutory text

[316] The concept of "rebellion" was at the core of s 2, the provision on which the application of the New Zealand Settlements Act turned. As has been seen, it was under that section that the Governor in Council was empowered to declare a district subject to the provisions of the Act, and thus able to be confiscated under s 3. The Governor's power could be exercised where "any Native Tribe or Section of a Tribe or any considerable number thereof has since the first day of January 1863 been engaged in rebellion against Her Majesty's authority".[221]

[317] There is no express definition of "rebellion" in the New Zealand Settlements Act. As we have noted, the Act's preamble referred to a rebellion occurring in the

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218 F M Brookfield *Waitangi & Indigenous Rights: Revolution, Law & Legitimation* (updated ed, Auckland University Press, Auckland, 2006) [Brookfield (2006)] at 146, citing E P Thompson *Whigs and Hunters* (Allen Lane, Harmondsworth, 1975) at 266.

219 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at [6(e)].

220 Legislation Act 2019, s 10(1). For the avoidance of doubt, we note that cl 3 of sch 1 specifies that the Act applies to any legislation enacted before that Act's commencement date.

221 New Zealand Settlements Act, s 2.

North Island.[222] The Act was premised upon the existence of the rebellion. For convenience, we replicate the preamble here:[223]

> WHEREAS the Northern Island of the Colony of New Zealand has from time to time been subject to insurrections amongst the evil-disposed persons of the Native race to the great injury alarm and intimidation of Her Majesty's peaceable subjects of both races and involving great losses of life and expenditure of money in their suppression And Whereas many outrages upon lives and property have recently been committed and such outrages are still threatened and of almost daily occurrence And Whereas a large number of the Inhabitants of several districts of the Colony have entered into combinations and taken up arms with the object of attempting the extermination or expulsion of the European settlers and are now engaged in open rebellion against Her Majesty's authority And Whereas it is necessary that some adequate provision should be made for the permanent protection and security of the well-disposed Inhabitants of both races for the prevention of future insurrection or rebellion and for the establishment and maintenance of Her Majesty's authority and of Law and Order throughout the Colony And Whereas the best and most effectual means of attaining those ends would be by the introduction of a sufficient number of settlers able to protect themselves and to preserve the peace of the Country:

[318] We consider this preamble, read together with s 5, provides significant assistance in understanding what constituted rebellion in terms of the Act. Section 5 provided for the payment of compensation to all persons having any "title interest or claim" to any land taken under the Act, but also provided that no compensation would be granted to the following categories of persons:

(a) those who had, since 1 January 1863, been engaged in levying or making war or carrying arms against Her Majesty or Her Majesty's forces;

(b) those who adhered to, aided, assisted or comforted any person caught by para (a);

(c) those who counselled, advised, induced, enticed, persuaded or conspired with any other person to make or levy war against Her Majesty or Her Majesty's forces, or to join with or assist any person caught by paras (a) and (b);

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222 See Legislation Act, s 10(3)–(4), which provides that the text of legislation includes the indications provided in the legislation. Preambles are listed as an example of these indications.

223 New Zealand Settlements Act, preamble.

(d) those who, in the furtherance or execution of the plans of any person caught by paras (a), (b) and (c), was concerned in any outrage against person or property either as principal or accessory; or

(e) those who, on being required by the Governor by proclamation to deliver up the arms in their possession refused or neglected to comply with such a demand after the specified date.[224]

[319] The group of people thus barred from compensation was broadly cast. Clearly, s 5 reflects what is meant by "engaged in rebellion", the phrase employed in s 2.[225] The Act makes no distinction between offence and defence; it is directed to resisting the authority of the Crown. On the face of it, the "rebellion" appears to encompass what Māori may have considered to be self-defence, and perhaps even people who resisted the Crown's authority through means which were not violent, such as giving assistance or comfort to those who were carrying arms. This militates against Mr Harris's submission that a defensive engagement could not constitute rebellion.

Purpose

[320] The long title of the Act articulates the purpose of the Act as being to "enable the Governor to establish Settlements for Colonization in the Northern Island of New Zealand". But it is clear that the establishment of the settlements was seen as a necessary response to the rebellion.

[321] Authenticated copies of several Acts recently passed, together with explanatory memoranda, were sent by Governor Grey to the Duke of Newcastle in London. One of these Acts was the New Zealand Settlements Act, which was discussed in conjunction with the Suppression of Rebellion Act (which we will address in more detail below). In relation to these Acts, Governor Grey wrote that:[226]

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224 We note that Ngāti Te Ata were not required to deliver up their arms.

225 And the words "now engaged in open rebellion" in the preamble. We note that in the dispatch from the Rt Hon Edward Cardwell to Governor Grey, explaining his decision not to recommend the disallowance of the Act, Mr Cardwell seemingly interpreted the first four paragraphs of this provision as referring to those engaged in rebellion, but the fifth as applying to persons "whether engaged in rebellion or not".

226 Emphasis added.

> 4. There are two modes of dealing with subjects after a rebellion, to treat them with great generosity, or with severity. I believe the former method is found to be the most successful; when, therefore, former wars terminated, the Natives were very generously treated, and no large forfeiture of lands declared. In one way this policy was certainly eminently successful; for in the present war our former enemies, had they joined against us, might have inflicted the most serious injury upon us; whereas they have, I believe to a man, refrained from in any way taking advantage of our present difficulties, and many of them have earnestly expressed their readiness to aid us, if we wished them to do so.
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> 5. I do not think the same policy would now succeed to the same extent. The Natives have acquired too many arms and too much ammunition. The war has become more a war of races; we have used no Native allies in this war. It has lasted longer than any previous war, and more tribes have been drawn into it, and it originated, at least in the estimation of a large number of the Natives, in an attempt on our part to establish a new principle, in procuring native lands, and in an overlooking of their interests in other respects. Hence a wide-spread distrust and dislike of the Government has sprung up. The early successes of the Natives at Taranaki have also emboldened their young men. *All these causes make me think that it is necessary now to take lands from the Natives who have been in arms*, and to locate an European population upon them. But, *acting upon the principle of the great wisdom of showing a large generosity towards defeated rebel subjects, I would not carry this system too far*.

[322] Also attached to the copy of Governor Grey's dispatch was a note by Frederick Whitaker. He explained the objects of the Acts as follows:[227]

> THE object of these Acts is to deal with the present Native Rebellion. The first [the Suppression of Rebellion Act] is directed at its suppression; and the second [the New Zealand Settlements Act] is intended to establish a permanent security against future rebellions; or, at all events, to place within the disturbed districts a population which, if it does not actually deter, will, with little assistance, be enabled to put down outbreaks by the ill-disposed of the native population.
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> …
>
> 2. The complete defeat of the rebels would have but little effect in permanently securing the peace of the colony, unless some ulterior measures are adopted for that object. In former wars in New Zealand, the natives have been permitted to leave off fighting when they thought fit; to keep all the plunder they had obtained; and they have not been subjected to any kind of punishment for disturbing the peace of the country, killing her Majesty's subjects, and destroying their property. If native wars are to be prevented for the future, some more effective mode of dealing with those who create them must be adopted. The question then is, in what way, for the future, can the peace of the colony be best maintained, and the peaceable inhabitants of both races best secured against the aggression of lawless men?

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227 Emphasis added.

> For the most part, the natives of New Zealand possess but little personal property, and therefore suffer but little from losing temporary possession of their settlements. What they have most dreaded in their own wars has been slavery and the permanent loss of their landed possessions. There is no doubt that the native lands afford the most effectual means of securing the object the Government has in view. They may be made, by affording a striking example, the means of deterring other tribes for the future from engaging in rebellion, and at the same time of securing the rebellious districts against future outbreaks.
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> The object of the Settlements Act is to give effect to these views. Already 3,000 men have taken military service under conditions, copies of which are included in the papers herewith, and it is intended to increase that number to 20,000. The provisions of the Act are framed with the intention of enabling the Government to fulfil the promises made to those who have already been enlisted in the service, and to meet future engagements of a similar kind.
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> …
>
> Care has been taken on the one hand that satisfactory provision is made for granting compensation to those who may be entitled to it, *and on the other hand those are excluded who have fairly forfeited all claim to consideration*. It is a recognised principle that, when the public interests require it; the property of individuals, on fair compensation, may be taken as available for the purposes of the State. A great public object, essential to the peace and security of the country, is to be gained in this instance, fully justifying the practical application of the principle. Again, it is undoubted natural justice that those who violate the fundamental principles of the Government under which they live, justly forfeit their right to the advantages which they derive from that Government. The rebellious natives have placed themselves in that position, and fairly subjected themselves to the penalty due to their offences.

[323] Section 5 was clearly intended to specify those who had forfeited their claim to consideration by being "in rebellion". This iteration of the purpose supports the broadly cast definition of "rebellion" suggested by the statutory wording. We are bound to interpret the word rebellion so as to give effect to the spirit and intent of the legislation, even if that spirit is a dark reminder of New Zealand's colonial past.

Context

[324] The immediate context includes the Suppression of Rebellion Act, which was passed contemporaneously with the New Zealand Settlements Act and provides further guidance as to what Parliament meant by using the word "rebellion".

[325] The Suppression of Rebellion Act was, in summary, an extremely severe and thorough legislative response to what was regarded as a rebellion by "certain Aboriginal tribes".[228] The Act commenced with the following preamble, described by the marginal note as a "Preamble reciting existence of Rebellion":

> WHEREAS a combination for the subversion of the authority of Her Majesty and Her Majesty's Government has for some time existed amongst certain Aboriginal tribes of this Colony and has now manifested itself in acts of open Rebellion And Whereas persons in prosecution of the said Rebellion have committed murders on some of Her Majesty's subjects engaged in their peaceful occupations have pillaged their homesteads and burnt and destroyed their property And Whereas the ordinary course of law is wholly inadequate for the suppression of the said Rebellion and the prompt and effectual punishment of those who are guilty of such atrocity and outrage:

[326] Section 2 of the Suppression of Rebellion Act empowered the Governor in Council "during the continuance of the said Rebellion" to issue orders to all persons whom he thought fit, authorising them:[229]

> … to take the most vigorous and effectual measures for suppressing the said Rebellion in any part of this Colony which shall appear to be necessary for the public safety and for the safety and protection of the persons and properties of Her Majesty's peaceable and loyal subjects and *to punish all persons acting aiding or in any manner assisting in the said Rebellion or maliciously attacking or injuring the persons or properties of Her Majesty's loyal subjects in furtherance of the same* according to Martial Law either by death penal servitude or otherwise as to them shall seem expedient and to *arrest and detain in custody all persons engaged or concerned in such Rebellion* or suspected thereof and to cause all persons so arrested or detained in custody to be brought to trial in a summary manner by Courts Martial at the earliest possible period for *all offences committed in furtherance of the said Rebellion whether such persons shall have been taken in open arms against Her Majesty or shall have been otherwise concerned in the said Rebellion in aiding or in any manner assisting in the same* …

[327] Unsurprisingly this is the same conception of "rebellion" as in the New Zealand Settlements Act. As can be seen, the section provided for the punishment of all persons:

> (a) acting, aiding or in any matter assisting the said rebellion; or

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228 Suppression of Rebellion Act, preamble.
229 Emphasis added.

(b) maliciously attacking or injuring the persons or properties of Her Majesty's loyal subjects in furtherance of the rebellion.

Thus, the two Acts plainly had a consistent approach to the concept of rebellion.

[328] Section 53 of the New Zealand Constitution Act specified that the General Assembly could not make laws "repugnant to the law of *England*".[230] In his book *Waitangi & Indigenous Rights: Revolution, Law and Legitimation*, Professor Brookfield referred to the vagueness of this "repugnancy proviso" which, at the time the New Zealand Settlements Act and Suppression of Rebellion Act were passed, had not yet been clarified and narrowed by ss 2 and 3 of the Colonial Laws Validity Act 1865.[231] He recorded that, due to this ambiguity, the English Law Officers of the Crown were asked to advise the Secretary of State for the Colonies in effect whether the phrase would invalidate the two Acts:[232]

> Their advice was, in short, that both were justified as emergency legislation, for '… the laws of England had repeatedly recognized the necessity for exceptional legislation, to suppress a rebellion threatening the existence of the State'. (There were precedents in both English and Irish legislation.) At least so far as the New Zealand Settlements Act was concerned, I think their advice was correct, however doubtful some of the instances of its implementation were. Which is really to say that that Act, an important instrument of the Crown's partly revolutionary seizure of power, was valid within the rules which (so to speak) the revolution imposed on itself; and which were applicable at the time as part of the legal order progressively imposed on the country.

[329] We do not consider it is necessary (or permissible) to define the concept of rebellion other than in terms of the statutes. Neither the New Zealand Settlements Act nor the Suppression of Rebellion Act conceives of legitimate resistance against the Crown. Rather, the statutory scheme makes it clear that any engagement in the Waikato War by Māori against the Crown was intended by Parliament to constitute "rebellion".

Effect of the Waikato Raupatu Claims Settlement Act 1995

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230 New Zealand Constitution Act, s 53 (emphasis in original).
231 Brookfield (2006), above n 218, at 130.
232 At 130–131 (footnote omitted).

[330] As we have already mentioned, the Waikato Raupatu Claims Settlement Act contains an acknowledgement by the Crown that:[233]

> … grave injustice was done to Waikato when the Crown, in breach of the Treaty of Waitangi, sent its forces into the Waikato, occupied and subsequently confiscated Waikato land, and unfairly labelled Waikato as rebels:

[331] The Act also records the apology given by the Crown to Waikato in the deed of settlement in both te reo Māori and English:[234]

> **4 Apology**
>
> This Part records the apology given by the Crown to Waikato in the deed of settlement.
>
> **5 Text in Maori**
>
> The text of the apology in Maori is as follows:
>
> "1 E whakaae ana Te Karauna ko oona reo ko oona mana i hara ki nga tikanga o Te Tiriti o Waitangi i taa raatou whakawhiunga i te Kiingitanga me Waikato ki ngaa hooia i Mangataawhiri i te marama o Hongongoi 1863 i raro i ta raatou tohu whakaingoa. 'he iwi whakakeke a Waikato'.
>
> "2 E whakaatu ana Te Karauna i toona pouri tino hoohonu, aa, kaaore he mutunga o taana tuku whakapaa mo ngaa taangata i mate i ngaa parekura whakaeke o aana hooia, aa, mo te taaorotanga hoki o ngaa whenua tae atu ki te whakararurarutanga o te nohoanga o ngaa Iwi.
>
> "3 E whakaae ana Te Karauna teeraa ko ngaa raupatutanga o ngaa whenua me ngaa rawa i whakamanahia e te Ture Mo Te Whakanoho i Te Hunga Maarie, ara, te Iwi Paakeha 1863, a Te Paaremata o Niu Tireni he mahi tino hee, e peehi kino nei i a Waikato mai raano. E noho pani tonu nei raatou i roto i te rawakoretanga me to hauwareatanga o ngaa mahi toko i te ora, o ngaa mahi whanaketanga mo ngaa Iwi o Waikato.
>
> "4 E maarama pai ana Te Karauna teeraa ko teenei pouritanga tino toimaha, kaaore nei anoo kia whakatikaina i raro i te Tiriti o Waitangi kei te whakataairi i eenei puutake e rua a Waikato: 'i riro whenua atu, me hoki whenua mai' te tuatahi; 'ko te moni hei utu mo te hara' te tuarua. Hei whakatutuki, e whakaae ana Te Karauna ki te whakahoki ki te iwi ngaa whenua e taea ai i roto i teenei whakaaetanga kei raro i toona mana i Waikato.
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> "5 E whakaae ana Te Karauna teeraa anoo ngaa whenua raupatu o Waikato te tino taakoha nui ki te rangatiratanga me te whanaketanga

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233 Waikato Raupatu Claims Settlement Act, preamble.
234 Part 1.

o Niu Tireni ahakoa kei te noho rawakore tonu te Iwi o Waikato i oona whenua me ngaa hua o aua whenua.

"6 Nooreira ka kimi Te Karauna, mo te taha ki ngaa Iwi Katoa o Niu Tireni, i te huarahi e whakamaarie ai i eenei tuukinotanga, araa, mo te waahanga e taea ai, aa, i teenei whakatutukitanga o teenei take whakamau o Te Raupatu. He whakaotinga teenei i raro i ngaa take raarangi o Te Pukapuka Whakaaetanga i hainatia i te 22 o ngaa raa o Haratua 1995, maana hei arahi atu ki te ao hoou o te mahi tahi ki Te Kiingitanga me Waikato."

6 Text in English

The text of the apology in English is as follows:

"1 The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanga and Waikato in sending its forces across the Mangataawhiri in July 1863 and in unfairly labelling Waikato as rebels.

"2 The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted.

"3 The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 of the New Zealand Parliament were wrongful, have caused Waikato to the present time to suffer feelings in relation to their lost lands akin to those of orphans, and have had a crippling impact on the welfare, economy and development of Waikato.

"4 The Crown appreciates that this sense of grief, the justice of which under the Treaty of Waitangi has remained unrecognised, has given rise to Waikato's two principles 'i riro whenua atu, me hoki whenua mai' (as land was taken, land should be returned) and 'ko to moni hei utu mo te hara' (the money is the acknowledgment by the Crown of their crime). In order to provide redress the Crown has agreed to return as much land as is possible that the Crown has in its possession to Waikato.

"5 The Crown recognises that the lands confiscated in the Waikato have made a significant contribution to the wealth and development of New Zealand, whilst the Waikato tribe has been alienated from its lands and deprived of the benefit of its lands.

"6 Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the grievance of raupatu finally settled as to the matters set out in the Deed of Settlement signed on 22 May 1995 to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato."

[332] The definition of "Waikato" contained in s 7 of the Act included Ngāti Te Ata, who were identified as Waikato descendants of the Tainui Waka who had suffered or were affected by the Confiscation of their land by the New Zealand Government under the New Zealand Settlements Act.

[333] It is clear in accordance with our analysis above that when both the New Zealand Settlements Act and the Suppression of Rebellion Act were passed, it was the view of Parliament that there was a rebellion. It is a fact that there were hostilities in which armed Māori were ranged against the forces of the Crown. We think it would be unrealistic for this Court, over 160 years later, to conclude as a matter of law that there was no rebellion, contrary to what Parliament asserted. Nor do we think it is possible or appropriate at this distance in time to proceed on the basis that, unless it can now be established that in any particular case Māori were not acting in self-defence, the Government could not take the actions authorised under the New Zealand Settlements Act and the Suppression of Rebellion Act, or that actions taken were for that reason unlawful. Rather, we think the lawfulness of what occurred after the enactment of the Acts, and in purported reliance on them, should be determined on the basis of what the statutes said at the time. We do not see how those Acts can be treated as if the authority which they conferred was unlawful or simply ineffective.

[334] We accept Mr Kinsler's submission that for the purposes of this case, the answer to the question of whether there was in fact a rebellion is not to be found in the terms of the Waikato Raupatu Claims Settlement Act. By the time that Act was enacted in 1995, Parliament had obviously accepted that the people of the Waikato did not rebel: rather, they were attacked. But there was a basis on which it could have been concluded at the time that some members of Ngāti Te Ata had aligned themselves against the Government. Ahipene Kaihau himself advised the Government that a number had "gone to Waikato".

[335] It seems to us that the Waikato Raupatu Claims Settlement Act was not intended to be declaratory as to the existence or non-existence of rebellion in the Waikato as a matter of historical fact. Neither does it seem to us that the Act intended to alter the application of the New Zealand Settlements Act in any way. Rather the Waikato Raupatu Claims Settlement Act specifically and deliberately describes the

characterisation of Māori in the Waikato as being in rebellion as unfair—not legally wrong. The Waikato Raupatu Claims Settlement Act does not purport to change the definition of rebellion, nor to regulate or alter the consequences of actions that took place before it was in force.

[336] In the end we agree with the conclusion of the Waitangi Tribunal in *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* that, having considered the implications of the Waikato Raupatu Claims Settlement Act, the effect of the acknowledgements is that:[235]

> - The Crown initiated hostilities by invading the Waikato and, in relation to the Kingitanga and Waikato Maori, this was unjust and in breach of the Treaty of Waitangi but it was not unlawful.
>
> - Though it was unfair of the Crown to label Waikato as rebels, it was correct according to the law.

Were a considerable number of Ngāti Te Ata in rebellion?

[337] We now turn to assess whether a "considerable number" of Ngāti Te Ata were in rebellion.

[338] It seems that the members of Ngāti Te Ata who resided at Waiuku and Āwhitu and stayed there were not in rebellion against the Crown. On the evidence, Ahipene Kaihau, Hori Tauroa and those who remained with them continued to be "loyal" to the Crown (as discussed above at [130] to [138] and [172]). Despite violent provocations and the theft and destruction of some of their possessions by Captain Lloyd and his men,[236] they appear to have maintained a protective stance towards Pākehā living in the area.[237] The same cannot be said about the other members of the iwi who had "gone to Waikato". There is no particular evidence about this group's actions other than that which can be inferred from the accounts given in the letters written at the time.

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235 *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, above n 195, at [4.8].
236 See above at [139]–[143].
237 See above at [132] and [137]–[138].

[339] One of the relevant letters was from Pene Te Wharepu at Meremere, who was identified by Mr Parker as being a "Waikato Chief". On 10 August 1863, he wrote to Ruihana, a rangatira of Ngāti Tipa, who had been based on the south side of the Waikato Heads and had "gone into rebellion and had joined Waikato". In the letter, Pene Te Wharepu asked Ngāti Tipa and Ngāti Te Ata to join him at Meremere. Then, on 15 August 1863, Ahipene Kaihau and Hori Tauroa wrote a letter to Governor Grey, quoted above at [136], informing him that after receiving Pene Te Wharepu's letter, Ruihana had sought that Ngāti Te Ata go with him to Meremere, where entrenchments were being built to resist the Government forces. Ahipene Kaihau and Hori Tauroa recorded in the letter that, against their wishes, thirty members of Ngāti Te Ata (18 men and 12 women) had left to join Ruihana at Meremere. This was evidence on which it was reasonable for the Governor to conclude that those members of Ngāti Te Ata had joined what he regarded as the rebellion.

[340] It could be taken from the letter that those who remained with Ahipene Kaihau were 30 men and 41 women (excluding children). With the 30 who had left, the total number of Ngāti Te Ata appears to have been about 100.

[341] These numbers differ from those that Ahipene Kaihau subsequently gave in evidence to the Compensation Court in May 1865, when he is reported to have said:[238]

> There were about 100 Ngatitiatas, including women and children, existing now, who did not join in the war. There were about 40 who joined in the war …

[342] It appears from this that in May 1865 the numbers of Ngāti Te Ata were about 140 (including children) and that around 40 of the adults had joined in the war, and thus engaged in rebellion.

[343] Fitzgerald J, "recognising that precision is no longer possible", found that approximately 30 to 40 members of Ngāti Te Ata had been engaged in conflict with

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[238] This was recorded in a report published in the *Daily Southern Cross* on 22 May 1865 about the Compensation Court hearing regarding Tuimata Block: "Compensation Court" *Daily Southern Cross* (Auckland, 22 May 1865). Tuimata was one of the eight blocks confiscated under the Order in Council of 29 December 1864, which also included the Waiuku North and South Blocks.

the Crown since 15 August 1863, "more likely tending towards the larger number".[239] We see no reason to differ from that conclusion.

[344] We therefore turn to consider whether 30 to 40 members out of approximately 100 (excluding children) constitutes a "considerable number". Ascertaining the meaning of "considerable number" requires us to consider these words in the statutory context. Once again, the New Zealand Settlements Act offers no definition or criteria which would point to a clear conclusion.

[345] We have already set out the Act's preamble at [317] above which identifies the problem the Act is directed to address. We reproduce a relevant extract:[240]

> … And Whereas a *large number of the Inhabitants of several districts* of the Colony have entered into combinations and taken up arms with the object of attempting the extermination or expulsion of the European settlers and are now engaged in open rebellion against Her Majesty's authority …

[346] The mention of "a large number of the Inhabitants of several districts" being in rebellion is the only attempt to quantify the numbers of those joining the rebellion in the Act. It is of note that the preamble refers to "a large number" and "Inhabitants" rather than language used in s 2 of "Tribe", "Section" and "considerable number".

[347] The words "Tribe" (iwi) and "Section" (hapū) both connote complete social groupings with governance structures and rohe. Professor Hirini Moko Mead (an acknowledged expert) discusses these groupings in his book *Tikanga Māori*:

(a) With respect to hapū, he wrote:[241]

> The primary thing to say about a hapū is that it consists generally of more than one whānau and the units within it are bound as before by strong kinship ties and by the whakapapa principle.
>
> …
>
> The hapū is the basic political unit … within Māori society. Traditionally it occupied an area of land, and controlled a number of resources … The leader of the hapū was the chief, its rangatira or

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239 Judgment under appeal, above n 1, at [252].

240 Emphasis added.

241 Hirini Moko Mead *Tikanga Māori* (revised ed, Huia Publishers, Wellington, 2016) at 227–229 (citations omitted).

> ariki (high chief). … The hapū was responsible for its own defence and could enter into alliances to protect its integrity, its resources and its people. …
>
> However it would be incorrect to assert that the hapū was like an independent nation and that it stood alone against all odds. This is not true. Hapū did not stand alone and could not survive on their own. … A hapū was definitely a part of a larger whole.

(b) With respect to iwi, he wrote:[242]

> The iwi is logically larger than a hapū, far more numerous, richer in resources and occupies a far larger area of land. …
>
> The iwi is the social group that claims an estate or rohe and defends it against all threats of attack from others. At the time of the signing of the Treaty of Waitangi the land was occupied by a number of iwi and their hapū …
>
> …
>
> During the years 1989 and 1990 the late Wishy Jaram, an officer of the Department of Māori Affairs, was seconded to the office in Wellington to prepare some background data for the Runanga Iwi Bill. He interviewed a number of people about what they considered were the essential characteristics of iwi. …
>
> The original essential characteristics are listed below:
>
> 1. Descent from (commonly acknowledged) tupuna.
> 2. Collective possession of demonstrable cultural and historical identity, based on a shared body of traditional lore. …
> 3. A developed political organisation with widely shared aspirations. …
> 4. A structure of hapū. …
> 5. A network of functioning marae. …
> 6. Belonging historically to a (clearly delineated rohe) takiwā.
> 7. Continuous existence traditionally and widely acknowledged by other iwi. …

[348] The use of the words "Tribe" (iwi) and "Section" (hapū) provide some guidance as to the meaning of the phrase "considerable number". We consider "considerable number thereof", in light of the above, is referring to a "considerable number" of members of the relevant political or social group, whether that be an iwi or hapū. Section 2 does not use the phrases "considerable number" simpliciter or

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242 At 232–233 and 239.

"considerable number of inhabitants of a district". It refers specifically to what we take to be iwi and hapū, which are social and political units.

[349] Accordingly, we do not accept Mr Harris's submission that a "considerable number thereof" must be determined by reference to the security risk posed. Rather, a "considerable number thereof" must be assessed in relation to the size of the iwi or hapū, as submitted by Mr Kinsler. However, we do not consider the Judge was correct to interpret the phrase as meaning simply something more significant than de minimis.[243] For the reasons we now give, we consider that "considerable number thereof" must mean a "significant number" of the members of the social/political unit (being an iwi or hapū)".

[350] First, it is necessary to refer to the legislative context. For ease of reference, we set out again s 2 of the Act:

> II. Whenever the Governor in Council shall be satisfied that any Native Tribe or Section of a Tribe or any considerable number thereof has since the first day of January 1863 been engaged in rebellion against Her Majesty's authority it shall be lawful for the Governor in Council to declare that the District within which any land being the property or in the possession of such Tribe or Section or considerable number thereof shall be situate shall be a District within the provisions of this Act and the boundaries of such District in like manner to define and vary as he shall think fit.

[351] In Mr Whitaker's explanatory memorandum, discussed above at [322], he refers to issues pertaining to the taking of land under the New Zealand Settlements Act:[244]

> It will be observed that the provisions of the Act may be made to include lands belonging to persons who have not justly forfeited their rights by rebellion. In order to carry out the scheme, this is absolutely necessary. The principal difficulty which would arise from the want of such a power would be in those cases in which *portions of a tribe have joined in the rebellion, leaving a few behind them, in some instances, with the avowed object of preserving the tribal land from forfeiture.* The New Zealand native tenure of land is for the most part, in fact with little or perhaps no exception, tribal; and if the principle were admitted that *the loyalty or neutrality of a few individuals would preserve the lands of the tribe*, the Act would for the most part be a dead letter, and that in districts in which it is most required, and in which its operation would be perfectly just.

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243 Judgment under appeal, above n 1, at [259].
244 Emphasis added.

[352] It can be inferred from this that the phrase "considerable number thereof" was directed to situations where "portions of a tribe" joined the rebellion and left "a few behind them" in an attempt to avoid their lands being confiscated. The Act would be a "dead letter" if the loyalty or neutrality "of a few … preserve[d] the lands of the tribe". In the case of Ngāti Te Ata, as discussed above, a significant majority stayed behind.

[353] Secondly, we turn to the analysis of the New Zealand Settlements Act in the dispatch of Mr Cardwell, the Secretary of State for the Colonies in the British Government, as he explained his decision not to exercise his power to recommend disallowance of the legislation:

> It is necessary to take into account the anomalous position which [Māori] occupy on the one hand as having acknowledged the Queen's sovereignty, and thus become liable to the obligations and entitled to the rights of British subjects, and on the other hand as having been allowed to retain their tribal organisation and native usages, and as thus occupying, in a great measure, the position of independent communities. … Remembering the difficulty of determining what is private and what public property among the Maoris, it seems to follow that in the interest of all parties the rights of the Maori insurgents must be dealt with by methods not described in any law book, but arising out of the exceptional circumstances of a most anomalous case.
>
> It is therefore doubly necessary that those who administer in the name of the Queen a Government of irresistible power should weigh dispassionately the claims which the insurgent Maoris have on our consideration. …
>
> I recognise the necessity of inflicting a salutary penalty upon the authors of a war which was commenced by a treacherous and sanguinary outrage, and attended by so many circumstances justly entailing upon the guilty portion of the Natives measures of condign punishment. But I hold, in the first place, that in the apportionment of this punishment those who have actively promoted or violently prosecuted this war should be carefully distinguished from those who, by circumstances, connection, or sense of honour, or other natural temptation, have been unwillingly drawn into it, and still more pointedly from those who have on the whole adhered to the British cause. Even in the case of the most culpable tribes the punishment should be such as to inflict present humiliation and inconvenience rather than a recurring sense of injury, and should leave them with a conviction that their punishment, if severe, has not exceeded the limits of justice, and also with the assurance that for the future they have nothing to fear, but everything to hope from the Colonial Government. With this view, the punishment, however exemplary, should be inflicted once for all, and those who may have suffered from it should be led to feel that they may engage in the pursuits of industry on the lands which remain to them with the same security from the disturbance which is enjoyed by their most favoured fellow-subjects. And I should hold it as a great misfortune if the punishment were so allotted as to destroy those

> germs of order and prosperity which have been so singularly developed in some of the Waikato tribes.
>
> …
>
> Considering that the defence of the Colony is at present effected by an Imperial force, I should perhaps have been justified in recommending the disallowance of an Act couched in such sweeping terms, capable therefore of great abuse, unless its practical operation were restrained by a strong and resolute hand, and calculated, if abused, to frustrate its own objects, and to prolong, instead of terminate war. …
>
> …
>
> It should be clearly understood that [Governor Grey's] concurrence in any forfeiture is not to be considered as a mere ministerial act, but that it will be withheld unless [he is] personally satisfied that the confiscation is just and moderate.
>
> …
>
> Turning to that part of the law which authorises the dispossession of persons who have not been involved in the recent rebellion, I have to observe, that although Her Majesty's Government admit with regret that the tribal nature of the native tenure will sometimes render it unavoidable that innocent people should be deprived of their lands, they consider that land should not be appropriated against the will of the owners merely because it is in the same district with rebel property, and may conveniently be used for purposes of settlement, but only in cases where loyal or neutral Natives are unfortunate enough to be joint owners with persons concerned in the rebellion, or because it is absolutely required for some purpose of defence or communication, or on some similar ground of necessity. But every such case of supposed necessity should be examined with the greatest care, and admitted with the greatest caution and reserve.

[354] Again, it is clear that it was anticipated that some Māori who were not in rebellion would have their lands confiscated. That possibility must underlie the provisions in s 5 of the New Zealand Settlements Act, which contemplates compensation for persons whose land has been confiscated when they had not joined the rebellion. What is significant is that Mr Cardwell noted he had considered recommending disallowance, but had not done so on the basis that it "should be clearly understood" that Governor Grey had to be personally satisfied that any confiscation was "just and moderate". The apportionment of punishment should not exceed "the limits of justice"—those who actively promoted and participated in war were to be carefully distinguished from those who were unwillingly drawn into it, and even more so from those who have "on the whole adhered to the British cause". It cannot be concluded that Mr Cardwell was referring to Ngāti Te Ata, but that comment—and

also his observation that he would consider it a "great misfortune" if any punishment "destroy[ed] those germs of order and prosperity" which had developed in some "Waikato tribes"—can aptly be applied to them.

[355] These comments of Mr Cardwell made on behalf of the imperial government support an interpretation of "considerable number" which is measured ("just and moderate") and does not unnecessarily deprive "loyal Natives" of their lands. Mr Cardwell of course was not speaking in the New Zealand Parliament, but we are inclined to take his stated reasons for not recommending disallowance of the legislation as likely to reflect the intended application of the Act, especially given the content of Mr Whitaker's memorandum sent to London with Governor Grey's dispatch.

[356] Finally, we consider the parliamentary debate which preceded the enactment of the New Zealand Settlements Act. At the second reading of the New Zealand Settlements Bill, the Hon James FitzGerald objected on the basis that:[245]

> … above all things it is necessary, as a matter of the highest policy, that, whatever else we do, we should be careful to draw a clear and distinct difference between friend and foe, between those who have done right and those who have done wrong. That, with me, would be the touchstone of any policy which might be proposed at present. A large portion of the Natives are not now in a state of hostility to the Government. Nay, at an earlier period I am certain it would have been possible to have separated a considerable number of the Waikato tribes from the influence of the Ngatimaniapoto; and even now the most important thing to be done is to try to widen the breach as far as you possibly can between the friendly and the hostile Natives; above all things, to take care that you do not include all in one common category.

[357] To this the Hon William Fox responded:[246]

> [To establish settlements] the Government looks to the lands of those tribes who have been in rebellion. There is no injustice in taking the lands of such tribes …
>
> …
>
> He should himself, he confessed, have preferred if this Bill could have been so framed as to meet the objection that had been taken—*that it drew no line between the offending and non-offending Natives*; but if the honourable member had considered he would have seen that there was an extreme

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245 (5 November 1863) D NZPD 789.
246 At 783 and 790 (emphasis added).

> difficulty, in legislating antecedently on such a subject as this, in drawing such a distinction. *If in a large block of territory there should happen to be particular portions of land belonging to Natives that had not been in a state of rebellion, how could they leave those pieces out? The thing was impossible*. They must take both one and the other, but with this distinction: that they compensated the loyal owners, but refused to compensate the disloyal ones. This was really the only important point in which the honourable member in any way impugned the principle of the Bill; and, if he could suggest to the Government how they could amend the Bill on that point without destroying its practical utility, he would be prepared to modify the measure to that extent; but at present he did not see how it could be done.

[358] These passages from Hansard are of some significance. First, they show that there was a view that the Confiscation did not create "injustice" where the land taken was that of "rebels". Secondly, both Messrs FitzGerald and Fox agreed that it would have been preferable if the Bill could distinguish between those in rebellion and those not, but it did not do so other than through the compensation provisions of s 5. Mr Fox identified that the reason a line between "offending and non-offending Natives" could not be drawn was that it would be "impossible" in the event there was a "large block of territory" belonging largely to Māori who had been in rebellion which included "particular portions" owned by Māori who had not.[247]

[359] This case is of course not in that category. But there was the same difficulty in distinguishing between the land of those considered to be in rebellion and those not. The legislation had not, in Mr Fox's language, been so framed, as to draw a line between those offending and the non-offending. The policy of confiscation could not be implemented by "legislating antecedently" to avoid the problem.[248]

[360] In light of the foregoing discussion, we consider that a "considerable number thereof", with reference to an iwi or hapū must connote a significant proportion of the relevant iwi or hapū. We do not think it can be right to conclude the statute would treat any number which was simply "more than de minimis" as sufficient to allow for confiscation. However, the evidence about the numbers of Ngāti Te Ata who joined the rebellion was such as could reasonably justify a conclusion by the Governor in Council that a considerable number of the iwi had done so. We add that we see nothing in the history of the legislation which adds weight to Mr Harris's proposition that the

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247 At 790.
248 At 790.

"considerable number" question was to be assessed on the basis of the security risk posed by the numbers involved. For the reasons we have given, we do not consider the Judge erred in finding that a "considerable number" of Ngāti Te Ata were in rebellion. It follows that it was not unlawful for the Governor to declare the land of Ngāti Te Ata a "District within the provisions of [the] Act" under s 2 of the New Zealand Settlements Act.

[361] We turn next to Mr Harris's further point based on the fact that the Governor's declaration made in the 29 December 1864 Order in Council did not employ the words "a considerable number" but proceeded on the basis that Ngāti Te Ata, as an iwi, were in rebellion. The Order in Council contained two recitals. The first summarised the provisions of the New Zealand Settlements Act empowering the Governor in Council to declare land to be a district within the provisions of the Act if "satisfied that any Native Tribe or Section of a Tribe or any considerable number thereof" had been engaged in rebellion.

[362] The second recital read:

> And whereas the Governor in Council is satisfied that certain Native Tribes or Sections of Tribes having respectively as their property or in their possession the lands hereunder described have been engaged in rebellion against Her Majesty's Authority.

[363] Then followed the declaration that "the land described in each of the eight schedules to this Proclamation shall be a District within the Provisions of the 'New Zealand Settlements Act 1863'". Included in the schedules were the Waiuku North and South Blocks. Mr Harris focusses on the failure of the second recital in the Order in Council to mention the term "considerable number thereof" which is the basis of the Crown's present justification of the making of the Order.

[364] We are unpersuaded by Mr Harris's argument. The evidence shows that there was an ongoing discussion between Governor Grey and his ministers in 1864. The Governor resisted attempts by the ministers to declare far more extensive areas to be districts under the New Zealand Settlements Act than he was prepared to proclaim. After discussing the evidence, the Judge found that prior to signing the 29 December 1864 Order in Council, the Governor was aware of the rigour he was expected to bring

to his task under the New Zealand Settlements Act.[249] It also showed he was personally aware of matters such as which iwi, or parts thereof, had gone into rebellion and demonstrated that he would not sign proposed Orders in Council under the Act unless he was personally satisfied of the matters of which he was required to be satisfied under s 2 of the Act.[250] It can be inferred that Governor Grey would also be aware of the contents of the letter dated 15 August 1863 sent to him by Ahipene Kaihau and Hori Tauroa regarding the numbers of Ngāti Te Ata who had joined the rebellion.

[365] It is also relevant in this context to note that the series of steps taken in relation to the Waiuku Deed—including the surveying of the land, negotiation of terms, the consideration paid, and the Crown grants that followed—are all totally inconsistent with the idea that the Governor would have made the Order in Council on the basis that Ngāti Te Ata as a whole were in rebellion. We think the argument now made turns on what was simply a drafting omission in the terms of the Order. It is possible that might have been prompted by a conflation of the idea of "sections" of a tribe with a "considerable number" of a tribe, but that is speculative.

[366] In all the circumstances it is not appropriate to infer that Governor Grey proceeded on the basis that Ngāti Te Ata as a whole were in rebellion. We consider that is most unlikely. To the extent that the omission to refer to "a considerable number thereof" is of any moment we are satisfied that such an omission would have fallen within s 6 of the New Zealand Settlements Acts Amendment Act. As to Mr Harris's further argument that the Confiscation was unlawful because the declaration related to the entire district determined under s 2 without first ascertaining that the land was suitable for settlement, we do not consider that we are in a position to embark on what would necessarily be a factual inquiry obscured by the passage of time and the absence of any relevant witnesses as to what occurred.

[367] An argument advanced and rejected in the High Court was that the Confiscation fell outside the purpose of the New Zealand Settlements Act, being for the collateral purpose of acquiring land generally. In the course of dealing with that

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249 Judgment under appeal, above n 1, at [278(a)].
250 At [278(b) and (c)].

issue, the Judge noted that some of the confiscated land was later the subject of Crown grants to European purchasers.[251]

[368] But the present argument is different. There is some evidence that the Crown thought the land would be suitable for settlement because of the steps taken to survey and subdivide the area. Beyond that it is not possible to advance the issue on appeal because of the sparse state of the evidence. In the circumstances we are not prepared to hold that the Confiscation was unlawful for the reason now advanced.

[369] That leaves for consideration the effect of the New Zealand Settlements Acts Amendment Act.

The effect of the New Zealand Settlements Acts Amendment Act 1866

[370] Section 6 of the New Zealand Settlements Acts Amendment Act read as follows:[252]

> VI. All orders proclamations and regulations and all grants awards and other proceedings of the Governor or of any Court of Compensation or any Judge thereof heretofore made done or taken *under authority of the said Acts* or either of them are hereby declared to have been and to be absolutely valid and none of them shall be called in question by reason of any omission or defect of or in any of the forms or things provided in the said Acts or either of them.

[371] It is, of course, open to Parliament to legitimise past actions done without statutory authority. Argument before us was about whether the effect of the New Zealand Settlements Acts Amendment Act was directed to validating omissions or defects in form, or whether it was intended to embrace all forms of invalidity. The Crown sought to rely on a more extensive interpretation than is now necessary having regard to the conclusion we have already expressed.

[372] The only issue that might be thought to require reliance on the New Zealand Settlements Acts Amendment Act is the omission of the words "considerable number thereof" from the Order in Council. To the extent it might be necessary, we consider

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251 At [116] and [281]–[286].
252 Emphasis added.

that s 6 would validate the Order in Council and save it from any consequences of the omission.

[373] For the reasons we have given, we reject the arguments directed against the lawfulness of the Confiscation.

Did the Waiuku Deed and/or Confiscation breach a fiduciary duty to consider and protect the interests of Ngāti Te Ata?

[374] It is next necessary to refer to Mr Minhinnick's argument that the Crown's acquisition of land under the Waiuku Deed and/or the Confiscation breached a fiduciary duty of the Crown to consider and protect the interests of Ngāti Te Ata. The appellant relies on breach of fiduciary duty in relation to both this issue, and in relation to the takings that subsequently occurred under the Public Works Act and setting the land apart under the Iron and Steel Industry Act. We deal separately with the latter arguments after we have described the factual circumstances relied on in that part of the case.

[375] The claims rely on a "sui generis" duty, in that the source of the duty and the justification for the intervention of equity to enforce it, are said to be obligations peculiar to the Crown. The argument is founded on the obligations that good conscience requires of the Crown in its dealings with Māori. Insofar as the Waiuku Deed and the Confiscation are concerned, the claim advanced in this Court is that in confiscating whole districts under s 2 of the New Zealand Settlements Act, the Crown assumed a responsibility to protect the interests of loyal Māori to ensure they were not disadvantaged. That duty was breached by the Crown by unconscionable pressure leading to the unfair bargain represented by the sale, and by the mechanism of Crown grants made to those who had signed the Waiuku Deed. These failed to protect native property interests that were not susceptible to "crude division" according to notional individual interests and was destructive of the society of Ngāti Te Ata.

Judgment under appeal

[376] The Judge concluded it was inappropriate to extend existing legal principles to accommodate the novel fiduciary duty claimed in this case.[253]

[377] She noted that the fiduciary duty as pleaded was broad, but that in opening and closing submissions, trial counsel had focussed mainly on the Crown's right of pre-emption in s 73 of the New Zealand Constitution Act as the "anchor point" for the duty.[254] Under s 73, no person other than the Crown could purchase land from Māori. The argument that s 73 "necessarily" gave rise to a fiduciary duty relied on the decision of the Supreme Court of Canada in *Guerin* and the approach adopted by Elias CJ in *Proprietors of Wakatū*.[255]

[378] The Judge engaged in a comprehensive review of relevant authorities, including *Guerin*, *New Zealand Maori Council v Attorney-General* (the *Lands* case), *Paki (No 2)* and *Proprietors of Wakatū*, and the role played in New Zealand by the Treaty of Waitangi.[256] She concluded that while there were a number of obiter statements in the authorities to the effect that a fiduciary duty *might* arise from the matters relied on by Mr Minhinnick, no New Zealand court had found there was an enforceable fiduciary duty arising solely from the Treaty relationship, the nature of customary interests and/or the Crown's right of pre-emption.[257]

[379] The Judge considered that in *Proprietors of Wakatū*, the fiduciary duty articulated by the majority arose from the particular circumstances and relationship that existed in that case: the Crown's specific assumption of responsibility in relation to land to be held by it and used for the benefit of the original Māori proprietors.[258] In the present case, and by contrast, in exercising the right of pre-emption and negotiating land purchases from Māori proprietors, the Crown was not obliged to put aside its own

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253 Judgment under appeal, above n 1, at [372].
254 At [298] and n 147.
255 *Guerin*, above n 145; and *Proprietors of Wakatū* (SC), above n 49.
256 Judgment under appeal, above n 1, at [304]–[370], citing *Guerin*, above n 145; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands* case]; *Proprietors of Wakatū* (SC), above n 49; and *Paki (No 2)*, above n 54.
257 Judgment under appeal, above n 1, at [374].
258 At [375].

and other competing interests, and act solely on behalf of and for the benefit of the vendors.[259]

[380] As to the Canadian jurisprudence,[260] the Judge considered that the primary context in which the Canadian courts had found the Crown owed fiduciary duties was where it had assumed a responsibility to specific First Nations people (referred to as "Indian bands") to administer customary property on behalf or for the benefit of that band, or to act as an intermediary or agent in relation to dealings with third parties affecting such property.[261] The Judge also noted that such duties existed in the specific statutory framework existing in Canada.[262] In the absence of anything more, the right of pre-emption provided for in art 2 of the Treaty of Waitangi, confirmed in the Land Claims Ordinance of 1841,[263] and reflected in s 73 of the New Zealand Constitution Act, could not give rise to a fiduciary duty.[264]

[381] Finally, she referred to the statutory scheme established by the Treaty of Waitangi Act 1975 and the jurisdiction and processes of the Waitangi Tribunal. The Waitangi Tribunal offered a much more flexible and effective process, which was often better suited to the analysis of historical claims than formal court proceedings. She observed that the Waitangi Tribunal is well placed to fashion "appropriate remedies for the modern age", and is unencumbered by limitation-related difficulties.[265]

Appellant's submissions

[382] Mr Harris submitted the fiduciary duty of the Crown had its origin in the special relationship established between the Crown and Māori by the Treaty of Waitangi. He referred to the instructions of Lord Normanby, set out above at [126], which directed the Crown not to enter into exploitative purchase agreements with Māori and to act in good faith towards them. Those instructions, Mr Harris

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259 At [377], affirming *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 [*Proprietors of Wakatū* (HC)].
260 *Guerin*, above n 145; and *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245.
261 Judgment under appeal, above n 1, at [379].
262 At [379].
263 Lands Claims Ordinance 1841 4 Vict 2.
264 Judgment under appeal, above n 1, at [381].
265 At [384]–[387], citing *Paki (No 2)*, above n 54, at [194] per McGrath J.

submitted, invoked equitable language and required the Crown to trade with Māori on terms that expressly took into account their interests in land. Further, the right of pre-emption enacted in s 73 of the New Zealand Constitution Act made it unlawful for any person other than the Crown to acquire any interest in land from Māori. He referred also to the Native Lands Frauds Prevention Act 1881 which provided that alienations of Native land or transactions relating to Māori were invalid if contrary to equity and good conscience.[266]

[383] Mr Harris relied on the observations of Cooke P in the *Lands* case that the Crown was required to act with the utmost good faith towards Māori, that being the characteristic obligation of partnership.[267] Further, Cooke P considered that the relationship between the Treaty partners "creates responsibilities analogous to fiduciary duties".[268] Mr Harris noted that in their separate judgments in the same case, both Richardson and Casey JJ also invoked the language of equity.[269]

[384] Next, Mr Harris referred us to Cooke P's elaboration of principles in *Te Runanga o Muriwhenua Inc v Attorney-General*:[270]

> More recently in Canada Indian rights have been identified as pre-existing legal rights not created by Royal proclamation, statute or executive order. It has been recognised that, in some circumstances at least, the Crown is under a fiduciary duty to holders of such rights in dealings relating to their extinction. The judgments in *Guerin*, cited earlier, delivered by Dickson J and Wilson J seem likely to be found of major guidance when such matters come finally to be decided in New Zealand. The approach of this Court in the *Maori Council* case to the principles of the Treaty of Waitangi and the partnership and fiduciary analogies there drawn are consistent with them. Her Majesty the Queen's Waitangi Day speech gives the ideal a scope much wider than legal proceedings. There are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these. Moreover, in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America.

[385] Mr Harris then referred us to Elias CJ's judgment in *Paki (No 2)*. She was "not convinced it [was] inappropriate to apply principles developed in connection with

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266 See Native Lands Frauds Prevention Act 1881, s 5(1).
267 *Lands* case, above n 256, at 664 per Cooke P.
268 At 664 per Cooke P.
269 At 683 per Richardson J and 704 per Casey J.
270 *Te Runanga o Muriwhenua Inc*, above n 205, at 655.

duties of a fiduciary nature recognised in equity".[271] She noted that the "principles on which courts intervene in cases of undue influence, unconscionability, and breach of fiduciary duty overlap" and were "not closed categories".[272]

[386] Elias CJ gave this summary of the statements of Cooke P in a number of cases:[273]

> [152] In particular, duties may arise in relation to Maori in New Zealand because of the obligations taken on by the Crown in the Treaty of Waitangi in the exchange of sovereignty for the protection of property. As Cooke P suggested in *Te Runanga o Muriwhenua Inc v Attorney-General* the idea that the Crown in New Zealand has lesser obligations to its indigenous people than are owed to the indigenous peoples of other jurisdictions, is unattractive.[274] It is difficult to reconcile with the terms of the Treaty of Waitangi. Cooke P said of the Treaty that it created "an enduring relationship of a fiduciary nature" in which each party accepted a "positive duty to act in good faith, fairly, reasonably and honourably towards the other".[275] Extinguishment of Maori property rights by "less than fair conduct or on less than fair terms" was, he thought:[276]
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> > … likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.

[387] Elias CJ expressed the view that a fiduciary duty—in the sense it has been recognised in respect of indigenous people in New Zealand and Canada—does not depend on the existence of a relationship characterised by loyalty.[277] She went on to say that, aside from the general obligations owed by the Crown, a duty may arise "in the particular context" of the Crown's dealings with Māori.[278]

[388] Mr Harris submitted that the existence of any fiduciary duty may draw support from the Treaty of Waitangi, but that did not mean the Treaty of Waitangi was being directly enforced. Rather, the duty arises independently by virtue of the relationship between a sovereign authority and a pre-existing indigenous population. He relied on Elias CJ's observations that:[279]

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271 *Paki (No 2)*, above n 54, at [150] per Elias CJ.
272 At [151] per Elias CJ.
273 Footnotes in original.
274 *Te Runanga o Muriwhenua Inc*, above n 205, at 655.
275 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.
276 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.
277 *Paki (No 2)*, above n 54, at [155] per Elias CJ.
278 At [159] per Elias CJ.
279 At [155] per Elias CJ (footnotes omitted).

> [155] Whether it matters greatly whether duties of good faith and fair dealing a court of equity will recognise in cases where the conscience of the court requires it are rightly described as "fiduciary" is a matter for consideration in a case where such claims arise for determination. The language of "fiduciary" obligations is now familiar in connection with the dealings between the sovereign and indigenous peoples, including in decisions of the courts in New Zealand. Although a usual characteristic of a fiduciary is loyalty, a fiduciary duty in the sense in which it has been recognised in respect of indigenous people in New Zealand and in Canada does not seem to depend on a relationship characterised by loyalty. It follows that, without further development in a case in which the point arises, it remains an open question whether the principles of equity relied on by the appellants are "a function of the duty of loyalty owed by fiduciaries" …

[389] Mr Harris also noted that in *Paki (No 2)*, McGrath J accepted that the recognition of a sui generis fiduciary duty between the Crown and Māori may be appropriate.[280] William Young J was the only member of the Court who considered that the duty of loyalty could not apply, as in acquiring the land, the Crown was acting on behalf of the public not the vendors.[281]

[390] In *Guerin*, the Supreme Court of Canada held the Crown was under an equitable obligation, deriving from the language of s 18 of the Indian Act, to deal with reserve lands held by it for the benefit of Indian Bands.[282] In *Proprietors of Wakatū*, the Crown had assumed a responsibility to deal with land for the benefit of Māori.[283] In *Guerin* and *Proprietors of Wakatū*, the Crown was held to be subject to enforceable fiduciary obligations because it had expressly assumed a responsibility to act in the interests respectively of First Nations people and Māori. The sources of the assumption of responsibility were respectively statute and the terms of purchase. Mr Harris submitted that the duty of loyalty was engaged as that was the fiduciary characteristic necessary to uphold the assumptions of responsibility in those cases.

[391] In the circumstances of this case, Mr Harris submitted, the Crown had assumed a responsibility to consider and protect the interests of Ngāti Te Ata when dealing with the land at Maioro. The formulation of this duty was intended to capture the notion in

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280 At [186] per McGrath J.
281 At [281] per William Young J.
282 *Guerin*, above n 145, at 376 per Dickson, Beetz, Chouinard and Lamer JJ.
283 *Proprietors of Wakatū* (SC), above n 49, at [388] per Elias CJ, [588]–[590] per Glazebrook J and [779]–[782] per Arnold and O'Regan JJ.

Lord Normanby's instructions that the Crown was not to accept improvident transactions.

[392] Mr Harris submitted that the Crown's assumption of responsibility arose from the following facts and circumstances:

(a) the obligation stemming from the Treaty of Waitangi to act with the utmost good faith in the Crown's dealings with Māori;[284]

(b) the impact on Ngāti Te Ata of the Waiuku Deed and Confiscation, through which they lost much of their land and customary communal ownership was broken and replaced with Crown grants;

(c) the recognition of successors to grantees required applications to the Māori Land Court, a process that was inconvenient and time-consuming, a factor that motivated the Crown to proceed under statutory powers rather than by negotiations; and

(d) the restraints on the alienation of land (first under the right of pre-emption and later under the terms of the Crown grants), in recognition of vulnerability and a need for Crown protection, both of which have parallels in *Guerin* and *Proprietors of Wakatū*.[285]

[393] In sum, Ngāti Te Ata lacked effective means of looking after their own interests (as a result of actions of the Crown). Mr Harris submitted the circumstances called for the application of a sui generis fiduciary duty, requiring the Crown to take the interests of Ngāti Te Ata into consideration, and give them reasonable weight, before taking the land. Fiduciary law is capable of the flexibility that the application of the duty claimed here requires—as is typical, the duty must be tailored to reflect the nature of the relationship. Recognition of a fiduciary duty does not cut across the jurisdiction of the Waitangi Tribunal, as Māori are entitled to access the courts for determinations of their legal rights.

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284 See *Lands* case, above n 256.

285 Several other facts and circumstances also serve to compound those listed, but they relate to the Public Works Act takings, so we do not discuss them here.

[394] The New Zealand Settlements Act empowered the Governor to confiscate the land of "loyalists" as well as those "in rebellion" in furtherance of the policy of ensuring security through settlements. In confiscating the whole district under s 2 of the New Zealand Settlements Act, the Crown assumed an equitable responsibility to protect the interests of loyalists. It then breached the duty by the unconscionable pressure and unfair bargain of the Waiuku Deed, and the mechanism of Crown grants.

Crown submissions

Existence of duty

[395] Ms Sinclair, who made the Crown's submissions on this part of the case, submitted that the Crown did not owe Ngāti Te Ata a fiduciary duty or any other duty based in equity. The alleged duty, as acknowledged by the appellant, would go further than those recognised in *Guerin* and *Proprietors of Wakatū*.

[396] First, Ms Sinclair addressed the issue of assumption of responsibility in relation to the Waiuku Deed and Confiscation. Secondly, she turned to the content of the duty itself, specifically the importance of loyalty and the unworkability of the claimed duty. Thirdly, she submitted that the interests of justice did not require an expansion of the principles of fiduciary duty.

[397] Ms Sinclair submitted that the Court should decline to recognise a novel fiduciary duty in the circumstances of this case, arguing that there is no valid basis for finding there was an assumption of responsibility, the duty contended for is unworkable and cuts across longstanding principles of fiduciary law.

[398] Ms Sinclair submitted that, as yet, the Crown has only been held to owe a fiduciary duty where there have been express undertakings or assumptions of fiduciary responsibility. In both *Guerin* and *Proprietors of Wakatū* the fiduciary duty arose from an express assumption of responsibility, although in *Proprietors of Wakatū* this was through a transaction as opposed to a statute. Ms Sinclair contended that the following

paragraph in the judgment of Elias CJ captured the "crux" of the reasoning on assumption of responsibility in *Proprietors of Wakatū*:[286]

> The Crown's acceptance of the alienation to it on the terms of the 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. In addition, and as Toohey J [in *Mabo v State of Queensland (No 2*)] thought provided further basis for equitable obligations, the Crown's dealings in managing the tenths reserves constituted it as a fiduciary.

[399] Although Elias CJ stated that the Treaty of Waitangi can amplify obligations of the Crown, she had also expressly disclaimed a stand-alone fiduciary duty arising from the Treaty of Waitangi.[287]

[400] In sum, Ms Sinclair submitted that the Crown has only been held to owe fiduciary duties in narrow circumstances where it has expressly assumed responsibility to act in the interests of Māori (in New Zealand) or First Nations people (in Canada). In this respect, the duty contended for would be a significant development of the law. Ms Sinclair submitted Governor Grey's notice issued on 15 July 1863 that those who supported the Crown would be protected in their lands, person and property, was couched in general terms and directed towards a much broader audience than the specific vendors relevant to this case. Lord Normanby's instructions were also general and did not relate to particular transactions or exercises of power. In any event, obligations to act in good faith are not exclusive to fiduciaries. The dicta cited by the appellant stops short of recognising a general fiduciary duty arising from the Treaty of Waitangi.[288]

[401] Secondly, Ms Sinclair submitted that the duty contended for is unworkable and not truly fiduciary in nature. There would be no meaningful yardstick against which to assess any alleged breach. In the absence of the core characteristic of loyalty, it was hard to see how the duty could be fiduciary in nature. Loyalty is the defining

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286 *Proprietors of Wakatū* (SC), above n 49, at [366] (footnotes omitted), referring to *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

287 *Proprietors of Wakatū* (SC), above n 49, at [385] and [391].

288 See *Paki (No 2)*, above n 54, at [186] per McGrath J.

characteristic of a fiduciary.[289] In *Proprietors of Wakatū*, there "were no competing interests to be considered … by the Crown."[290]

[402] Ms Sinclair submitted that the decision of the Supreme Court of Canada in *Wewaykum Indian Band v Canada* spells out clearly that, where the Crown is a fiduciary, its obligations remain obligations grounded in loyalty, even if tempered by the Crown's unique constitutional role.[291] The tempered duty of loyalty in that case arose from statute which expressly imposed the obligations.

[403] The duty contended for by the appellant, to "consider and protect", is unorthodox and different to what is classically understood to be a fiduciary duty. Fiduciary duties are proscriptive and onerous, and ought to provide fiduciaries with sufficient certainty to know what they can and cannot do. A duty in the terms suggested by the appellant is too vague to constitute a fiduciary duty—it is unclear what the Crown would have to do to discharge such a duty.

[404] The prescriptive duty to protect and preserve in the Canadian authorities arose by virtue of the greater level of control the Crown assumed over land following the creation of reserves. This context differs from those circumstances, where the Crown acquired the land outright, assumed no fiduciary responsibility through contract or statute, and subsequently acted in a distinctly public capacity. Further complicating matters are the effluxion of time and the fact that so much of the historical record relating to the decision-making process is no longer available.

[405] Thirdly, the expansion of fiduciary law to meet the circumstances of this case is unnecessary; the Waitangi Tribunal is a forum designed to address these types of issues. Straining the principles of equity would have consequences beyond this case—it would risk diverting the courts to the sorts of grievances the Tribunal was established to resolve.

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289 *Bristol and West Building Society v Mathew* [1997] 2 WLR 436 (CA) at 449 per Lord Millett.
290 *Proprietors of Wakatū* (SC), above n 49, at [389].
291 *Wewaykum Indian Band v Canada*, above n 260, at 289.

Application of duty

[406] On the issue of assumption of responsibility, counsel submitted that there was no assumption sufficient to establish the Crown as a fiduciary. The obligation allegedly stemming from the Treaty of Waitangi engages the principle that Treaty principles are not directly enforceable in New Zealand courts; it has never been held that the Treaty of Waitangi gives rise to a private fiduciary obligation. In accordance with this Court's decision in *Paki (No 2)*, this would require the Crown to act with "real selflessness vis-à-vis a disadvantaged party", which would wrongly treat the Crown as superior and Māori as inferior.[292] A patronising implication underlies the appellant's arguments that the Waiuku vendors were incapable of deciding where their own best interests lay.

[407] Further, the argument requires inferences about the Waiuku vendors which are not supported by the evidence. There is no evidential basis for the assertion that the acquisition of Maioro was "destructive of the society of Ngāti Te Ata".

[408] The Waiuku Deed and Confiscation left no room for a residual fiduciary duty. The Waiuku Deed did not create a relationship between parties beyond vendor and purchaser. Similarly, the Order in Council declaring the Waiuku North and South Blocks confiscated did not represent, assume or indicate that it had any purpose other than confiscation.

[409] Ms Sinclair submitted that even if the duty were found to exist, there is nothing to suggest the transaction was unconscionable. A true breach of a fiduciary duty requires an element of infidelity or disloyalty, normally requiring assessment of the motivations and states of mind of relevant actors. This cannot be undertaken 160 years after the fact.

Our view

[410] The fiduciary duty advanced by Mr Harris rests principally on the observations of Cooke P and Elias CJ in the cases to which he referred in the argument summarised

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[292] *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [103].

above, as well as the duty recognised by the Supreme Court in *Proprietors of Wakatū* and the Canadian Supreme Court in *Guerin*.[293]

[411] In *Paki (No 2)*, the Supreme Court had to consider whether land adjacent to the Waikato River, which became vested in or transferred to the Crown at various dates between 1887 and 1899, included the riverbed adjacent to the land acquired by operation of the English common law rule that a conveyance of riparian land is presumed also to transfer title to the adjacent riverbed up to its midpoint. The appellants claimed, on behalf of descendants of a number of hapū who were awarded interests in the relevant land in the late 19th century, that the common law presumption would not have been understood by the Māori vendors and was not explained to them. They asserted that, in taking advantage of the common law presumption, the Crown had breached fiduciary or equitable duties of disclosure and fair dealing to the Māori vendors.[294] It was said that the owners would not have agreed to transfer the riverbed land with the riparian lands because the Waikato River was essential to their identity and was an important tribal property valued for its spiritual qualities, in addition to being a source of food. Accordingly, the appellants sought a declaration that the Crown held the relevant stretches of riverbed as a constructive trustee for the descendants of the original owners.[295]

[412] The Supreme Court held that it could not decide the case on the basis that the riparian owners owned the riverbed to the midpoint; it had not been shown on the facts that the presumption of ownership to the midpoint applied to the land and ownership could not be inferred by the Court.[296] In the end, Elias CJ, McGrath and Glazebrook JJ all held that the question of whether the Crown owed fiduciary duties to Māori vendors of land was better left for a case in which it squarely arose.[297] Of relevance for present purposes, however, are the observations of Elias CJ, McGrath and William Young JJ in response to the claim that the Crown owes general duties of a fiduciary nature to Māori, both by reason of the Treaty of Waitangi and because of

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293 *Proprietors of Wakatū* (SC), above n 49; and *Guerin*, above n 145.
294 *Paki (No 2)*, above n 54, at [170]–[171] per McGrath J.
295 At [3] and [50] per Elias CJ.
296 At [25]–[26], [65]–[66] and [142]–[145] per Elias CJ; [179]–[181] per McGrath J; [243]–[244] and [251]–[253] per William Young J; and [319]–[321] per Glazebrook J.
297 At [29]–[31] per Elias CJ, [182] per McGrath J and [322] per Glazebrook J.

the relationship between the sovereign authority and a pre-existing indigenous population.

[413] The Chief Justice observed that duties might arise in relation to Māori in New Zealand "because of the obligations taken on by the Crown in the Treaty of Waitangi in the exchange of sovereignty for the protection of property".[298] She then referred to the statement of Cooke P in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, that the Treaty of Waitangi created "an enduring relationship of a fiduciary nature" in which each party accepted a "positive duty to act in good faith, fairly, reasonably and honourably towards the other".[299] And, quoting further dicta of Cooke P, the extinguishment of Māori property rights "by less than fair conduct or on less than fair terms" was "likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power".[300]

[414] The Chief Justice thought that it was "well arguable" that in the late 19th century the Māori landowners were unlikely to have known of the application of the common law mid-point presumption.[301] And the relevant context was likely to include the recognition of Māori property according to their own custom, both at common law and under the Treaty guarantee, and the fact that, at the relevant times, the Crown had a monopsony on purchases of land from the Māori vendors.[302]

[415] The Chief Justice accepted that where duties arise out of the relationship between the Crown and indigenous populations, they can readily be seen to be in a category of their own, but was "not convinced it is inappropriate to apply principles developed in connection with duties of a fiduciary nature recognised in equity".[303] She observed further that the principles on which courts intervene in cases of undue influence, unconscionability, and breach of fiduciary duty overlap, and are not closed. She added:[304]

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298 At [152] per Elias CJ.
299 At [152] per Elias CJ, quoting *Te Runanga o Wharekauri Rekohu Inc*, above n 275, at 304.
300 *Paki (No 2)*, above n 54, at [152] per Elias CJ, quoting *Te Runanganui o Te Ika Whenua Inc Society*, above n 276, at 24.
301 *Paki (No 2)*, above n 54, at [159] per Elias CJ.
302 At [160] per Elias CJ.
303 At [150] per Elias CJ.
304 At [151] per Elias CJ.

> It is not inconceivable that circumstances from which a presumption of undue influence may be inferred (shifting the onus of proof) may arise in cases of land transactions between the sovereign power and indigenous peoples.

[416] In sum, the Chief Justice did not consider that it could be accepted without closer inquiry in a case where the question arose unmistakably that a claim for breach of fiduciary duty could not be maintained against the Crown.[305]

[417] While noting that it was not necessary to resolve the issue of whether the Crown owed a fiduciary duty to Māori in the circumstances of the case, McGrath J thought it was appropriate to identify considerations which would be relevant to the courts' approach if and when the issue needed to be decided.[306]

[418] The first such consideration was the characterisation of the Treaty of Waitangi by the Court of Appeal in the *Lands* case. After quoting the similar language employed in the separate reasons of all five members of the Court who decided the *Lands* case,[307] McGrath J quoted Cooke P's later summary in *Te Runanga o Wharekauri Rekohu* of what the Judges had collectively decided in the *Lands* case:[308]

> … the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

[419] McGrath J pointed out that this Court's descriptions of the Treaty relationship in the *Lands* case arose from the need to identify the principles of the Treaty of Waitangi in order to apply s 9 of the State-Owned Enterprises Act 1986. The section required assessment of whether intended actions by the Crown would be inconsistent with the "principles of the Treaty of Waitangi". He noted that, in identifying the principles, the Court was not concerned with the enforceability of the Treaty, nor with the obligation of good faith identified, except for the purpose of applying the statute. That context was relevant "in considering the significance of the [*Lands* case] and its

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305 At [162] per Elias CJ.

306 At [182] per McGrath J.

307 At [183] per McGrath J, citing *Lands* case, above n 256, at 664 and 667 per Cooke P, 680–681 per Richardson J, 693 per Somers J, 703 per Casey J and 715 per Bisson J.

308 *Paki (No 2)*, above n 54, at [184], quoting *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, above n 275, at 304.

references to fiduciary duties to the broader question of whether the Crown has enforceable fiduciary obligations to Maori".[309]

[420] The next relevant consideration was that the unique nature of the relationship between the Crown and Māori might mean that it is:[310]

> … appropriate to recognise the existence of a sui generis fiduciary duty even though the application of general equitable principles developed in relation to private commercial transactions or relationships may not give rise to such a duty.

However, recognition of such a duty would not mean that the Treaty of Waitangi was being directly enforced in the domestic courts. Rather, a sui generis fiduciary duty would arise between the Crown and certain Māori, in the circumstances of particular situations, and against the background of the Treaty relationship.[311]

[421] The third matter which McGrath J considered should be taken into account was what he described as "the limit on the constitutional capacity of courts to develop the common law in fields that have been addressed by the legislature".[312] After noting that the role of the Supreme Court includes developing the common law of New Zealand, he referred to one of the purposes of the Supreme Court Act 2003 as being "to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions".[313] He continued:[314]

> [190] It is Parliament, however, that has full power to make laws under our constitutional arrangements.[315] The Supreme Court Act itself recognises New Zealand's commitment to the sovereignty of Parliament, as well as to the rule of law.[316] An Act of Parliament is the superior law that prevails over any inconsistent laws made by the executive or judicial branches of

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309 *Paki (No 2)*, above n 54, at [185] per McGrath J, citing *Lands* case, above n 256, at 655–656 per Cooke P, 672 per Richardson J and 691–692 per Somers J.
310 *Paki (No 2)*, above n 54, at [186] per McGrath J.
311 At [186] per McGrath J.
312 At [189] per McGrath J.
313 At [189] per McGrath J, quoting Supreme Court Act 2003, s 3(1)(a)(ii).
314 *Paki (No 2)*, above n 54 (footnotes in original).
315 As recognised in s 15 of the Constitution Act 1986.
316 Supreme Court Act, s 3(2).

government. The constitutional position of the courts is different. As Kirby J once said:[317]

> At whatever level they may be in the hierarchy, Judges of the common law tradition, are aware of the superior right of the legislature and its special legitimacy to make laws within its constitutional competence, particularly involving major changes to the law.

[191] It follows that the courts should not develop the common law in a manner inconsistent with legislation. Furthermore, where Parliament has legislated in a certain area, the courts must consider whether development of the law may be more appropriately left to Parliament.

[422] McGrath J also recorded his view that if a case involving circumstances giving rise to an arguable case of fiduciary duty came before the New Zealand courts for consideration, the courts would have to address whether development of New Zealand's common law to recognise a directly enforceable duty of good faith in the context of the relationship of the Crown and Māori would cut across the statutory scheme established by the Treaty of Waitangi Act for recognising and providing remedies for breaches of the Treaty of Waitangi.[318] In this context, he noted that the Waitangi Tribunal process provided for by that Act overcomes issues of limitation and evidential difficulties inherent in historic claims. He considered the Tribunal "better placed than the courts to overcome these difficulties and to fashion appropriate remedies for the modern age".[319]

[423] The other judge who dealt with fiduciary duties in *Paki (No 2)* was William Young J. For present purposes, we consider the most relevant conclusions in his judgment were:

(a) The principles of equity requiring strict scrutiny of fiduciary/beneficiary transactions, particularly the requirement for retrospective justification, are a function of the duty of loyalty owed by fiduciaries.[320]

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317 Michael Kirby *Judicial Activism: Authority, Principle and Policy in Judicial Method* (Sweet & Maxwell, London, 2004) at 69–70.

318 *Paki (No 2)*, above n 54, at [192] per McGrath J.

319 At [194] per McGrath J.

320 At [281] per William Young J.

(b) That duty can be seen as the corollary of a relationship in which one party has power to act for another. That can appropriately be applied to the situation when the Crown gained sovereignty over New Zealand and its radical title was burdened by customary ownership interests.[321]

(c) By the time the Crown purchased the land relevant to the claim in *Paki (No 2)*, customary title had been extinguished "pursuant to statutory processes which the courts cannot ignore".[322] When the land was purchased, the Crown agents were not acting on behalf of the vendors nor dealing with assets which the Crown held on the vendors' behalf. And in finalising the acquisitions, the "agents had duties to the taxpayer (as we would now say)".[323]

(d) It was likely the vendors would have been reasonably well aware of the price the land could command and they were not obliged to sell if the price offered was not acceptable. He did not see the case as involving a necessary imbalance of information or the absence of choice.[324]

(e) While counsel for the appellants had been critical of the reliance placed by the Courts below on the fact that the Crown could not be said to owe Māori a duty of absolute loyalty, and argued that the Crown was not an "ordinary" fiduciary, they had been unable to point to cases in which the special rules applying to bargains between fiduciaries and their beneficiaries had been applied other than where a duty of loyalty was owed.[325]

(f) A conclusion that the sales of the land should be set aside would involve an extension of existing authorities and legal principles.[326] That would be inappropriate in the circumstances of the case because:

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321 At [281] per William Young J.
322 At [281] per William Young J.
323 At [281] per William Young J.
324 At [282] per William Young J.
325 At [283] per William Young J.
326 At [284] per William Young J.

(i) the factual circumstances of the case were very different from current conditions;[327]

(ii) there would be a "distinct element of overreaching" if the Court were to extend existing legal principles and implement the consequences of doing so to the social and economic conditions of the 1890s;[328] and

(iii) the imposition of a requirement of retrospective justification in the present circumstances would be "distinctly unfair", because the requirement could not be met due to the effluxion of time.[329] This would have the practical result of setting aside the relevant transactions despite complete uncertainty about whether the vendors were under "any relevant misapprehension".[330]

(g) The process and remedies contained in the Treaty of Waitangi Act would enable claims such as those before the Court to be addressed by reference to the principles of the Treaty of Waitangi. This would provide a more flexible mechanism for addressing the underlying grievance than resort to the rules of equity. There would also be no limitation issues, and outcomes could be calibrated to current circumstances.[331]

[424] It is clear that, in a number of important respects, there was disagreement between the judgments of Elias CJ and William Young J. Elias CJ considered that, in an appropriate case, fiduciary duties might be owed by the Crown to Māori. That might be so where the Crown had not met its Treaty-based obligations to act in good faith, fairly, reasonably and honourably towards Māori. It appears William Young J would have limited the imposition of any such duty to circumstances in which the

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327 At [285] per William Young J.
328 At [286] per William Young J.
329 At [287] per William Young J.
330 At [287] per William Young J.
331 At [288] per William Young J.

Crown owed a duty of loyalty, either because it was exercising a power to act on behalf of Māori or it was dealing with land subject to customary ownership interests of Māori.

[425] As we read McGrath J's judgment, he too contemplated that cases might arise where it would be appropriate for the courts to recognise what he described as "enforceable fiduciary or relational duties to Maori".[332] But he preferred not to express any view on that question; instead setting out some of the considerations which he thought should inform the courts' approach if and when the issue fell to be decided. One of his emphases was on the need to recognise the primacy of legislation, and the need in this field not to "cut across" the statutory scheme established by the Treaty of Waitangi Act for recognising and providing remedies for breaches of the Treaty of Waitangi.[333] In sum, *Paki (No 2)* cannot be seen as an authority that recognises the existence of a sui generis fiduciary duty owed by the Crown to Māori.

[426] We turn next to the discussion of fiduciary duty by the Supreme Court in *Proprietors of Wakatū*.[334] Before summarising what the Supreme Court decided, it is necessary to give a brief outline of the factual setting.[335]

[427] The case arose out of the purchase of land in the north of the South Island by the New Zealand Company from Māori in 1839. The predominant form of consideration was the Company's undertaking to hold one-tenth of the area sold for the benefit of the vendors (referred to as the tenths reserves). It was anticipated that in the long-term, as the land was developed, the tenths reserves would be more valuable to the Māori vendors than the rest of the purchase price actually paid. Following the Crown's assumption of sovereignty in New Zealand in early 1840, the Land Claims Ordinance 1841 declared that all pre-Treaty sales of land were of no effect until confirmation after investigation by the Crown that the purchases had been "on equitable terms".[336] If it was so determined, the land became Crown land, able to be the subject of grants by the Governor.[337]

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332 At [182] per McGrath J.
333 At [192] per McGrath J.
334 *Proprietors of Wakatū* (SC), above n 49.
335 We have adopted the facts as set out in the judgment of Elias CJ at [96]–[287].
336 At [10] per Elias CJ, quoting Land Claims Ordinance 1841, ss 2 and 3.
337 Land Claims Ordinance, ss 2 and 3.

[428] Commissioner William Spain was appointed to investigate the sales and make a recommendation as to whether a grant should be made to the Company. He completed his award on 31 March 1845. He was satisfied that the Māori vendors had intended the "alienation of their rights and interests in the lands treated of".[338] He recommended that there should be a grant to the Company of the area purchased (151,000 acres) on the condition that 15,100 acres of the land were reserved for the benefit of Māori owners of the district, and that pā, urupā and cultivations were excluded. It was implicit in his recommendation that he considered the purchase terms had been fair and equitable. His determination cleared the land of native title and vested it as demesne lands of the Crown, able to be granted by it to the Company.

[429] The Company was dissatisfied with the 1845 grant that was made in the terms recommended by Commissioner Spain and subsequently, in 1848, a new grant was made. In the meantime, the Crown continued to manage the identified town and suburban tenths reserves sections set apart for Māori, as it had done since 1842. That land was administered by officials and agents appointed by the Governor, and the revenue was expended for the benefit of the vendors.

[430] Due to the occupation lands not having been properly surveyed and excluded from the settlement, a number of exchanges and grants by officials had been made in which tenths reserves were given to settlers in exchange for land that had been sold to them despite the fact that it was occupation land. Some of the exchanges had swapped originally-selected town and suburban tenths reserves for sections occupied or part occupied by Māori. The intended tenths rural reserves were never identified and reserved, although rural sections for the settlers were selected in March 1848.

[431] By July 1850, the Company was bankrupt and eventually surrendered all its assets to the Crown. In 1882, the tenths reserves were vested in the Public Trustee under s 8 of the Native Reserves Act 1882. By then the beneficiaries had, through exchanges and reductions effected from 1844 to 1849, lost 47 of the 100 town sections reserved and a significant number of suburban sections.[339] Rural sections had never

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338 *Proprietors of Wakatū* (SC), above n 49, at [149] per Elias CJ.
339 This was explicitly recorded at [529] per Glazebrook J.

been allocated. The extent and effect of the diminution of the tenths reserves was a matter of contention in the litigation.[340]

[432] In 1892, the Public Trustee applied to the Native Land Court, under s 16 of the Native Reserves Act, for orders identifying those with beneficial interests in the tenths reserves. Having identified the hapū entitled in 1892, Judge Mackay made orders in 1893 identifying 253 persons with a beneficial interest in the reserves. In 1977, Proprietors of Wakatū Inc, the first appellant, was created to represent the descendants of the beneficiaries. At this stage there was a residue of 1,626 acres.[341]

[433] In 1986, a claim was filed in the Waitangi Tribunal seeking redress for the failures of the Crown to protect and reserve the full tenths reserves (Wai 56). The Wai 56 claim was heard concurrently with other claims concerning, for example, the Crown's purchases and compulsory acquisitions of Māori land over the past 160 years; loss of access to fisheries and other natural resources; and the use of violence against Māori by the Crown in Te Tau Ihu.[342] Before the Tribunal, the Crown accepted it had committed a number of breaches of Treaty principles in relation to western Te Tau Ihu, including in connection to the tenths reserves.

[434] In 2010, during settlement negotiations, proceedings were commenced in the High Court seeking to ensure that the unallocated and lost reserved tenths would not be overlooked in the settlement. The plaintiffs claimed equitable relief against the Crown as a trustee or fiduciary for breaches of duties in failing to preserve the tenths reserves and failing to get in the 10,000 acres of rural reserves; for dealings and disposals of the tenths reserves land which diminished the trust estate before 1882; and for failure to reserve and exclude their pā, urupā and cultivations.

[435] The High Court rejected the claims.[343] On appeal, this Court unanimously held that the Crown owed no fiduciary duties to the plaintiffs, but the Judges differed as to

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340 At [35] per Elias CJ.

341 In the High Court, a figure of 3,066 acres was given, but this includes the residue of the occupation reserves in Massacre Bay. See [35], n 27 per Elias CJ, referring to *Proprietors of Wakatū* (HC), above n 259, at [14].

342 See Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at [1.5].

343 *Proprietors of Wakatū* (HC), above n 259.

the reasons.[344] Harrison and French JJ held that the Crown had acted at the relevant times in a governmental capacity in its dealings in relation to the tenths reserves and that, in the absence of an express undertaking from which a fiduciary obligation could be derived, the Crown's constitutional responsibilities to the public precluded it being under a duty of loyalty to one group.[345]

[436] Ellen France J considered the Crown could be subject to enforceable fiduciary duties and obligations, but was not on the facts of the case. They did not disclose any undertaking of responsibility or duty of loyalty. The tenths arrangements were of a political nature, intended to be reflected in legislation, and the Crown had been required to balance a number of interests in a manner that was inconsistent with a duty of loyalty to the beneficiaries of the tenths reserves. She considered a more flexible approach to fiduciary duty and the requirement of a duty of loyalty might have been required if there were no other remedy available.[346] The Supreme Court granted leave to appeal.[347]

[437] In the Supreme Court a majority of Elias CJ, Glazebrook, Arnold and O'Regan JJ held that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners of the land and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award. A declaration was granted to that effect. The claim would consequently be permitted to proceed in the High Court for determination of matters of breach and remedy.[348]

[438] The Judges disagreed on the issue of whether the Crown was to be regarded as a trustee in respect of the tenths. Both Elias CJ and Glazebrook J considered the Crown was a trustee.[349] Being of that view, they also concluded that the Crown had fiduciary obligations.

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344 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [118] and [146] per Ellen France J and [217]–[218] per Harrison and French JJ.
345 At [208]–[210] per Harrison and French JJ.
346 At [97], [102], [115], [123], [145]–[146] and [153] per Ellen France J.
347 *Proprietors of Wakatū v Attorney-General* [2015] NZSC 54.
348 *Proprietors of Wakatū* (SC), above n 49, at [1].
349 At [390] and [401] per Elias CJ, and [572]–[582] and [588] per Glazebrook J.

[439] The Chief Justice began her reasons by acknowledging that where the Crown "wears many hats and represents many interests",[350] it may not owe fiduciary duties to individuals or groups, but only governmental obligations owed to all.[351] However, as was accepted in Canada in the cases following *Calder v Attorney-General of British Columbia*,[352] that is not the case when the Crown is dealing with indigenous peoples to whom it has special responsibilities, especially in respect of their pre-existing interests in land recognised by the Crown.[353] In such cases, the Supreme Court of Canada has recognised that the Crown would be subject to fiduciary duties arising out of "clear government commitments" and, by way of analogy with obligations "in the private sphere", in the additional circumstances where the Crown's obligation "is akin to one where a fiduciary duty has been recognized" and goes beyond a "general obligation to the public or sectors of the public".[354]

[440] Elias CJ continued:[355]

> [380] Such assumption of responsibility towards Māori in New Zealand began with the Treaty of Waitangi (a covenant which guaranteed to Māori the "full, exclusive, and undisturbed possession" of their lands and which set up the Crown's right of pre-emption) and the Charter of 1840 (which made it clear that the Māori interest in land was inalienable and that the interests passed to the descendants of the occupiers). These commitments were repeated in the Royal Instructions and official correspondence. They were behind the terms of the Land Claims Ordinance, which provided the process for checking that pre-Treaty purchases were on "equitable terms".

[441] The Chief Justice acknowledged that there had been no occasion for New Zealand courts to determine whether the Crown owed fiduciary duties to the owners of land (according to Māori custom) in respect of any particular transaction.[356] However, as recognised in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, extinguishment of native title "by less than fair conduct or on less

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350 *Proprietors of Wakatū* (SC), above n 49, at [379] per Elias CJ, quoting *Wewaykum Indian Band*, above n 260, at 294. To place this quote in context, the Canadian Supreme Court in *Wawaykum Indian Band* stated that the Crown "can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting", referring to *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 (CA).

351 *Proprietors of Wakatū* (SC), above n 49, at [379] per Elias CJ.

352 *Calder v Attorney-General of British Columbia* [1973] SCR 313.

353 *Proprietors of Wakatū* (SC), above n 49, at [379] per Elias CJ. See also [341]–[358], where the Chief Justice further discussed the Canadian jurisprudence.

354 *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [48].

355 *Proprietors of Wakatū* (SC), above n 49 (footnote omitted).

356 At [381] per Elias CJ.

than fair terms" was "likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power".[357] And, as had been acknowledged by William Young J in *Paki (No 2)*, a fiduciary responsibility may be regarded as applicable to the situation where the Crown gained sovereignty over New Zealand and its radical title was burdened by customary ownership interests.[358]

[442] The Chief Justice drew an analogy between the facts before the Court in *Proprietors of Wakatū* and those recognised as giving rise to fiduciary duties in the Canadian case of *Guerin*, noting "close parallels" between the process followed in Canada under the Indian Act, and in New Zealand under the Land Claims Ordinance:[359]

> The terms of the surrender in the present case were those set by the Spain award to have been "equitable" rather than having been terms set by the Band itself, as in *Guerin.* But observance of those terms by the Crown in both cases was I consider equally an obligation enforceable in equity. In both cases the Crown undertook control of the surrender of existing interests of property it had undertaken to protect and in which it was of necessity acting on behalf of the native owners.

[443] Later, the Chief Justice observed that where the "equitable terms" of the purchase included reservation of land for the benefit of the former proprietors or exclusion of land intended to be retained in their possession and control according to native custom, as they did under the Spain award, the Māori proprietors depended on the Crown to protect their interests and fulfil the terms of the purchase.[360] The Crown, which had no pre-existing interest in the land or ability to grant it, obtained exclusive authority to do so when it was cleared of native title. These were the circumstances which:[361]

> … set up conditions of dependence and obligation in which the Crown was under a duty in equity to act in the interests of the Māori proprietors in observing the terms which made it equitable for their land to be alienated.

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357 At [381] per Elias CJ, citing *Te Runanganui o Te Ika Whenua Inc Society*, above n 276, at 24.
358 *Proprietors of Wakatū* (SC), above n 49, at [382] per Elias CJ, citing *Paki (No 2)*, above n 54, at [281] per William Young J.
359 *Proprietors of Wakatū* (SC), above n 49, at [384] per Elias CJ, citing *Guerin*, above n 145.
360 *Proprietors of Wakatū* (SC), above n 49, at [388] per Elias CJ.
361 At [388] per Elias CJ.

[444] The Chief Justice expressly stated that she was not holding there is "a general fiduciary duty at large owed by the Crown to Māori".[362] What she determined was that, where Māori have pre-existing and independent property interests 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".[363]

[445] Glazebrook J observed that, even if she were wrong in her conclusion that the Crown was a trustee, the narrative upon which she had reached that conclusion would create obligations so close to those of a trustee that it was "an inevitable conclusion that the Crown owed fiduciary obligations to the customary owners".[364] The Company's promise to hold the tenths reserves on trust for the customary owners was an important reason the purchase was held to be just and equitable, and thus an important reason the land in question became demesne lands of the Crown. The Crown could not subsequently purport to take the lands free from the obligation to hold them for the benefit of the customary owners.[365] Glazebrook J made it plain that her position did not depend on any special fiduciary duty of the Crown in its dealings with the property of indigenous peoples. If it was necessary to rely on such special duties, the analysis of Elias CJ had "much to recommend it, at least in the circumstances of this case", but it was not necessary to come to a definitive view on that wider analysis for the purposes of her own judgment.[366]

[446] Arnold and O'Regan JJ followed the approach of the Supreme Court of Canada in *Guerin*, holding that the Crown owed fiduciary duties to Māori who had customary rights to the land purchased by the Company in the Nelson area.[367] That duty arose because the Crown assumed the Company's obligation to allocate the tenths reserves and to manage them in the best interests of the original customary owners. This was in addition to responsibilities the Crown had towards Māori as the government.[368] The Crown's decision to accept Commissioner Spain's recommendations and allow the company to obtain cleared title (albeit only to the extent of his award) crystallised

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362 At [391] per Elias CJ.
363 At [391] per Elias CJ.
364 At [588] per Glazebrook J.
365 At [589] per Glazebrook J.
366 At [590] per Glazebrook J.
367 At [779] per Arnold and O'Regan JJ, citing *Guerin*, above n 145.
368 *Proprietors of Wakatū* (SC), above n 49, at [779] per Arnold and O'Regan JJ.

the Company's obligations to Māori. Effectively, the Crown stood in the Company's shoes in the sense that:[369]

> … it took it upon itself not only to ensure that the terms agreed by the Company were honoured (in particular, that land be reserved as agreed) but also to hold the [t]enths reserves for the benefit of Māori in fulfilment of the Company's long-term obligations.

[447] Later in the judgment, Arnold and O'Regan JJ said:[370]

> [784] But the essential point is that the Crown's assumption of responsibility, from an early stage, for the oversight and implementation of the Company's obligations to Māori in relation to the [t]enths reserves is clear from the historical record. We consider that it brings into operation the *Guerin* analysis.

[448] It followed from this analysis that the Crown's conduct in relation to the tenths reserves could not be properly explained on the basis that the Crown was simply performing a broad governmental or political function. The Crown had in fact acted in two capacities. First, to ensure that the pre-1840 purchases were fair. An investigation process was put in place to assess that and resulted in the Spain award. By accepting the award, the Crown acknowledged the importance of the Company's obligations in respect of the tenths reserves to the fairness of the transaction. Consideration for the land had two dimensions: the initial allocation of the tenths reserves and their subsequent administration for the benefit of local Māori. The Crown had taken upon itself the provision of both aspects of the consideration. At that point, it was not called upon to balance the interests of settlers and Māori, or take any other decision of a political or governmental nature. It was simply performing promises made by the Company to the original customary owners in the context of the land sales.[371] It was on this basis that O'Regan and Arnold JJ did not accept this Court's analysis, holding that a fiduciary duty did not arise because the Crown was fulfilling governmental functions with obligations to the public generally and not to any particular group of Māori.

[449] In summary, of the Judges who considered there had been a breach of fiduciary duty, only Elias CJ founded her view on a special fiduciary duty owed by the Crown

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369 At [782] per Arnold and O'Regan JJ.
370 Footnote omitted.
371 At [785] per Arnold and O'Regan JJ.

to Māori in respect of their pre-existing and independent property interests which can be surrendered only to the Crown.

[450] For reasons we have already addressed in dealing with the arguments about unconscionable bargain, the evidence does not establish that the terms of the Waiuku Deed were unfair, nor that the Ngāti Te Ata vendors who signed it did so other than voluntarily and as authoritative representatives of the iwi. This was not a pre-Land Claims Ordinance transaction which fell to be investigated to ascertain whether it was fair and equitable. The case lacks any of the elements that contributed to the findings of the existence of fiduciary duty in *Proprietors of Wakatū* or *Guerin*: the Crown never assumed responsibilities towards the vendors, nor was the Crown under any obligation to protect their interests in a way not satisfied by the grants of land to those who signed the Waiuku Deed and the provision of fair value for the land acquired.

[451] The area acquired by the Crown was extensive, but the price paid is not criticised. It seems that agreement was able to be reached on the amount of land that was to be revested in Ngāti Te Ata by Crown grants, comprising 5,153 acres, and the Crown adopted the position in the negotiations that Ngāti Te Ata should select the land that they required for their own use.

[452] The transaction represented by the Waiuku Deed cannot be characterised as an extinguishment of Māori property rights by less than fair conduct or on less than fair terms. The Crown bought the land for an agreed price which is not now impugned. In these circumstances, this is not a case of the kind contemplated by Elias CJ in *Paki (No 2)* where there could be a presumption of undue influence.

[453] For these reasons, we are unable to conclude that the Waiuku Deed was procured by the Crown in breach of a fiduciary or other equitable duty owed to Ngāti Te Ata. It is clear however that it is not sufficient to consider the Waiuku Deed on its own and divorced from the Confiscation which followed a month later. It is the effect of both together that must be considered.

[454] We have concluded that the Confiscation took place under the authority of the New Zealand Settlements Act. While the Act and the actions taken under it are

now regarded as an unjustified exercise of the power of the Crown and Parliament, the actions taken under the Act are part of the context which must be assessed in relation to the argument of breach of fiduciary duty. Whatever the judgement of history on the events of the 1860s, it would be a remarkable extension of any concept of fiduciary duty to decide that actions taken by the Governor pursuant to statutory authority and believed to be necessary in the public interest in the circumstances of what was seen to be a rebellion could breach a fiduciary duty. That would require the assertion of a fiduciary duty not to exercise statutory powers for the purpose for which they have been conferred, a notion that cannot be derived from any of the cases we have discussed, including those that have contemplated the existence of a sui generis fiduciary duty based broadly on the Treaty of Waitangi and the relationship between Māori and the Crown.

[455] Following the Confiscation, the Crown implemented what was plainly envisaged by the Waiuku Deed when it issued Crown grants to the members of Ngāti Te Ata in respect of all of the land which was intended to remain in their ownership and possession. The land that was not the subject of those grants was the same land that the Crown acquired under the Waiuku Deed with the intention of retaining. The Confiscation was the means by which the Crown acquired the land "freed and discharged from all Title Interest or Claim of any person whomsoever" in terms of s 4 of the New Zealand Settlements Act. This was essentially implementation of the bargain that was struck between the Crown and the 27 Ngāti Te Ata signatories of the Waiuku Deed, who signed on behalf of themselves, their relatives and descendants. The result was to exclude from ownership the members of the iwi who had joined in the rebellion. That exclusion was what the Crown sought to achieve, and there is no evidence that the iwi signatories of the Waiuku Deed were opposed to it at the time.

[456] As the historical record shows, and despite the subsequent adverse judgement of history, the Confiscation occurred pursuant to a Government policy seeking to respond to the fact that Māori, including members of Ngāti Te Ata, were engaged in armed conflict against the Crown. It sought to distinguish between those who had continued to adhere to the Crown and those who joined the rebellion. The terms of the Waiuku Deed and the grants of the land selected by them acknowledged and

protected the former: the Confiscation effectively took the interest of the latter in the balance of the land. We do not think it is possible to characterise the Crown's actions taken for the perceived benefit of the public generally and the majority of Ngāti Te Ata as a breach of fiduciary duty on the basis of the authorities which we have reviewed, or anything said or implied in them. In our view the appropriate forum for advancing any grievances about the events of the 19th century is the Waitangi Tribunal, which has specific jurisdiction to inquire into claims that Māori have been prejudicially affected by Acts of Parliament passed, orders and proclamations made, and policies adopted by the Crown, at any time after 6 February 1840.[372]

[457] These conclusions mean that the argument based on breach of fiduciary duty cannot succeed.

THE 1939 AND 1959 TAKINGS AND ISSUE OF THE LICENCE

[458] We now turn to the claims directed to the takings of land at Maioro under the Public Works Act 1928 in 1939 and 1959 and the issue of the mining licence under the Iron and Steel Industry Act to NZ Steel.

[459] The chronological account which follows is based substantially on the facts found in the judgment under appeal (not in dispute on appeal) and the statement of agreed facts dated 16 April 2019, which was filed in that Court.

Background to the Public Works Act 1928 takings and the Licence

Sand dune reclamation

[460] It appears that a concern arose in the early 1900s that the sand dunes at Maioro were encroaching onto adjacent farmland. This concern was addressed in a report from an inspector for the Department of Lands and Survey (Lands Department) to the Under-Secretary of Lands in 1913. The report noted that behind Waiuku at the mouth of the Waikato River, there was a "wandering dune" of about 4,225 acres in size that was encroaching badly on "good land in the rear". The dune comprised 3,505 acres of Crown land and 720 acres of "Native land". The "Native land" was the land

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[372] *Paki (No 2)*, above n 54, at [192] per McGrath J. See also Treaty of Waitangi Act 1975, s 6.

comprising the four wāhi tapu at Maioro. The report recommended planting marram grass along the shore, which it was thought would enable afforestation to proceed at a later date.

[461] In 1914, the Crown began planting both marram grass and lupin in the Maioro area for that purpose. The Judge found that there was no evidence that planting occurred in the wāhi tapu areas.[373] The proposed extensions of sand dune reclamation had to be deferred in 1916 due to the "heavy drain on the public purse" of the First World War.[374]

[462] In 1926, the responsibility for sand dune reclamation passed from the Lands Department to the State Forest Service, and in 1931 the Public Works Department (PWD) took over that role.[375]

[463] In the early 1930s, settlers occupying properties bordering the sand dunes sought government assistance to combat "hardships they were suffering" on account of the encroachment by sand dunes. A reinvigorated sand dune reclamation project to be undertaken by the PWD was approved in 1932.

[464] On 2 May 1932, the PWD began work on what became known as the Waiuku or Waikato North Head Sand Dune Project, which involved stabilising the sand dunes by erecting barriers, and further planting of marram grass and lupin. Once the sandhills were stabilised, pine trees were planted. The work was undertaken on Crown land, land owned by settlers and on the four wāhi tapu. The parties agreed that there are no contemporary records indicating any attempt was made to contact the owners of the land not owned by the Crown about the works.

[465] In October 1935, the District Engineer suggested in a report that the land be afforested for reasons including that the trees could generate revenue in the future, and

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373 Judgment under appeal, above n 1, at [410].

374 Under-Secretary for Lands "Annual Report on Department of Lands and Survey" [1916] I AJHR C1 at 6.

375 Judgment under appeal, above n 1, at [411].

their presence would "prevent any agitation for return of reclaimed areas to original owners". Expanding on that point, the District Engineer wrote:

> As you are aware, most owners handed over their sand lands to the Crown for nothing. The question of returning land when covered with rough feed has been mentioned by some, but it is considered that such return would be courting disaster. Stock would undoubtedly tend to destroy the vegetation and so start the area on its return to sand waste.

[466] That same month, the Engineer-in-Chief recommended to the Minister of Public Works that the land be subject to afforestation. He stated that discussions had taken place with the State Forest Service, and recorded its view that the land might at some stage in the future be vested in it as state forest. In October 1935, the Cabinet approved afforestation at Maioro.[376]

The taking of Te Papawhero

[467] In 1938, the first pine trees were planted on Te Papawhero by the PWD. On 1 August 1938, a PWD engineer advised the District Engineer in a memorandum that the planting had occurred on the assumption that the area was Crown land. The memorandum stated:

> Adjoining (on the north side) the Crown area on which operations were commenced is a Native Block of 509 acres, Allot. 97, Waiuku West Parish [Te Papawhero]. To render our operations effective in arresting sand drift, they had to extend over all areas of moving sand. A recent survey revealed that much of the Native land had been planted, under the misapprehension that it was Crown land. Now that our operations include the planting of trees, it is desirable to have the interests in the reclaimed areas properly defined. The most direct and satisfactory method appears to be the resumption of the Native block by the Crown under the Public Works Act.

[468] The memorandum did not refer to the other three wāhi tapu. The author noted that he obtained from the Native Land Court a list setting out the owners of Te Papawhero and a 1936 Government valuation of the land of £100.[377]

[469] The list named the 10 original owners, and showed that six of the original owners still held their interests in the land under an unregistered Crown grant (being

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376 At [414].

377 Or approximately four shillings per acre.

the 1878 Crown grant).[378] Four of the original owners were shown as deceased and a number of successors to their interests had been appointed. Mr Parker, the Crown historian, noted that there is no contemporary evidence that local Māori were informed their land was being planted.

[470] On 13 October 1938, the Engineer-in-Chief informed the District Engineer that the taking of Te Papawhero under the Public Works Act was approved. The *New Zealand Gazette* published on 16 March 1939 records that, on 10 March 1939, the Minister of Public Works signed a notice of intention to take Te Papawhero under the Public Works Act for "sand-dune-reclamation purposes".[379] On 7 September 1939, notice of Te Papawhero's formal taking, to be effective from 11 September 1939, was given in the *New Zealand Gazette*.[380]

[471] On 26 February 1941, the PWD applied to the Native Land Court for an assessment of the amount of compensation to be paid for the taking of Te Papawhero, as well as for the names and addresses of the persons to whom the compensation should be paid. The hearing was advertised to take place on 29 April 1941 at Ngāruawāhia, but ultimately it did not occur until 27 March 1945 due to a number of postponements. On the basis of the minutes of the Native Land Court, Fitzgerald J found that there was an offer by the PWD to pay compensation based on a 1941 Government valuation of £180, of which the owners were to be advised.[381]

[472] Also in February 1941, a message from Te Puea Hērangi, the daughter of the Māori King, was forwarded to the Director-General of Health, requesting license under s 67 of the Cemeteries Act 1908 for the relocation of all Māori remains from Te Papawhero to the Māori Cemetery at Taupiri. On 28 March 1941, the Minister of Health approved the application to exhume remains from Te Papawhero, which then took place on 31 April 1941. The report of the Health Inspector at Pukekohe did not

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378 See above at [184].

379 "Notice of Intention to take Land in Block VI, Maioro Survey District, for Sand-dune-reclamation Purposes" (16 March 1939) 15 *New Zealand Gazette* 397 at 405.

380 "Land taken for Sand-dune-reclamation Purposes, in Block VI, Maioro Survey District" (7 September 1939) 105 *New Zealand Gazette* 2429 at 2429.

381 Judgment under appeal, above n 1, at [424].

go into detail about the remains removed or whether all the remains had been located and reinterred.[382]

[473] The Native Land Court hearing was then adjourned, reconvening on 18 July 1945. Fitzgerald J noted that there was no evidence that the descendants of the original owners (all of whom were deceased) were advised in the interim period of the original compensation offer, nor evidence that they attended the July hearing.[383] The Native Land Court assessed the compensation payable at £180 in accordance with the 1941 valuation and ordered that it be paid on behalf of the owners to the Waikato-Maniapoto District Māori Land Board. The payment was made to the Board on 13 September 1945.

[474] On 20 February 1957, Te Papawhero was declared, pursuant to the Public Works Act, to be Crown land subject to the Land Act 1948.

The takings of Waiaraponia, Te Kuo and Tangitanginga

[475] In 1940, the first pine trees were planted on Waiaraponia by the PWD. The planting was completed in 1949. In 1944, the first pine trees were planted on Te Kuo. The planting was completed in 1953. In 1945, the first pine trees were planted on Tangitanginga. The planting was completed in 1949.

[476] On 20 March 1951, Cabinet approved the transfer of control of sand dune reclamation project to the Lands Department, with the New Zealand Forest Service (NZFS) to be responsible for sand fixation and planting.

[477] On 11 March 1952, the Conservator of Forests at the Auckland Conservancy informed the Director of Forestry that the Waiaraponia, Te Kuo and Tangitanginga wāhi tapu areas had been planted as part of the sand dune reclamation project, but had not been formally acquired. He wrote:

> It is not considered desirable at this stage to draw attention to the fact that Maori-owned land on the Waiuku project has been planted without being acquired. The areas concerned are Sections 98 [Waiaraponia], 99 [Te Kuo]

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382 At [429].
383 At [424].

> and 100 [Tangitanginga], in Block VII, Maioro S.D. They have no legal access.

[478] On 20 May 1952, the Conservator sent a memorandum to the Commissioner of Crown Lands requesting that acquisition of the three wāhi tapu areas be raised with the Māori Affairs Department, as it was desirable that they be included in the sand dune reclamation project. The memorandum noted:

> There is no access to these sections, which are Maori-owned, and it is understood that the titles are very old and that possibly the owners are deceased.

[479] On 30 May 1952, the Commissioner of Crown Lands wrote to the Registrar at the Māori Affairs Department in Auckland, stating that the Lands Department wanted the three wāhi tapu to be added to the sand dune reclamation project. The Commissioner sought advice as to whether it would be possible to purchase the interests, or whether it would be more advisable to acquire them under the Public Works Act.

[480] According to Mr Parker's evidence, at that time, of all the original grantees of the 1878 Crown grant for the three wāhi tapu, only the interests of Hori Tauroa in Waiaraponia and Tangitanginga had been subject to succession orders, with his son (Wiremu Tauroa) succeeding him. However, Wiremu Tauroa had passed away in 1925. Consequently, in 1952, there were no living owners of the Waiaraponia, Te Kuo and Tangitanginga wāhi tapu areas.

[481] On 18 June 1952, the Registrar at the Māori Affairs Department replied to the Commissioner, informing him that "enquiries" were being made "among the owners of the land, with a view to ascertaining their attitude to this matter". At the same time the Registrar wrote to Mr Runciman of the Māori Affairs Department, asking for assistance.

[482] The Registrar's memorandum of 18 June 1952 to Mr Runciman set out the following:

> 1. The above-mentioned Blocks are owned by the Maoris set out in the attached searches of Title. They were granted to the original Maoris under the "Waiuku Grants Act, 1876". At that time they were probably open land,

> but are now covered with sand. They have no access, being enclosed by Crown land comprising the bulk of the area on the North side of the mouth of the Waikato River. …
>
> 2. When the [PWD] started sand dune reclamation at North Waikato Heads these sections were planted along with other areas. The [NZFS] has now taken over and desires to obtain Title. The Conservator of Forests in Auckland has seen me and a letter has been received from the Lands Department.
>
> 3. Would you please make discreet inquiries among the Waiuku people as to whether or not there would be any objection to the taking of the land under the Public Works Act. You should limit your enquiries to the Taur[o]a and Kaihau families; Rangi Brown (who is a Kaihau) could probably give some information. …

[483] Mr Runciman replied in a letter dated 21 July 1952, advising he had been able to contact some of the prospective successors to the owners of Lots 98 and 100 (being Waiaraponia and Tangitanginga) but not of Lot 99 (Te Kuo). He noted he was assured of the identity of a successor to the owners of Te Kuo, Tui Tipene, but that he had not spoken to him. The prospective successors Mr Runciman had spoken to communicated that there were no objections to Waiaraponia being taken under the Public Works Act, except in respect of an urupā in either Waiaraponia or Te Kuo, which they desired to protect. There was no objection to the majority of Tangitanginga being taken, but they sought retention "of the whole of the river frontage of the section", a favoured place for fishing.

[484] On 10 September 1952, the Commissioner was advised that an update had been provided by Mr Runciman. Mr Runciman reported that Tui Tipene indicated no objection to Te Kuo being taken under the Public Works Act, provided the urupā "in the area" was preserved for the owners, as was the fishing reserve.

[485] On 1 October 1952, the Conservator of Forests wrote to the Officer in Charge of NZFS advising that proposals had been submitted to the Commissioner of Crown Lands that an area of 2,830 acres, being all the Crown land within the sand dune reclamation project, should be proclaimed state forest. He said that negotiations had been entered into with the Department of Māori Affairs for the acquisition of the three wāhi tapu areas: "Generally the Department and most of the Maori owners have no objection to the proposal."

[486] Also around 1 October 1952, a senior ranger drafted a file note recording that an official from the Lands Department had stated that all the Crown land included in the sand dune reclamation project should be gazetted as state forest. He noted that a survey of the urupā in Te Kuo and the fishing reserve in Tangitanginga would delay the taking of the Māori land, but that when that was completed, the residue would also be proclaimed as state forest (what is today called the Waiuku State Forest).

[487] On 25 February 1958, the Lands Department reported the urupā had been located within Te Kuo with the help of a Mr Wikiriwhi of the Department of Māori Affairs. Mr Wikiriwhi had arranged for the interested Māori to be present to point out their position. The next day, a plan was completed showing the three wāhi tapu areas to be taken under the Public Works Act for state forest purposes, and the two areas to be excluded from the taking (the urupā and the fishing reserve). The plan was approved by the Chief Surveyor on 28 October 1958.[384]

[488] In early November 1958, the Conservator of Forests wrote to the Commissioner of Works enclosing copies of the survey of the three wāhi tapu, stating that "the acquisition of these sections may involve compensation to the owners" and that he "would be grateful if [the Commissioner] could handle the acquisition" with a view to taking the three wāhi tapu areas for forestry purposes under the Public Works Act, pursuant to s 15 of the Forests Act 1949.

[489] The Working Plans Officer at NZFS Head Office drafted a minute, dated 12 November 1958, which estimated that the acquisition of the three wāhi tapu areas could cost in excess of £10,000, unless the owners could be persuaded to accept less than present value. Later that month, the Working Plans Officer wrote to the Conservator of Forests requesting a valuation the three wāhi tapu. The Conservator of Forests replied near the end of November, stating it was best to delay the valuation until the Ministry of Works requested it, because it was "not improbable" that a valuation may not be required.

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[384] Ultimately, when the wāhi tapu were formally taken, 14 acres comprising the urupā at Te Kuo and five acres of frontage to the Waikato River on Tangitanginga for a fishing reserve were excluded from the land taken for state forest purposes.

[490] On 23 March 1959, the District Commissioner of Works in Auckland forwarded a memorandum to the Commissioner of Works attaching a notice of intention to take the three wāhi tapu areas (excluding the urupā and the fishing reserve) for state forest purposes. He noted that the land was owned by Māori and that it would be difficult to obtain consent, making it necessary to take land under the compulsory acquisition provisions of the Public Works Act.

[491] On 23 April 1959, notice of an intention to take the three wāhi tapu for state forest purposes under the Public Works Act was published in the *New Zealand Gazette*.[385] The notice announced that a plan of the land to be taken would be displayed at the post office at Tuakau and that objections should be forwarded to the Minister of Works within 40 days.

[492] On 6 May 1959, the District Commissioner of Works wrote to the Department of Māori Affairs, enclosing copies of the notice of intention to take the three wāhi tapu and requesting that they be served on the owners and occupiers of the land to be taken and upon any other person having an interest in the land. It was Mr Parker's evidence that the notice of intention to take the three wāhi tapu areas was published in the *Waiuku News* on "at least" 8 and 12 May 1959.

[493] On 14 May 1959, the District Officer of the Department of Māori Affairs wrote to the District Commissioner of Works and advised him that it was "thought" that all of the owners were deceased, and that accordingly he had been unable to serve the notice of intention upon the owners and occupiers of the land.

[494] On 22 July 1959, the Commissioner of Works informed the District Commissioner that no objections to the takings had been received.

[495] On 31 August 1959, the Governor-General and the Minister of Works signed the proclamation taking the three wāhi tapu areas under the Public Works Act for state forest purposes, to be effective from 7 September 1959. The proclamation was then

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385 "Notice of Intention to take Land in Block VII, Maioro Survey District, for State Forest Purposes" (23 April 1959) 23 *New Zealand Gazette* 503 at 529.

published in the *New Zealand Gazette* on 3 September 1959.[386] The wāhi tapu now formally formed part of the Waiuku State Forest.

Compensation for the takings of Waiaraponia, Te Kuo and Tangitanginga

[496] On 25 June 1971, Dame Ngāneko made inquiries of the Department of Māori Affairs about the taking of the Tangitanginga wāhi tapu area under the Public Works Act, advising that she had only become aware of the 1959 takings in March 1971. She wrote:[387]

> Dear Sir,
>
> Enclosed is an application for succession which I trust will be heard at the next court sitting.
>
> Earlier, this year my mother applied for succession to her share in her grandfather's piece at Waiuku West Parish Allot 100 [Tangitanginga] being an area of 66a 0r 08p. There were originally 3 owners, Wiremu Tauroa one of the owners was her grandfather.
>
> At the court sitting, 23 March, 1971 we were advised that in 1959 after an item had appeared once in the N.Z. Gazette, which, after inquiries I discovered is not readily available to the public, the [land] was taken for the State Forest and the sum of £19.00 was paid for compensation.
>
> My mother recently received $31.65 being shares held in her grandfather's name and was granted [to] her by the presiding judge of that court sitting.
>
> I queried the amount of £19.00 as being a fair & just sum for that number of acres. I was advised that the clerk a Mr. Te Kanawa, would if time availed itself, make further inquiries to ensure if the above matter was correct.
>
> He further advised, that he would notify us by mail.
>
> Would you be able to assist, us in our inquires?
>
> …

[497] The letter also enclosed an application for succession.

[498] On investigation, the Ministry of Works discovered it had not made arrangements for compensation for the takings at the time. On 10 September 1971,

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386 "Land Taken for State Forest Purposes in Block VII, Maioro Survey District" (3 September 1959) 53 *New Zealand Gazette* 1217 at 1222.

387 We note, as Fitzgerald J concluded, that the reference to compensation having been paid may have been in error as no evidence of any payment having been made at that point has been located. See judgment under appeal, above n 1, at [469].

the District Commissioner of Works wrote to the Registrar at the Māori Land Court advising that a formal claim was not available under the Public Works Act, but requesting the Māori Trustee act to negotiate compensation for the 1959 takings of the three wāhi tapu based on values as at 1959. On 7 October 1971, the Māori Trustee agreed to act on behalf of the owners on the question of compensation.

[499] On 6 December 1971, the Ministry of Works wrote to the Māori Land Court suggesting that compensation be based on the Government's valuation as at 1960, in addition to the interest since the taking. The Māori Trustee accepted this offer on 9 December 1971 and was paid compensation amounting to $649.59 ($400 plus interest) on 18 February 1972.

The genesis of New Zealand's iron and steel manufacturing industry

[500] In the meantime, processes were underway to explore the possibility of establishing an iron and steel manufacturing industry in New Zealand.

[501] A Cabinet minute, dated 4 June 1958, established an interdepartmental committee (the Iron and Steel Committee) to investigate, and report to the Cabinet on, various matters of concern to the Government in establishing an iron and steel industry in New Zealand. The Iron and Steel Committee was to consist of representatives from a number of departments: Industries and Commerce (as the convenor), Mines, Labour, Works, State Hydro-Electric and the Treasury. It had the power to adopt members from other departments including Māori Affairs, Marine, and Railways.

[502] In October 1958, the Iron and Steel Committee recommended that provision be made for the continuing investigation into the use of New Zealand ironsands and coal with a view to the establishment of an integrated iron and steel industry at a later date.

[503] In February 1959, a report of the Iron and Steel Committee recommended that a private company be set up in which the Government and private interests would jointly undertake a full investigation of the feasibility of establishing a major iron and steel industry based on ironsands. The report noted there were large ironsands deposits at "Waikato Heads" (Maioro) that were to be investigated.

[504] On 20 February 1959, the Under-Secretary of the Mines Department in Wellington wrote to the Commissioners of Crown Lands in Hamilton and Auckland, requesting land ownership information on the main ironsands deposits at Raglan Harbour, Waikato Heads, Kawhia Harbour and Muriwai Beach. On 12 March 1959, the Commissioner of Crown Lands in Hamilton forwarded the request for information about ownership of the Maioro ironsands area to his counterpart in Auckland. On 23 March 1959, the Commissioner of Crown Lands in Auckland wrote to the Under-Secretary of the Mines Department informing him that:

> The land at Waikato Heads is … Crown land to be declared permanent State Forest but it may be a few months before this action is finalised. Survey of the area is now virtually completed but Ministerial consent has yet to be obtained to the transaction although action to this end is proceeding.

[505] On 23 October 1959, the Iron and Steel Industry Act was enacted. The definition of an "Ironsands area", set out in the schedule to the Act, included a strip of land stretching from the South Head of the Kaipara Harbor to the northern bank of the Whangaehu River.[388] This extensive area of the west coast of the North Island included Maioro.

[506] On 20 June 1960, the Cabinet agreed, in line with the recommendations from the Iron and Steel Committee, that an iron and steel investigating company should be established as a government enterprise. The New Zealand Steel Investigating Company Limited (NZSICL) was then formed. The Crown was the sole shareholder in it, and the company was to have six directors, three being from the private sector.[389]

[507] In December 1960, the NZSICL began investigative drilling at Maioro. Drilling was completed in June 1961. It was found that within the boundary of the Waiuku State Forest, the site contained the necessary amount of ironsands with a higher grade of iron ore than previously estimated.

[508] In 1961, further additions were made to the Waiuku State Forest. On 9 May 1961, a proclamation was made setting apart the main Maioro block as permanent state

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388 Iron and Steel Industry Act 1959, s 2 definition of "Ironsands area" and sch.

389 The Cabinet appointed a provisional board to operate NZSICL in May 1963.

forest pursuant to s 18 of the Forests Act.[390] This was followed by a similar proclamation on 21 March 1962, setting apart other Crown land at Maioro, including Te Papawhero (the only wāhi tapu not already state forest land).[391]

[509] On 9 December 1964, a report from the NZSICL was presented to the Minister of Industries and Commerce and subsequently published. It stated that the investigations of the provisional board of NZSICL and its consultants had confirmed the findings of the NZSICL as to the technical and economic feasibility of a New Zealand iron and steel industry based on indigenous raw materials. The provisional board recommended the government initiate the formation of an operating company with the government as a major shareholder, the "Waikato North Head" (Maioro) deposit being the initial source of iron ore, and the industry being based in South Auckland. Although the published report referred to Maioro providing a source of iron ore "for more than 50 years", the unpublished partially confidential version noted that the iron ore reserves were sufficient for 100 years of mining. The report made no reference to Māori or to Ngāti Te Ata.

[510] On 1 March 1965, the Cabinet approved, subject to qualifications, the establishment of the iron and steel industry along the general lines of the NZSICL report.[392] It approved the Iron and Steel Industry Act being extended for a further term of ten years from 1 January 1968, and directed that the royalties paid on iron ore from Maioro should be negotiated on the basis of 20-year agreements.

[511] On 26 July 1965, NZ Steel was incorporated to be the operating company. By August 1965, Glenbrook was identified as the site for the steel plant and, on 29 September 1965, NZ Steel applied for authority under s 3(3) of the Iron and Steel

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390 "Crown Land Set Apart as Permanent State Forest Land" (18 May 1961) 33 *New Zealand Gazette* 697 at 703. The proclamation described the relevant Crown land as including "Waiuku West Parish, situated in Blocks VI, VII, and VIII, Maioro Survey District: Area 2,798 acres more or less".

391 "Crown Land Set Apart as Permanent State Forest Land" (29 March 1962) 20 *New Zealand Gazette* 499 at 505. The proclamation described the relevant Crown land as including "Waiuku West Parish, situated in Blocks VI and VII, Maioro Survey District: Total area, 670 acres 3 roods 16 perches, more or less".

392 The qualifications being that the proposals were referred to the Solicitor-General, and that further consultation took place with interested parties, including the Federated Farmers of New Zealand.

Industry Act to carry out mining operations at Maioro. The application excluded the urupā in Te Kuo and the fishing reserve in Tangitanginga.

[512] On 29 October 1965, the Iron and Steel Industry Act was amended. Section 4 of the Iron and Steel Industry Act Amendment Act 1965 inserted a new s 7A into the Iron and Steel Industry Act, enabling the Minister of Mines, together with the Minister of Forests, to set apart by notice in the *New Zealand Gazette* state forest land within an ironsands area for the purpose of mining ironsand. The land so set apart was to remain state forest land.[393] That same day, the Under-Secretary of the Mines Department wrote to the Director-General of the NZFS, stating that NZ Steel had applied for mining authority, and that the Ministers of Mines and Forests would need to issue a notice in the *New Zealand Gazette* setting aside the land for mining under s 7A of the Iron and Steel Industry Act.

[513] On 3 June 1966, a heads of agreement was signed between the Crown and NZ Steel (the Heads of Agreement). We note these significant features of the Heads of Agreement:

(a) The parties agreed that the Heads of Agreement were to constitute "a firm binding and enforceable agreement between them in accordance with the terms hereof".

(b) The Crown undertook not to introduce any legislation amending the schedule to the Iron and Steel Industry Act (which defined "Ironsands areas") to change the included areas.

(c) The Crown reserved to NZ Steel the right to mine for ironsands at Maioro for a period of 100 years. The wāhi tapu areas were not exempted from mining (except for the urupā in Te Kuo and the fishing reserve in Tangitanginga that remained in Māori ownership) and the Heads of Agreement contained no provisions for their protection.

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393 Iron and Steel Industry Amendment Act 1965, s 4(3).

(d) The Minister of Mines would, with the concurrence of the Minister of Forests, grant a mining licence to NZ Steel in respect of part of the ironsands deposit at Maioro in the terms of a draft annexed to the Heads of Agreement.

[514] The licence for mining at Maioro was granted contemporaneously on 3 June 1966 (the Licence). We note several key provisions of the Licence:

(a) The recitals in the Licence referred back to the Heads of Agreement:[394]

> … under Heads of Agreement … [NZ Steel] is *bound to establish and operate* [an iron and steel] *industry using the Waikato North Head deposit of ironsands* which includes the ironsands on or within the land described in the schedule hereto (hereinafter called "the said land") upon the terms and conditions therein more particularly set forth.

(b) Under the Licence, NZ Steel had:

> … exclusive licence liberty power and authority to mine and extract all ironsands as defined in section 2 of the [Iron and Steel Industry Act] lying on or within the said land, and convert the same to its own use and benefit by extracting or recovering therefrom such metals or minerals including titanium and vanadium as it thinks fit and generally using the same for such purposes as it thinks fit, in connection with the establishment and operation of an iron and steel industry.

(c) The Licence would continue in operation "for and during and unto the full end and term of one hundred years".

(d) The Licence was not only permissive—it also imposed obligations on NZ Steel to:

> … prosecute mining operations on the said land for ironsands at such times and in such manner as shall be necessary in order to meet the production requirements of the Iron and Steel Industry to be established by [NZ Steel].

[515] On 7 July 1966, a notice dated 27 June 1966 was issued in the *New Zealand Gazette* by the Minister of Mines (with the agreement of the Minister of Forests),

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394 Emphasis added.

setting apart land (described in the schedule as state forest land) for the purposes of the Iron and Steel Industry Act.[395] This included all of the wāhi tapu areas except the urupā in Te Kuo and the fishing reserve in Tangitanginga.

[516] NZ Steel commenced mining operations at Maioro in 1968, following the earlier construction of the Glenbrook Steel Mill.

The Glenbrook Steel Mill expansion project

[517] On 9 July 1975, NZ Steel made a formal application to separate its mining operation at Maioro from its iron and steel manufacturing business in order to take advantage of tax incentives available to mining companies under the Land and Income Tax Act 1954. On 2 February 1976, a deed of assignment was executed, transferring the mining licence from NZ Steel Ltd to its subsidiary company, Waikato North Head Mining Ltd.

[518] In 1978, NZ Steel applied for a renewal of its water rights consent under the Water and Soil Conservation Act 1967. The applications also sought new consents to allow its Glenbrook Steel Mill to expand manufacturing operations from 150,000 tonnes of steel each year to 775,000 tonnes (with a corresponding increase in the amount of ironsands processed at Maioro). The applications for the expansion project were granted.

[519] In August 1980, NZ Steel completed an Environmental Impact Report on the proposed Glenbrook Steel Mill expansion project. In September 1980, Dame Ngāneko lodged a submission on behalf of Ngāti Te Ata in opposition to the expansion project. She was concerned that traditional urupā grounds and fishing reserve were being threatened by the mining around them. She noted that local Māori were concerned mining activities were not respecting "these waahi tapu", and their desire that there be better protection for urupā that were located in the area of proposed mining expansion. She wanted assurances from NZ Steel that Ngāti Te Ata's

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395 "Notice Setting Apart Land in the North Auckland Land District for the Purposes of the Iron and Steel Industry Act 1959" (7 July 1966) 411 *New Zealand Gazette* 1059 at 1067–1068.

traditional rights, including access to sacred areas, would be protected as far as possible.

[520] In November 1980, the Commission for the Environment released an environmental impact audit on NZ Steel's Environmental Impact Report. It stated that it was important that "all sacred sites, whether surveyed land blocks or not, be identified and protected from mining" and that an "adequate buffer zone should be left around the sacred sites to protect, as much as possible, the sacred nature of the land". Specifically, the Commission recommended that:

(a) a vegetation buffer should be provided for around the fishing reserve in Tangitanginga;

(b) there should be sufficient protections for Māori land and access to it; and

(c) any other wāhi tapu that might lie outside the urupā and within the area proposed for mining should be identified and protected.

[521] The Commission noted, however, that increased mining "can take place without significant environmental costs, and the use of ironsands for steel making is an appropriate use of the resource".

[522] It was in the context of the proposed expansion project, and Dame Ngāneko's recorded concerns, that in early December 1980 the Huakina Liaison Committee, consisting of representatives from both Ngāti Te Ata and NZ Steel, was established as a "liaison vehicle" between the iwi and NZ Steel (the Liaison Committee). Referring to the Liaison Committee, Fitzgerald J said:[396]

> … the Committee's life was reasonably short-lived, at least relative to the overall history of this matter. It ceased meeting in December 1986. Key issues and concerns discussed by the Committee centred on the mining of the wāhi tapu areas. It appears that by 1986, the parties' respective positions were fairly entrenched; Ngāti Te Ata representatives not wanting any mining on the wāhi tapu areas, and NZ Steel representatives, while recognising

[396] Judgment under appeal, above n 1, at [522].

> the need to respect the needs of Ngāti Te Ata, seeking a compromise which allowed the mining to continue in accordance with the terms of its Licence.

[523] In October 1981, the Government gave approval for the first stage of the Glenbrook Steel Mill expansion project, and approval in principle to the second stage. New Zealand Steel Development Limited (NZSDL) had already been incorporated in 1980, with NZ Steel as its sole shareholder, to undertake the expansion.

[524] In December 1981, the Planning Tribunal (now called the Environment Court) dismissed an appeal by Dame Ngāneko against the water right consents granted to NZ Steel.[397] The Planning Tribunal held that there was nothing in the Water and Soil Conservation Act that permitted it to take account of Māori spiritual and cultural concerns when making its decisions.

[525] On 8 December 1982, the Crown, New Zealand Steel, NZSDL and Waikato North Head Mining Ltd entered into an agreement (the Formation Agreement) under which the Crown agreed to assist NZ Steel with development activity to increase the capacity to mine and concentrate ironsands at Maioro, and to enlarge the Glenbrook Steel Mill.

[526] The Glenbrook Steel Mill expansion project suffered delays and cost over-runs. NZ Steel's 1985 annual report records that the then estimated capital cost of the project, excluding interest, was $1.528 billion. This exceeded the previous year's estimate by $128 million. At that time, NZ Steel had borrowings of more than $1.427 billion.

[527] The foregoing factual narrative is sufficient to address the claims relating to the 1939 and 1959 takings and the issue of the Licence.

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397 *Minhinnick v Auckland Regional Water Board* PT Auckland A116/81, 16 December 1981.

The claims in respect of the 1939 and 1959 takings and the issue of the Licence

The causes of action pleaded in the High Court

[528] The allegations in the fourth and fifth causes of action pleaded in the High Court were respectively that:

(a) the Crown breached its (pre-existing) fiduciary duty and/or duty of good faith and/or fiduciary duty arising from s 15 of the Public Works Act (the fourth cause of action);[398] and

(b) the 1939 and 1959 takings of the wāhi tapu were unlawful because, broadly, the land was taken for purposes not permitted under the Public Works Act (the fifth cause of action).

[529] Under the fourth cause of action, there was a broad allegation that the Crown breached its fiduciary duty and/or its relational duty of good faith by not acting with loyalty and good faith to Ngāti Te Ata in its dealings with Maioro and the iwi. In particular, it was alleged that the Crown breached its duty through a number of actions, including:

(a) dealing with the land in a manner inconsistent with Ngāti Te Ata's customary title;

(b) in 1959, misrepresenting the proposed purpose of the takings of the wāhi tapu, failing to consult with Ngāti Te Ata as to the intended use of the wāhi tapu for mining, allowing mining to take place on the wāhi tapu, and failing to pay compensation to Ngāti Te Ata in respect of the appropriation of and damage to its interests by mining the ironsand;

(c) failing to ensure that that Ngāti Te Ata's customary interests in the wāhi tapu would be protected; and

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398 Some of the claims pleaded in the fourth cause of action related to events subsequent to the takings and issue of the Licence, including issues in relation to the "1990 commitments" which are separately discussed below.

(d) issues pertaining to the alienation of the Crown's interest in NZ Steel, (which we have not yet discussed).

[530] As a result of the alleged breaches, the plaintiffs submitted that the Crown held all profits made in relation to the use of the wāhi tapu as a constructive trustee for Ngāti Te Ata.

[531] Under the fifth cause of action, the plaintiffs claimed that the 1939 and 1959 takings were unlawful because the land was taken for purposes not permitted under the Public Works Act.

[532] Further, the plaintiffs alleged that the Crown could not lawfully deal with the wāhi tapu as if they were state forest land for the purposes of the Forests Act because:

(a) the takings were void and the land was accordingly held on constructive trust for Ngāti Te Ata;

(b) at the time of the takings, the mining of ironsands was not a permitted use of state forest land; and

(c) the minerals in the wāhi tapu were owned by Ngāti Te Ata.

[533] Other arguments were also raised based on a failure to offer the wāhi tapu back to Ngāti Te Ata when the intended use changed from the original purpose of sand dune reclamation to mining the ironsands. This was because the wāhi tapu were no longer required for the purposes for which they had been taken. It was said that a constructive trust arose at that point. Further, it was claimed that royalties ought to be paid for mining that had already occurred on Tangitanginga.

[534] Finally, the plaintiffs submitted that the takings under the Public Works Act had proceeded in bad faith, having been in reality for mining purposes, with the

ulterior purpose of bringing the wāhi tapu within the ambit of the Iron and Steel Industry Act.[399]

Judgment under appeal

[535] The Judge dealt comprehensively with each of the arguments advanced.[400]

[536] It is not necessary to repeat the detail of the judgment in respect of these causes of action, because Mr Harris clearly stated that there was no challenge on appeal to the Judge's findings that the taking of Te Papawhero for sand reclamation purposes and of the other three wāhi tapu for state forest purposes were: (1) authorised by statute; and (2) not made for an improper or ulterior purpose.[401]

[537] Apart from the broad assertion of breach of fiduciary duty in the fourth cause of action, which the Judge dealt with by rejecting the particulars of breach pleaded, the Judge did not deal with the different arguments now advanced on appeal, to which we now turn.

The issues to be determined

[538] As we summarised above at [46], the issues on appeal relating to the 1939 and 1959 takings of the wāhi tapu, and their subsequent inclusion in the Licence in 1966, are whether those actions of the Crown were:

(a) unlawful on the basis that the Crown failed to consider the special status of the land; and/or

(b) a breach of a fiduciary duty owned by the Crown to Ngāti Te Ata to consider and protect their interests in the special circumstances prevailing.

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399 A further argument raised under the fifth cause of action based on a commitment by the Crown in 1990 to revest the wāhi tapu in Ngāti Te Ata is dealt with below at [658].

400 Judgment under appeal, above n 1, at [598]–[678].

401 At [614]–[638].

Appellant's submissions

[539] On appeal, the focus of the unlawfulness argument was the Crown's alleged failure to consider at any stage the nature and significance of the wāhi tapu and effect of the takings on the wāhi tapu—both before the initial takings under the Public Works Act, and then before their inclusion in the Licence issued under the Iron and Steel Industry Act in 1966.

[540] Mr Harris submitted that the Crown was obliged to consider the special status of the wāhi tapu before taking them under the Public Works Act, and before including them in the Licence.[402] Although neither the Public Works Act nor the Iron and Steel Industry Act expressly referred to or directed the consideration of special interests that Māori may have in land or in relation to activities on the land, Mr Harris submitted that Māori interests (including cultural and spiritual values) cannot be disregarded merely because a statute does not refer to them. Mr Harris relied on *Huakina Development Trust v Waikato Valley Authority*.[403] There, Chilwell J held that the phrase "the interests of the public generally" in the Water and Soil Conservation Act could not be interpreted to exclude Māori spiritual and cultural values if the evidence established the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Māori people.[404]

[541] Mr Harris submitted that the relevant Minister was obliged to consider these matters due to the context provided by the Treaty of Waitangi, which recognised the importance to Māori of their lands and the obligation undertaken by the Crown to protect them. Nothing in the Public Works Act directed the Minister to exclude those factors from consideration. Relevant context was also provided by the Crown's historical recognition of the importance of the significance of the wāhi tapu, the restrictions on alienation, the interests of the iwi as a whole in them, the Crown's knowledge that the grantees were deceased and the decision not to seek the appointment of successors to deceased grantees from whom objections might be

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402 Mr Harris did not rely on breach of the Forests Act 1949 in his argument on appeal.

403 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC). Mr Harris also referred to *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.

404 *Huakina Development Trust*, above n 403, at 223.

received. As events transpired, there had been little opportunity for there to be objections. All these considerations amplified the Crown's responsibility to inform itself and weigh the special status of the wāhi tapu, and properly consider it, before deciding to take the land.

[542] In respect of the Iron and Steel Industry Act, Mr Harris submitted that consideration of the interests of Māori may have led the decision-maker to exclude the wāhi tapu from the Licence area (as the Crown later decided should happen), and/or to include other terms in the Licence to recognise the impact of mining on what was an important taonga of Māori, such as requiring remediation. There could also have been consideration of whether utilising Māori land to establish the industry would have justified sharing the economic benefits with Māori whose land was to be mined. Mr Harris submitted that the Crown's failure to consider the interests of Māori and the status of the wāhi tapu rendered the granting of the Licence and setting apart of the wāhi tapu for the purposes of the Iron and Steel Industry Act unlawful.

[543] Secondly, Mr Harris submitted that the Crown had breached a fiduciary obligation which it owed to Ngāti Te Ata. Although the fiduciary duty relied on was different in kind from that arising in *Guerin* and *Proprietors of Wakatū*, the Crown had still assumed a responsibility, in the circumstances of this case, to consider and protect the interests of Ngāti Te Ata when dealing with the land at Maioro and the wāhi tapu in particular. Mr Harris argued the fiduciary duty arose from:

(a) the obligations of good faith and active protection stemming from the Treaty of Waitangi;

(b) the impact on Ngāti Te Ata of the Waiuku Deed and Confiscation, through which they had lost much of their land, and customary ownership was broken and replaced with Crown grants;

(c) the recognition of successors to grantees required applications to the Māori Land Court, which was an inconvenient and time-consuming process. This had motivated the Crown to proceed under statutory powers rather than by negotiation;

(d) the restraints on the alienation of land, in recognition of the vulnerability of Ngāti Te Ata (the right of pre-emption and the terms of the Crown grants);

(e) the fact that the exercise of statutory powers to take and licence land for mining would deprive Ngāti Te Ata of the use and enjoyment of their land, and disrespect the wāhi tapu; and

(f) the adoption of a method of acquisition that denied those most affected a means of looking after their own interests.

[544] If the alleged fiduciary duty is found to exist, Mr Harris argued it was breached when: (1) Te Papawhero was taken in 1939; and/or (2) when the other three wāhi tapu were taken in 1959; and/or (3) when the wāhi tapu were included in the Licence to NZ Steel in 1966.

NZ Steel's submissions

[545] Turning first to the legality of the takings and the inclusion of the wāhi tapu in the Licence, Mr Hodder noted that the applicant's new mandatory relevant consideration claim falls outside the scope of the proceeding and the appeal. Regardless, Mr Hodder submitted that the position of Ngāti Te Ata was not a mandatory relevant consideration, and in any event, views from Ngāti Te Ata were sought and taken into account.

[546] Mr Hodder contended that it did not follow from the authorities cited by Mr Harris that the nature and significance of the wāhi tapu is a mandatory relevant consideration for the exercise of powers under the Public Works Act, the Forests Act, or the Iron and Steel Industry Act. A mandatory relevant consideration arises only where the statute expressly or impliedly identifies considerations which are required to be taken into account by an authority as a matter of legal obligation.

[547] The Public Works Act authorises interference with property rights in the public interest. Mr Hodder referred us to *Dannevirke Borough Council v Governor-General*, in which the Chief Justice held that the status of land as Māori land was an irrelevant

consideration to takings under the Public Works Act.[405] Despite the criticism of *Dannevirke Borough Council* by this Court 40 years later in *Minister for Land Information v Dromgool*,[406] Mr Hodder submitted that *Dannevirke Borough Council* reflects the law as it stood at the time the statutory decisions relevant here were made.

[548] The Iron and Steel Industry Act had a specific and overriding focus on the establishment and promotion of a domestic iron and steel industry by exploiting a natural resource in the national interest. A balancing of competing interests would be inconsistent with the apparent legislative purpose.

[549] In any event, Mr Hodder noted that there is no direct evidence as to what was taken into account at the time statutory decisions were made. Nevertheless, the evidence that is available indicates that the effects of the takings and the grant of the Licence, including on Ngāti Te Ata, were specifically considered by decision-makers.

[550] Next, Mr Hodder submitted that general principles of fiduciary law do not support a sui generis fiduciary duty or relational duty of good faith in this context. Both *Guerin* and *Proprietors of Wakatū* were narrowly tailored to their respective circumstances, which are not analogous to the facts of this case.

[551] He submitted that the specific statutory powers to which the duty is alleged to attach are inconsistent with the development of such a duty. None of the relevant statutes involve a discretion on the part of the Crown that was to be exercised on behalf of or for the benefit of Māori. Decision-makers were obliged to make decisions in the public interest consistent with the purposes of the relevant statutes, which were irreconcilable with the proposed fiduciary duty.

[552] Mr Hodder also submitted that the appellant cannot establish that no consideration was given to the status of the land which was then subjected to the Licence and the impact of decisions on Ngāti Te Ata.

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405 *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129 (HC).
406 *Minister for Land Information v Dromgool* [2021] NZCA 44, [2021] NZRMA 382 at [119].

[553] In any event, even if this Court considered the Crown erred in the taking of the wāhi tapu, Mr Hodder submitted it would not follow that the grant of the Licence was unlawful. The validity of the Licence and the rights it granted to NZ Steel do not depend on Crown ownership of the Licence area. Section 3 of the Iron and Steel Industry Act vested the right to prospect and mine within the Licence area in the Crown, and authorised the Minister to carry on prospecting or mining operations on the Licence area "without further authority". Section 3(1) clearly stated the rights granted under it override any inconsistent property rights. To suggest the Crown has breached any duty in relation to the Licence would be a collateral challenge to primary legislation and Parliamentary sovereignty.

Crown submissions

[554] The Crown adopted the submissions of NZ Steel regarding the legality of the takings but made an additional point in relation to the scheme of the Public Works Act.

[555] The Crown submitted the challenge to the takings should be considered in light of the statutory scheme of the Public Works Act. The requirement under s 22 of the Public Works Act to serve notice on owners, occupiers or persons with an interest in land was limited: s 22(3) provided that the naming and serving requirements in s 22(1) did not need to be complied with if the affected individual was a "Native" whose title was not registered under the Land Transfer Act 1915. Section 23 provided that, after addressing any objections, the Minister could take the land in the manner set out in s 23 if satisfied that the proposed works would not cause harm. It was clear from the operation of ss 22 and 23 of the Public Works Act that there was no duty or requirement for the Minister to actively consult, or seek the permission of, the owners or any individual with an interest in the land prior to, or during, the taking.

[556] The scheme was also designed to ensure there was a narrow window in which a party could challenge or seek relief against public works takings. Section 45(1) provided that a claim for compensation relating to lands being taken could not be brought more than five years from the date of proclamation. Section 27(1) also limited the ability of the Governor-General to revoke a proclamation order—revocation had

to occur between the time of the issuing of proclamation and the granting of compensation.

Our view

Were the 20th century actions of the Crown unlawful by reason of its alleged failure to consider the special status of the wāhi tapu?

[557] We deal first with the argument advanced that the Minister of Public Works was obliged to consider the special status of the land comprising the wāhi tapu at Maioro prior to exercise of the powers of acquisition under the Public Works Act. For a number of reasons, we are not persuaded that there was a mandatory consideration to that effect.

[558] There is now no claim that the taking of the land compromising the wāhi tapu was unlawful because it was not authorised by statute or carried out for an improper purpose. The taking of the land was authorised by s 11 of the Public Works Act as land required for a public work, namely a Government work in terms of s 11(a). In the case of Te Papawhero, the taking was for "sand dune reclamation" purposes. In the case of the other three wāhi tapu—Waiaraponia, Te Kuo and Tangitanginga—the taking was for state forest purposes. The High Court explained how the Public Works Act applied to authorise these purposes, and there is no challenge to the Judge's reasoning.[407]

[559] There were procedural requirements set out in s 22 of the Public Works Act. Section 22(1)(a)–(c) required that the relevant land be surveyed and shown on a plan, together with the names of the owners and occupiers of the lands "so far as they [could] be ascertained";[408] a copy of the plan to be deposited in some place in the roads district in which the lands were situated; and a notice to be gazetted and twice publicly notified stating where the plan could be inspected, and giving a general description of the proposed works and land required to be taken. The notice was required to ask all persons affected to "set forth in writing any well-grounded objections" to the works or takings within forty days from the first publication of the notice.[409] There was an

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407 Judgment under appeal, above n 1, at [614]–[625].
408 Public Works Act 1928, s 22(1)(a).
409 Section 22(1)(d).

obligation under s 22(1)(e) to serve the notice and description on the owners and occupiers, and any other person with an interest in the land, "so far as they can be ascertained". If there were "well-grounded" objections, the objectors had the right to call evidence to support the objection, before the Minister or their delegate.[410]

[560] However, s 22(3) provided that the requirements of s 22(1)—to show the names and occupiers on the plan, and as to service of the notice on the owners and occupiers—would "have no application to any Native" (as defined in s 2) who was an owner or occupier of the land, unless their title to the land was registered under the Land Transfer Act. If their interest was not so registered, there was an additional requirement, set out in s 22(4), to publish a notice to the same effect as the s 22(1)(c) *New Zealand Gazette* notice in the "*Kahiti*", but proceedings for the taking of the land could not be invalidated by any failure to do so.[411]

[561] After consideration of any objections, if the Minister was "of opinion that it is expedient that the proposed works should be executed" and that "no private injury" would be done for which due compensation was not provided by the Public Works Act, the taking could proceed in accordance with machinery provisions set out s 23. This would culminate in a proclamation by the Governor-General taking the land.[412] A copy of the proclamation was then deposited in the relevant District Land Registry.[413]

[562] It is clear from the statutory regime that there was no duty or requirement on the Minister to consult or negotiate with affected landowners in advance of the taking, and no equivalent to the notice of intention to acquire process contained in s 18 of the Public Works Act 1981, which requires prior notice to and negotiation with the owners of land to be acquired.[414] There was a requirement to seek and consider "well-grounded objections" and to pay compensation for the taking,[415] but no other process was required. Even if there was a "well-grounded objection", it seems that

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410 Section 22(1)(f).
411 "*Kahiti*" was presumably a reference to *Ko te Kahiti o Niu Tireni*, a Government publication like the *New Zealand Gazette* containing official notices in te reo Māori.
412 Public Works Act 1928, s 23(d).
413 Section 28(1).
414 Public Works Act 1981, s 18.
415 Public Works Act 1928, pt 3.

the Minister could nevertheless decide to proceed if it was "expedient" that the proposed public work be executed.[416] If there were no objection, the Minister was not required to undertake any balancing of potentially competing interests. We accept the Crown's submission that these aspects of the statutory scheme tell against Ngāti Te Ata's claimed mandatory consideration.

[563] We do not consider *Huakina Development Trust*, on which Mr Harris relied, suggests a different conclusion. The judgment of Chilwell J is rightly regarded as important for its recognition of the significance of the Treaty of Waitangi in the interpretation and application of statutory provisions. But it is important to recognise what it determined. The case came to the High Court on appeal from a decision of the Planning Tribunal which had upheld the grant of a water right to discharge treated dairy shed water and waste into a tributary of the Waikato River.[417] In the course of its decision, the Planning Tribunal had determined, amongst other things, that art 2 of the Treaty of Waitangi and the spiritual and cultural relationship of Māori people to the waters of the region were not proper matters to be considered on an application for a water right under s 21 of the Water and Soil Conservation Act.

[564] The High Court held this was an error of law.[418] It noted that s 21 did not explicitly express the matters to be taken into account in granting or refusing applications for a water right. This had led to judicial decisions that established the proper approach was to balance the advantages and disadvantages which would follow from the exercise of the water right. The ultimate decision was that which best accorded with the objects and purposes of the Act.[419] There was also not much detail in the Act about what matters could be raised in an objection to the grant of an application for a water right. Section 24(4) of the Act relevantly provided that any person could lodge an objection "on the ground that the grant of the application would prejudice [their] interests or the interests of the public generally". As noted above, Chilwell J held that the phrase "the interests of the public generally" could not be interpreted to exclude Māori spiritual and cultural values if the evidence established the existence of spiritual, cultural and traditional relations with natural water held by

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416 Section 23.
417 *Huakina Development Trust*, above n 404, at 190–191.
418 At 227.
419 At 194.

a particular and significant group of Māori people.[420] He also held that the Planning Tribunal did not correctly apply the policies of the Act in concluding those matters were not proper matters to be considered on an application under s 21.[421]

[565] The issue here is different. It is not whether consideration of the special status of the wāhi tapu was a matter that the Minister could take into account, but whether that was an obligatory consideration under the statutory framework of the Public Works Act. We do not see how such an obligation could be read into the Public Works Act in circumstances where the proposed acquisition and works were (as is conceded) for purposes authorised by the statute, the expediency test was able to be satisfied, and no objections were lodged, whether in 1939 in relation to Te Papawhero or in 1959 in relation to the other three wāhi tapu.

[566] We add however that we do not think that *Dannevirke Borough Council*, on which Mr Hodder relied, establishes that it would have been impermissible or irrelevant for the Minister to have considered issues raised in opposition to the acquisition based on the existence of the wāhi tapu had they been raised in objections.[422] It may be, as Mr Hodder submitted, that the decision in *Dannevirke Borough Council* reflected the contemporary understanding of matters that could properly be taken into account under the Public Works Act, although as this Court observed in *Minister for Land Information*, the view seems anachronistic today.[423] However, in this case, had objections been lodged by representatives of Ngāti Te Ata referring to the kinds of issues raised by Mr Harris in submissions, it is difficult to see how they could have been rejected as not "well-grounded" in terms of the statutory language in s 22 of the Public Works Act. Even if the Minister decided they should not be dispositive in view of the purpose of the works of sand dune reclamation, the history of the Crown's dealing with the land would have properly justified consideration of the views of Ngāti Te Ata ascertained after a genuine attempt to consult with them.

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420 At 223.
421 At 227.
422 *Dannevirke Borough Council*, above n 405.
423 *Minister for Land Information*, above n 406, at [119].

[567] As to the Iron and Steel Industry Act, we also cannot read into that statute a mandatory obligation to take into account the special status of the land. We accept the submissions made by NZ Steel that to do so would be contrary to the statutory scheme which proceeded on the basis that the right to prospect for and mine was appropriately granted in relation to land within an ironsands area described in the schedule to the Public Works Act. The land so included was owned by the Crown.

[568] As a consequence, we are unable to uphold Ngāti Te Ata's claim that the 1939 and 1959 takings under the Public Works Act were unlawful, or that the inclusion of the wāhi tapu in the Licence in 1966 was unlawful.

Did the Crown breach a fiduciary duty owed to Ngāti Te Ata?

[569] We do not repeat here the discussion of fiduciary duty which we have already considered in the different context of the Waiuku Deed and the Confiscation. In the present context, the principal difficulty with the claim of breach of fiduciary duty is that it seeks to challenge the exercise of statutory powers which it is now conceded were exercised for purposes contemplated by both the Public Works Act and the Iron and Steel Industry Act. It is accepted that the purpose of sand dune reclamation that lay behind the 1939 taking of Te Papawhero was lawful. In 1959, the takings of the other wāhi tapu for state forest purposes were also within the statutory authority conferred by the Public Works Act. So too, clearly, was the grant of the Licence to mine ironsands within an ironsands area that had been specifically identified for the purpose in the Iron and Steel Industry Act. Unless it can be said that the statutory powers were subject to a gloss that they would not be exercised in respect of land of special significance to Māori, we can see no basis for the claimed fiduciary duty.

[570] The concept of a fiduciary duty whether of a kind recognised in equity or as a sui generis obligation owed by the Crown to indigenous people as a colonising power, must be based on an assumption of responsibility to act or refrain from acting in a way that reflects the duty. As earlier discussed, in *Paki (No 2)* Elias CJ spoke of the Crown having taken on obligations in the Treaty of Waitangi in the exchange of sovereignty for the protection of property.[424] It was on this basis that the Chief Justice considered

[424] *Paki (No 2)*, above n 54, at [152] per Elias CJ.

it was "not inconceivable" that duties of a fiduciary nature might arise in the context of land transactions between the Crown as the sovereign power and indigenous peoples.[425] We see that proposition and context as very different from the exercise of statutory powers, as occurred here, in accordance with the purpose for which the powers have been given, in respect of land no longer held pursuant to customary title. In such a case, the Crown is not dealing with "pre-existing interests in land" or going beyond a "general obligation to the public".[426] And as we have already noted earlier in the judgment, there was nothing here equivalent to the assumption of responsibility by the Crown which characterised the facts of *Proprietors of Wakatū*.[427]

[571] The powers of acquisition in the Public Works Act were to be exercised for a public purpose.[428] Here the work of sand dune stabilisation (in 1939) and afforestation (in 1959) were for the purpose of preserving and using the land for purposes perceived to be of public utility. And in the case of the powers exercised under the Iron and Steel Industry Act in 1966, it was plainly government policy to provide for the mining of ironsands so as to facilitate the establishment of an iron and steel industry for the country. Thus, the Iron and Steel Industry Act's long title provided that it was:

> An Act to vest in the Crown the right to prospect for and mine ironsands in certain areas, to enable the Minister to grant certain powers, and to make provisions in respect of an iron and steel industry in New Zealand

[572] In the case of both statutes, the relevant powers were the paradigm of powers to be exercised as "governmental obligations owed to all".[429] The idea that the exercise of such powers could be in breach of a fiduciary duty owed to a small section of the public is problematic.

[573] None of this is to depart from the view already expressed that the special nature and history of the land could have been taken into account in the context of the exercise of the Public Works Act powers in question. What the practical effect of that might have been on the sand dune reclamation project is difficult to ascertain at this distance

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425 At [151] per Elias CJ.

426 *Proprietors of Wakatū* (SC), above n 49, at [379] per Elias CJ, citing *Calder*, above n 352; and *Elder Advocates of Alberta Society*, above n 354.

427 See above at [379], [390] and [450].

428 Public Works Act 1928, s 13(a).

429 As put by Elias CJ in *Proprietors of Wakatū* (SC), above n 49, at [379].

in time, given the desire to ensure the land was stabilised and farmland adjacent to it protected. But as detailed above, there was at least an attempt to ascertain the views of Ngāti Te Ata, and those spoken to apparently indicated no objection to the taking subject to reservations that resulted in the exclusion of the urupā in Te Kuo and the fishing reserve in Tangitanginga. There was also a process followed to fix and pay compensation for the taking, as detailed above at [471] to [473] and [496] to [499], involving payment to the Waikato-Maniapoto District Māori Land Board in the case of Te Papawhero, and the Māori Trustee in the case of the other three wāhi tapu. We were not taken to evidence about what was done with this money, but note that the Waitangi Tribunal said that the compensation was received by the Māori Trustee without consultation, and few of the successors entitled to it had been paid.[430]

[574] We acknowledge Mr Hodder's point about the lack of information now available about what was taken into account in exercising the relevant statutory powers under the Iron and Steel Industry Act, but it seems unlikely there can have been a proper appreciation of the importance of the wāhi tapu at the time.

[575] It does seem extraordinary that the wāhi tapu were included in the Licence, given the history we have detailed above about their exclusion from the Waiuku Deed, their subsequent confiscation but then inclusion in Crown grants, and the knowledge that must have existed about their importance to Ngāti Te Ata. It is not possible to say whether there was failure of institutional memory on the part of the Government departments involved, or simple carelessness or indifference. The Waitangi Tribunal clearly recognised the legitimacy of Ngāti Te Ata's grievance about the inclusion of the wāhi tapu in the Licence.[431] Further, as will be apparent from our subsequent discussion about the 1990 commitments, successive governments apparently recognised that the wāhi tapu should not have been included in the Licence. However, the fact that the wāhi tapu were included in the Licence does not mean that there was conduct amounting to an actionable breach of fiduciary duty.

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430 Wai 8 report, above n 7, at 22. The Waitangi Tribunal also observed that many of the Māori affected did not know their lands had been taken until it was raised in the hearings, and that if they were to claim compensation at that point there would be so many successors that the claims would not be worth making.

431 At 23. See also recommendation 12(a) at 98.

[576] Consequently, we are not able to accept the argument that the Crown breached a fiduciary duty to Ngāti Te Ata in respect of the exercise of its Public Works Act and Iron and Steel Industry Act powers.

1990 COMMITMENTS AND TREATY OF WAITANGI NEGOTIATIONS

Background

[577] The Wai 8 claim was filed in the Waitangi Tribunal by Dame Ngāneko on 9 December 1983. It was brought on behalf of the Huakina Development Trust and Te Puaha ki Manukau. The claim raised issues relating to the Manukau Harbour, including the decision to grant NZ Steel's application for water rights in respect of the proposed Glenbrook Steel Mill expansion project.

[578] On 27 March 1984, Dame Ngāneko provided further particulars of the claim to the Waitangi Tribunal. Then, on behalf of the Huakina Development Trust, she wrote to NZFS and NZ Steel requesting that all activity on the wāhi tapu areas cease. In a letter to Dame Ngāneko, the Commissioner for the Environment concurred with this request. He noted that he had expected the Commission's 1980 recommendations concerning the wāhi tapu, contained in the environmental impact audit set out above at [520], had been implemented.

[579] In July 1984, the Planning Tribunal dismissed an appeal by Dame Ngāneko against the water rights granted to NZ Steel by the Waikato Valley Authority.[432] The water rights allowed NZ Steel to draw increased amounts of water from the Waikato River for use in the ironsands concentration plant on the mine site and for use in its slurry pipeline system.

[580] The Waitangi Tribunal sat from 16 to 20 July 1984 for an initial hearing of the Wai 8 claim. At the hearing, counsel for Ngāti Te Ata provided the Waitangi Tribunal with a list of issues, including a claim that the wāhi tapu at Maioro were being desecrated and threatened by the mining activities of NZ Steel. The Waitangi Tribunal's then-jurisdiction under the Treaty of Waitangi Act prevented it

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[432] *Minhinnick v Waikato Valley Authority* PT Auckland A66/84, 25 July 1984.

from making findings or recommendations in respect of acts or omissions of the Crown that occurred before 1975, but it could review issues that were part of a continuing legislative scheme or policy that remained in force after 10 October 1975.[433]

[581] On 31 July 1984, the Waitangi Tribunal issued an interlocutory decision on issues in the Wai 8 claim requiring further consideration.[434] Those issues included the compulsory acquisitions of the four wāhi tapu areas at Maioro.[435]

[582] There were further hearings on the claim in the Waitangi Tribunal between 20 and 24 August and between 19 and 23 November 1984, the latter devoted to the parties' submissions. During this process, NZFS made a conditional offer to sell back either the four wāhi tapu areas, or a combination of some of them and other land of importance to Ngāti Te Ata, provided that the land remained subject to the Licence and a forestry lease to the Minister of Forests. It was proposed that Ngāti Te Ata receive the royalties under the Licence and revenue from the forestry lease. This proposal had the support of NZ Steel, but Ngāti Te Ata did not accept it.

[583] In its July 1985 report, the Waitangi Tribunal discussed its findings on the claims about the compulsory acquisitions at Maioro.[436] It referred to the issue of whether it has jurisdiction to inquire into the claims, saying it had decided not to determine it because the NZFS had embarked on "almost immediate negotiations for a return of the land".[437] It continued:[438]

> A necessary caveat (which may in fact be negotiable) was that private interests must be protected, and in particular the mining rights of [NZ Steel] under what we judge to be terms very favourable to the company.
>
> … We encourage the resolution of disputes without recourse to this Tribunal. We therefore have no specific recommendations on this part of the claim and instead commend the [NZFS's] initiatives to seek settlement. To protect the interests of the claimants we simply grant leave to them to file a fresh application in respect of the same subject matter should that be necessary. Meanwhile we urge that the search for a settlement be continued.

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433 Treaty of Waitangi Act, s 6(1)(c) and (6)(a) (as at 31 July 1985).
434 Waitangi Tribunal *Re Nganeko Minhinnick* (Wai 8, interlocutory decision, 31 July 1984).
435 At [10].
436 Wai 8 report, above n 7.
437 At 88.
438 At 88–89.

[584] The Waitangi Tribunal made two recommendations on Maioro. Recommendation 9, addressed to the Ministers of Lands, Forests, Energy and Works and Development, was that negotiations be continued with all affected parties for a settlement of the claims in respect of the compulsory acquisitions at Maioro.[439]

[585] Recommendation 12(a) stated:[440]

> that the consents and licences whereby NZ Steel Ltd is authorised to undertake mining operations at Waikato North Head be reviewed and renegotiated, or new undertakings sought, to protect sacred sites and adjoining Maori lands … (but not so as to presume that all former Māori freehold lands are sacred sites), with provision for the re-interment of discovered remains, and with provision for the re-interment of the remains within larger wahi tapu where burials are dispersed, with the concurrence of elders of Ngati Te Ata

[586] Recommendation 12(b) was that, if Ngāti Te Ata agreed, assistance would be given by the Crown for survey of agreed sacred sites, and for them to be established as Māori reservations, with trustees appointed for their control.

[587] On 9 September 1985, the Director-General of Lands wrote to the Director-General of Forests and referred to a memorandum of 22 August 1985 requiring "our two departments" to proceed as a "matter of urgency" to satisfactorily resolve the issues concerning the Waiuku State Forest and mining operations at Maioro.

[588] It was also on 9 September 1985 that the Ngāti Te Ata Trust was formed with Tuherea Kaihau as Chairperson, Dame Ngāneko as Deputy Chairperson and Alex Kaihau as Secretary. The latter wrote to the local manager of NZFS informing him a "tribal trust" had been formed to represent the tangata whenua within Āwhitu, Maioro, Puni and Glenbrook on all matters. The letter sought to follow up on the Waitangi Tribunal's recommendation that "the matter concerned rest with the Ngati Te Ata people" in the near future.

[589] On 6 November 1985, John Hood of the NZFS wrote (for the Director-General) to Mr Alex Kaihau (on behalf of the Ngāti Te Ata Trust),

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439 At 97.
440 At 98.

referring to a meeting on 19 October 1985. This was one of a series of meetings of the Liaison Committee, referred to above at [522], attended by representatives of Ngāti Te Ata, NZ Steel and the NZFS.[441] The letter noted that Mr Alex Kaihau had asked in the meeting for an offer made during the Waitangi Tribunal hearing to be repeated in writing.[442] The letter continued:

> The Minister of Forests has approved a proposal that the Government should seek statutory authority to sell back to such Maori people or organisation as shall be determined by the Maori Land Court either the Tangitanginga, Te Kua, Waiaraponua and Te Papawhero, Waahi Tapu or other land within Waiuku State Forest in substitution for any part or parts of them at a reasonable price, taking into account the long-term encumbrances (mining rights and forestry lease) on the land, the circumstances under which the land was acquired by the Crown and the improvements to the land brought about by the Crown. It is intended that this statutory authority be obtained by way of an appropriate empowering clause in a Maori Purposes Bill which would also provide for the preservation of the mining rights of NZ Steel Ltd.
>
> The Minister of Forests further decided that, in the event of such statutory authority being obtained, the sale of the land to the Maori people or organisation determined by the Maori Land Court would be negotiated subject to an agreement to lease the land back to the [NZFS] for at least 99 years for continued protection/production afforestation.
>
> This offer was conveyed to a group of Ngati Te Ata elders during the course of the Waitangi Tribunal hearings and, at the same time, they were advised that, having regard to the manner in which the land had been compulsorily acquired and to the fact that a 99-year lease back to the Forest Service would also be required, the price at which the land would be sold back would not be very large.
>
> The [NZFS] has taken note of the finding of the Waitangi Tribunal … where it states "In the identification of site[s] the [NZFS] should not accept the whole of the former Maori blocks as Waahi Tapu, simply on the grounds that they were once so described, but should strive to identify those sites that are strictly Waahi Tapu through burials or through having a particular sacred significance for the tribe. … The test should be whether the site can be shown to have a sacred significance for Ngati Te Ata." …

[590] The letter ended by expressing readiness to continue discussions on the proposals with members of the Ngāti Te Ata Trust at a further meeting of the Liaison Committee planned for 12 December 1985.

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441 A memorandum of 25 October 1985 from the Director-General of Forests to the Minister of Forests referred to the Liaison Committee as "proving to be a very useful vehicle" for continuing discussions following the Waitangi Tribunal report.

442 The offer had been referred to in a written brief of evidence given by Mr Hood before the Waitangi Tribunal, but the letter of 6 November 1985 went into more detail.

[591] At the 12 December 1985 meeting there was a discussion about wāhi tapu and urupā. At one stage, Mr Alex Kaihau explained that he had not answered Mr Hood's letter of 6 November 1985 because Ngāti Te Ata did not wish to discuss the proposal it contained "in isolation from the bigger issue of confiscation". Discussing the proposal in the letter could be seen as "endorsement for all other transactions". Mr Alex Kaihau asked Mr Hood if he was in a position to talk about the Confiscation. The minutes of the meeting summarised Mr Hood's response:

> Mr Hood replied that that issue was completely separate from the Maioro Block which had happened more recently. All the other confiscations are separate and unrelated to what has happened in the forest area. He agreed that if Ngati Te Ata wanted to talk about the earlier confiscations they would have to talk to Department of Maori affairs and possibly Lands and Survey or Ministry of Works. But with reference to the Maioro Block and the forest, Ngati Te Ata could talk to the [NZFS].

[592] Mr Alex Kaihau did not accept this. According to the minutes:

> He said that the taking of the Wahi Tapu areas back in 1959, or thereabouts, under the Public Works Act, in their view was an incorrect transaction. If the Ngati Te Ata were seen to be a party to this, it would appear to endorse the earlier confiscations.

[593] On 30 May 1986, Mr Tuherea Kaihau wrote to the Waitangi Tribunal and requested an "immediate rehearing" of the compulsory acquisitions in Maioro. Mr Tuherea Kaihau wrote "with regret" that a satisfactory solution had not been offered, and that the NZFS would return the land "but with conditions attached".

[594] The Cabinet Social Equity Committee discussed the Waitangi Tribunal's recommendations on 24 June 1986 and again on 30 September 1986. At the latter meeting, the Committee agreed to support all the recommendations in principle (except one that is not relevant here). It noted that negotiations with Ngāti Te Ata were being undertaken by the Minister of Forests and invited him to advise the outcome of the discussions and options for the settlement of the claims in accordance with recommendation 9. With respect to recommendation 12, the Committee noted the absence of provision in the Iron and Steel Industry Act to renegotiate conditions for the cessation of mining currently underway, and agreed that negotiations should continue between Ngāti Te Ata, government agencies, and NZ Steel "in order that

options may be reached to protect where practicable, Maori sacred sites and Maori lands affected by proposed, current or completed mining operations".

[595] On 28 August 1986, the Waitangi Tribunal wrote to Mr Tuherea Kaihau stating that the Waitangi Tribunal could not conduct a rehearing but it could receive a fresh claim. The letter noted the Waitangi Tribunal had granted leave to file a fresh application in respect of the compulsory acquisition of the land forming the Waiuku State Forest. Further, a fresh claim could be lodged with respect to the mining at Maioro. The letter advised that a fresh application should set out the matters complained of and the relief sought.

[596] In the meantime, consideration was being given to the restructuring of NZ Steel, which by September 1986 had become indebted to the extent there were doubts about its viability while it needed to incur significant additional expenditure in order to fund the Glenbrook Steel Mill expansion project. On 1 December 1986, the Treasury submitted a report to the Cabinet Policy Committee on strategies for disposing of the Crown's interest in NZ Steel in a manner that would minimise the cost to taxpayers. On 8 December 1986, the Cabinet agreed the Crown was to take over the guaranteed debt of NZ Steel as at 30 September 1986 in return for a 90 per cent shareholding.

[597] On 18 December 1986, the State-Owned Enterprises Act was enacted. It included provision for the abolition of the NZFS and the transfer of its assets and liabilities to the New Zealand Forestry Corporation (Forestry Corporation).[443] Dame Ngāneko sought confirmation that blocks of land currently part of the Waiuku State Forest would not be vested in the Forestry Corporation. The Deputy Prime Minister advised her on 24 February 1987 that s 27 of the State-Owned Enterprises Act provided that when land subject to a Waitangi Tribunal claim was transferred to a state-owned enterprise, that land would "continue to be subject to that claim".

[598] On 17 March 1987, Wai 31 was lodged by Dame Ngāneko in the Waitangi Tribunal on behalf of Te Puaha ki Manuka and the Huakina Development

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443 State-Owned Enterprises Act 1968, s 23 and sch 2.

Trust. The claim alleged the transfer of the wāhi tapu in Maioro to a state-owned enterprise would be prejudicial.

[599] On 1 April 1987, management of the Waiuku State Forest was transferred to the Forestry Corporation. Until October 1988, the four wāhi tapu areas were excluded from the transfer and instead managed by the Ministry of Forestry.

[600] On 2 June 1987, the Cabinet approved the sale of the Crown shares in NZ Steel. This was to take place as soon as possible, in a manner that maximised the value to the taxpayer. On 19 October 1987, an agreement was signed to sell the Crown shareholding in NZ Steel to Equiticorp Holdings Ltd in exchange for Equiticorp shares.

[601] On 3 August 1988, Dame Ngāneko filed an amended statement of claim for Wai 31 in the Waitangi Tribunal which expanded the claim to cover all of the Waiuku State Forest, not just the wāhi tapu in Maioro.

[602] A report by the Forestry Working Group dated 19 October 1988 stated there was a need to clarify the definition of a number of assets in respect of which there was some uncertainty or special circumstances. Those assets included the wāhi tapu and Waiuku State Forest more generally. The Ministerial Committee on Land Allocation agreed to amend the land allocation schedules to show that Waiuku State Forest was allocated to the Forestry Corporation and that the four wāhi tapu areas were allocated to the Department of Conservation (DOC).

[603] On 7 December 1988, the Ministerial Committee on Land Allocation agreed that:

(a) the Forestry Corporation held cutting rights over the wāhi tapu to enable it to meet wood supply agreements;

(b) the Forestry Corporation and DOC were to enter into a management agreement to enable the forest to continue to be managed as an entity while safeguarding the values of the wāhi tapu;

(c) tangata whenua should be consulted on the management agreement; and

(d) the management agreement should have regard to the general policy of protection of wāhi tapu and the claims before the Waitangi Tribunal.

[604] On 27 January 1989, Shieff Angland Dew & Co, solicitors acting for Ngāti Te Ata, sought an assurance from the Minister of State-Owned Enterprises that commercial cutting rights to Waiuku State Forest would not be sold.

[605] On 7 March 1989, the Cabinet Social Equity Committee agreed that the resolution of the issues at Maioro must include the continued operation of sand mining there. But it decided that there should be negotiation between the Crown, NZ Steel and Ngāti Te Ata with a view to reaching agreement as to which areas of importance should be excluded from mining operations. The agreement was "to include procedures to ensure that the tapu and proper reinterment of discovered remains in mining areas is provided for". It approved the sending of a letter by the Minister of State-Owned Enterprises to Ngāti Te Ata's solicitors setting out the Government's position. The decision was approved by the Cabinet on 13 March 1989.

[606] On 17 March 1989, the Minister of State-Owned Enterprises wrote a reply to Shieff Angland Dew & Co's 27 January 1989 letter. The Minister noted that although that letter had raised a particular concern about the sale of cutting rights, he was taking the opportunity to more widely address what the Government understood to be the concerns of Ngāti Te Ata to ensure progress could be made in the settlement of outstanding grievances. The letter gave an assurance that the land forming the Waiuku State Forest would not be sold, and that the Government did not intend to sell forestry rights in respect of the four wāhi tapu areas. He added:

> Indeed, in respect of these four areas I can go considerably further and state that the Government is prepared in principle to make them no longer subject to the Iron and Steel Industry Act and to revest them in the original owners (after a determination of ownership, if necessary, by the Maori Land Court). This would also apply to any other burial sites in the forest that might be identified in agreement between the Ngati Te Ata, the Crown and [NZ Steel], subject to a satisfactory agreement being reached between all parties on the net outcome of the identifications and the procedures for dealing with the discovery and interment of human remains in those lands that would

> remain in Crown ownership. The Government is prepared to fund this identification exercise on agreed terms. We hope that it may proceed as soon as possible.

[607] After referring to other issues concerning tribal control over fishing areas and the effects of commercial fishing in the Manukau Harbour and lower Waikato River, the Minister offered to discuss any other issues of concern. He expressed the hope that an overall settlement could be reached. He invited a reply, saying he would also be writing to NZ Steel to inform them of the Government's approval in principle in respect of the wāhi tapu.

[608] The Minister's letter to NZ Steel was dated 23 March 1989. The letter was sent to inform the company of "a recent decision taken by the Government in relation to Waiuku State Forest" and to seek the company's assistance in a course of action the Government intended to pursue "in concert with" the company and Ngāti Te Ata. The letter included the following:

> In response to a recent letter on behalf of the Ngati Te Ata, the Government has indicated that, subject to an agreement between all the parties involved (see below), it is prepared in principle to make the areas known as Te Papawhero, Tangitanginga, Waiaraponia and Te Kuo no longer subject to the Iron and Steel Industry Act and to revest these sites in the original owners … This would also apply to any other burial sites that might be identified by the Ngati Te Ata in agreement with the Crown and New Zealand Steel …
>
> The objectives of the Government are to resolve a long-standing grievance on the part of the Ngati Te Ata through providing reasonable protection for wahi tapu, but also to provide secure access by NZ Steel to a sufficient iron sands resource within Waiuku State Forest. The Government is strongly of the view that any agreement, to be lasting, must be acceptable to all the parties as a reasonable compromise.

[609] On 3 April 1989, NZ Steel wrote to the Minister of State-Owned Enterprises, stating it would "vigorously defend" its legal rights to mine under the Licence, and that if the terms of the Licence remained unchanged, changes in the ownership would have no effect on their operations. The letter continued:

> Accordingly, we view with some concern the suggestion that the areas of Waahi Tapu should no longer be subject to the Iron and Steel Industry Act. It would seem that this must necessarily affect our mining rights granted under the licence issued under that Act.

[610] The letter also urged that the identification exercise mentioned in the Minister's letter proceed and look at the whole forest, and not be restricted to areas outside the wāhi tapu. This was based on an understanding that areas of greater significance existed elsewhere in the forest, whereas "only a small part, if any", of the four wāhi tapu was of significance. The company recorded its expectation that there would only be small areas not able to be mined at all, that some areas could be mined with appropriate safeguards, and that the majority of the forest would be cleared for mining.

[611] On 30 April 1989, Mrs Clark of the Ngāti Karewa Ngāti Tahinga Trust wrote to the Minister of State-Owned Enterprises, asserting those hapū were the rightful owners of Maioro. Mrs Clark had previously filed a claim in the Waitangi Tribunal. The Cabinet Social Equity Committee agreed, on 4 July 1989, that the Minister of Māori Affairs should refer the Ngāti Karewa/Ngāti Tahinga cross-claim to the Māori Appellate Court, and that the wāhi tapu identification process should continue in the meantime. On 21 July 1989 the Minister of State-Owned Enterprises wrote separate letters to the solicitors acting for Ngāti Te Ata, NZ Steel and Mrs Clark advising them that the question of who held historic interests in Maioro was being referred to the Māori Appellate Court for a decision.

[612] On 1 January 1990, a demonstration camp was established by Ngāti Te Ata at the entrance to the mine site. On 18 April 1990, a human femur bone was found during mining operations near the Tangitanginga wāhi tapu area, and on 20 April 1990, Ngāti Te Ata placed a tapu over the mine site. A letter written by Mr Tuherea Kaihau to NZ Steel on 1 May 1990 described the tapu as having been placed "on the whole of the area known as the Waiuku State Forest on the northern side of the Waikato River mouth comprising of 1508 hectares". In his letter, Mr Tuherea Kaihau complained that mining had resumed at Maioro in spite of the tapu, recording that the tapu was "very sacred to us and the trampling and mockery that is alleged to have occurred is viewed with absolute abhorrence". He asked for the mining to stop.

[613] According to the statement of agreed facts, NZ Steel had begun using stocks of ironsands concentrate held on the mine site but had not engaged in actual mining. However, on 10 May 1990, Mr Tuherea Kaihau filed injunction proceedings in

the High Court against NZ Steel, requesting an order to stop mining. The proceedings were withdrawn the following day on the basis that negotiations between the Crown and Ngāti Te Ata were expected to be resolved imminently. In a fax of 11 May 1990, the Managing Director of NZ Steel wrote to Mr Tuherea Kaihu stating:

> In the proceedings this afternoon before the High Court your counsel argued for a withdrawal, of your previously listed application for an injunction, on the basis that negotiations between Ngaati Te Ata and the Crown would be resolved within 24 hours. The judge agreed to a withdrawal. Your counsel said for the Company to resume operations now would cause difficulties in these negotiations.
>
> I have decided not to commence operations to-day.

[614] This suggestion of an imminent agreement proved to be very optimistic. On 16 May 1990, the Cabinet Policy Committee, which had been granted power to act on the issue of mining at Maioro, authorised the Ministers of Justice and Māori Affairs to arrange negotiations with Ngāti Te Ata and NZ Steel, agreeing that the basis of those negotiations was to be the Cabinet's decision of 13 March 1989.[444] The Committee agreed that the Crown should continue dialogue with Ngāti Te Ata with a view to providing redress for their social and economic concerns, providing the tapu placed over the mining was lifted and Ngāti Te Ata agreed to allow NZ Steel to resume full mining operations at Maioro.

[615] Also on 16 May 1990, the Minister of Justice wrote to Mr Tuherea Kaihau setting out the Crown's in principle proposal to make the wāhi tapu areas no longer subject to the Iron and Steel Industry Act and to revest the four wāhi tapu in the descendants of the original owners, subject to agreements between the Crown, Ngāti Te Ata and NZ Steel as to conditions under which mining could proceed on the balance of the land.

[616] On 22 May 1990, the Ministers of Māori Affairs and Justice met Ngāti Te Ata representatives at Parliament and agreed on the establishment of a joint implementation group, consisting of representatives of Ngāti Te Ata and of the Ministers of Justice, Māori Affairs and Energy. On 1 June 1990, the joint

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444 See above at [605].

implementation group completed its report on Ngāti Te Ata's claims concerning Maioro.

[617] Around 1 June 1990, an interim on-site observation arrangement scheme at Maioro was drafted, giving designated Ngāti Te Ata observers the right to access the mine site on a 24-hour basis during mining operations. Ngāti Te Ata representatives had begun doing this by 3 July 1990.

[618] On 15 June 1990, the Minister of Justice issued a press statement announcing the Government's approval of the joint implementation group's 1 June 1990 report. The release noted that "the Government had set in motion the process to return the four wahi-tapu at Maioro to Ngati Te Ata" and to remove these from the Iron and Steel Industry Act. However, in a letter dated 16 June 1990 sent to the Minister of Justice, NZ Steel expressed surprise at the Government's stated intention to remove the four wāhi tapu areas from coverage of the Iron and Steel Industry Act. The letter said that NZ Steel had sought legal advice on its position, and its advice was that the Minister of Energy did not have the right to remove the lands in question from the Iron and Steel Industry Act; if he attempted to do so he would be acting without jurisdiction and ultra vires. The letter recorded NZ Steel's position as being that once the Minister had granted a licence under s 10 of the Iron and Steel Industry Act, the land could only be removed if the Minister was able to determine that the land was no longer required for the iron and steel industry.

[619] On 25 July 1990, the Ministers of Forestry and Conservation declared the wāhi tapu areas (excluding the urupā in Te Kuo and the fishing reserve in Tangitanginga) to be held for conservation purposes pursuant to s 7(1) of the Conservation Act 1987.[445]

[620] On 17 September 1990, the Cabinet Policy Committee directed the Minister of Commerce to declare the wāhi tapu areas no longer subject to the Iron and Steel Industry Act and the Minister of Conservation to apply to the Māori Land Court revest the land in the original owners.

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445 "Declaring Land to be Held for Conservation Purposes" (2 August 1990) 132 *New Zealand Gazette* 2729 at 2742.

[621] On 24 September 1990, the memorandum of understanding (MOU) that had earlier been signed by Ngāti Te Ata was signed by the Minister of Justice on behalf of the Crown. This is an important document, which received considerable emphasis in Mr Harris's argument about the 1990 commitments. The MOU relevantly stated that:[446]

> … the following actions are required to take place simultaneously and, it is anticipated, before 30 September 1990.
>
> (1) The Crown will remove the four wahi tapu from the ironsands mining licence, preparatory to the making of an application to the Maori Land Court for final re-vesting of the lands concerned.
>
> (2) Ngati Te Ata will propose the conditions under which mining can proceed on the balance of the Maioro land lying outside the four wahi tapu. These conditions will include a procedure for re-interment. Such proposed conditions should either
>
> (a) be acceptable to New Zealand Steel Ltd
>
> or (b) be such that, in the view of the Minister of Justice, New Zealand Steel Ltd, ought reasonably to accept them.
>
> (3) As a sign of good faith, and without prejudice to its view as to longer term responsibilities, the Crown will continue, for the present, to meet the cost (at the existing level) of the continued operation of the "Interim On-Site Observation Arrangement" agreed between the parties.
>
> (4) The underlying concept of this understanding is that … the task can only be accomplished if both sides carry out their part simultaneously and with mutual respect.
>
> (5) This understanding is without prejudice to the further discussions and negotiations which must continue in respect of the other elements identified in the Report of the Joint Implementation Group.

The Minister of Justice wrote to NZ Steel, attaching a copy of the MOU on the same day. A joint press statement was issued by the Minister and Ngāti Te Ata.

[622] On 25 September 1990, the Minister of Justice informed NZ Steel of the contents of the MOU. The following day, NZ Steel's counsel were informed that the company would be given three working days' notice of any action to remove the wāhi tapu from the operation of the Iron and Steel Industry Act. Then, on 15 October 1990, the Minister of Justice wrote to NZ Steel giving notice that the Minister of Energy

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446 Emphasis omitted.

intended "to remove the four wāhi tapu from the operation of the Iron and Steel Industry Act on or after Friday, 19 October 1990".[447]

[623] On 17 October 1990, NZ Steel (and its associated mining company) commenced judicial review proceedings in the High Court against the Minister of Energy. Both companies also filed an application for interim orders pursuant to s 8 of the Judicature Amendment Act 1972 against the Minister of Energy. The following day, after hearing from counsel, Tompkins J issued a minute recording that the Minister of Energy and the Government were prepared to give an undertaking that the four wāhi tapu would "not be removed from the operation of the Iron and Steel Industry Act until the … application for interim orders" had been argued and the judgment delivered.[448]

[624] On 5 November 1990, Ngāti Te Ata was joined (at their request) as a party to the judicial review proceedings.

[625] On 14 November 1990, Tompkins J issued another minute recording the agreement of the parties that NZ Steel's substantive judicial review proceedings should be heard rather than the application for interim relief.[449] The basis of this was an exchange of undertakings between the Crown and NZ Steel that "pending the final determination of these proceedings [or] further order of the court":[450]

(a) NZ Steel would not mine the four wāhi tapu; and

(b) the Crown would not remove the wāhi tapu from the Licence.

[626] On 12 December 1990, Ngāti Te Ata filed a statement of claim seeking relief against the Minster of Energy and the Attorney-General in relation to the takings under the Public Works Act and the Iron and Steel Industry Act. The claim was filed in the same proceeding as the NZ Steel claim and sought declarations, as well as orders setting aside the various exercises of statutory power. The claim also sought a

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447 Emphasis omitted.

448 *New Zealand Steel Mining Ltd v Butcher* HC Auckland M1761/90, 18 October 1990 (minute of Tompkins J) at 2.

449 Interim orders minute, above n 10, at [2].

450 At [2]–[3].

declaration that the Crown was under a duty to perform "the contract entered into on the 24th September 1990" (referring to the MOU), and specific performance of that contract or an order requiring the Minister to exercise powers to that effect. Then, on 14 December 1990, Ngāti Te Ata filed a separate counterclaim against NZ Steel.

[627] On 23 April 1991, Hillyer J issued a minute in the judicial review proceedings noting that negotiations were ongoing and that the issues may have been resolved. On 18 June 1991, he issued a further minute noting that the parties might resolve the matter within the next two weeks.

[628] On 3 July 1991, the Minister of Justice forwarded terms of a proposed settlement to NZ Steel and counsel acting for Ngāti Te Ata, Sian Elias KC. On 16 July 1991, the Minister wrote again noting it appeared that with minor amendments sought by Ngāti Te Ata to the proposal, a settlement could be affected. He attached the amended proposal incorporating the proposed amendments (the 1991 settlement proposal). On the same day Ms Elias and NZ Steel's managing director confirmed the 1991 settlement proposal was acceptable. The Minister said he would proceed to seek Cabinet approval, and on 12 August 1991, the Cabinet approved the terms of the 1991 settlement proposal.

[629] The terms that related to the wāhi tapu can be summarised as follows:

(a) the Licence over the four wāhi tapu was to be cancelled, and the four wāhi tapu were to be vested in Ngāti Te Ata whilst remaining subject to the provisions of the Iron and Steel Industry Act;[451]

(b) NZ Steel was to notify Ngāti Te Ata of any application for a mining licence in respect of the wāhi tapu areas, and the Crown was to hear the views of Ngāti Te Ata before granting any such licence;

(c) if a mining licence was granted to NZ Steel in respect of the wāhi tapu, NZ Steel was to pay a royalty to Ngāti Te Ata as agreed between them;

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[451] The Iron and Steel Industry Act was to be "grandfathered" pending the passage of the Resource Management Bill.

(d) NZ Steel and Ngāti Te Ata were to agree on a proper reinterment procedure in respect of the Maioro licence area outside the wāhi tapu;

(e) the Crown and Ngāti Te Ata would urgently seek mediation to resolve all disputes;

(f) the Crown was to pay NZ Steel an agreed sum in full settlement; and

(g) all High Court proceedings relating to the wāhi tapu areas were to be discontinued.

[630] The 1991 settlement proposal was however derailed by the enactment and imminent coming into force (on 1 October 1991) of the Resource Management Act 1991 and the Crown Minerals Act 1991. On 3 September 1991, Crown counsel, Ms Kerr, informed counsel for Ngāti Te Ata and NZ Steel that those enactments might impact the implementation of the 1991 settlement proposal. She wrote that enactment of the two Acts had:

> … to a certain extent affected features of the proposed settlement noted under the headings "Return of Wahi Tapu" and "Future Resource Use of Wahi Tapu". For instance, it would seem that the Crown potentially has no future part in future resource use questions arising with respect to the four wahi tapu.

[631] Crown counsel also noted that the Iron and Steel Industry Act would be repealed with the coming into force of the Resource Management Act and raised other issues concerning the preservation of rights under the Crown Minerals Act. She suggested that counsel should meet to discuss "the appropriate option for progressing the settlement". By 4 February 1992, counsel for Ngāti Te Ata and NZ Steel were agreed that amending legislation would be required. The statement of agreed facts records that considerable delays then ensued as counsel for Ngāti Te Ata and NZ Steel drafted the amending legislation.

[632] On 13 July 1992, counsel acting for the Crown wrote to counsel for NZ Steel and Ngāti Te Ata asking them to confirm first, that they agreed to the 1991 settlement proposal as approved by the Cabinet and secondly, as to whether they had reached agreement on the proposed legislation which would be part of the settlement. If so,

the Crown would progress the draft legislation and prepare a deed of settlement. Crown counsel advised the Minister of Justice on 18 February 1993 that counsel for Ngāti Te Ata had advised they did not want to proceed on that basis, preferring to wait for the decision of the Māori Appellate Court about which group (Ngāti Te Ata or Ngāti Tahinga/Ngāti Karewa) had authority to represent Maioro.[452]

[633] That decision was not delivered until 12 September 1994.[453] The Court issued a judgment determining that rangatiratanga over all the lands comprising the Waiuku State Forest referred to as Maioro was held by Ngāti Te Ata at all material times from 1840 to 1865, and that the right of ownership according to customary law principles of "take" and occupation or use was vested in them at the time the lands were taken by the Crown in 1865.[454]

[634] Then, at a meeting on 22 November 1994, Dame Ngāneko informed the Crown that Ngāti Te Ata wished to amend the terms of the 1991 settlement proposal so that if they did not agree to NZ Steel undertaking mining in the wāhi tapu areas, they could pursue whatever remedies were available in respect of any future mining licence granted.

[635] On 1 March 1995, the Director of the Office of Treaty Settlements wrote to Dame Ngāneko responding to a request that all of the Maioro lands be returned to Ngāti Te Ata (including the wāhi tapu) without a mining licence, separately from an agreement between NZ Steel, the Crown and Ngāti Te Ata. The Director wrote confirming earlier telephone discussions that any agreement concerning the wāhi tapu must involve NZ Steel and that the Licence could not be removed without an agreement with NZ Steel. The letter confirmed the Office of Treaty Settlements' understanding that when negotiations had been left off in 1991, none of the parties had given final approval to the proposed deed of settlement and that draft legislation had not been finalised nor approved by any of the parties.

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452 See above at [611].
453 *Minhinnick* Māori Appellate Court decision, above n 64.
454 At 16.

[636] As summarised in the statement of agreed facts, by 23 May 1995, Ngāti Te Ata had requested further amendments to the terms of the 1991 settlement proposal including ownership of the trees on the wāhi tapu areas, proper procedures regarding human remains, direct negotiation rather than mediation, and additional legal costs. The Office of Treaty Settlements wrote to Dame Ngāneko on 28 June 1995, recording points from a meeting on 22 May 1995, where it had been agreed that "the preferred approach [was] to stick as closely as possible to terms of [the 1991] agreement and endeavour to implement it as expeditiously as possible".

[637] In 1996, the Cabinet considered a variation to the 1991 settlement proposal, but the matter was deferred until after the general election. In 1997, further consideration of the 1991 settlement proposal was again deferred by the then-Minister in Charge of Treaty of Waitangi Negotiations.

[638] On 20 April 1998, the Cabinet agreed to the 1991 settlement proposal being withdrawn and decided that in future the Crown would consider the return of the wāhi tapu areas to Ngāti Te Ata as part of negotiations towards a comprehensive settlement of their claims in the Maioro area. Dame Ngāneko was informed of this decision by the Minister in Charge of Treaty of Waitangi Negotiations in a letter of 28 May 1998, which confirmed that the 1991 settlement proposal was formally withdrawn. The Minister's letter stated that while settlement of grievances relating to the four wāhi tapu areas would need to be part of a comprehensive settlement of Ngāti Te Ata's historical Treaty of Waitangi claims, issues concerning protection of the wāhi tapu from mining should be addressed as a contemporary matter under the relevant provisions of the Resource Management Act and the Historic Places Act 1993.[455] The Minister also wrote:

> The Crown proposes that it negotiate direct[ly] with Ngati Te Ata on resolving grievances under the Treaty of Waitangi relating to the Maioro area, including Te Papawhero, Te Kuo, Tangitanginga, and Waiaraponia. This will enable wide-ranging redress options to be considered by the Crown. Within

[455] The Minister's successor, Hon Christopher Finlayson KC, explained in an affidavit filed in the 2014 proceeding that it was thought that the Resource Management Act 1991 and the Historic Places Act 1993 provided adequate protection for archaeological and other sacred sites. He did not explain the reason for this view, but it might reflect the repeal of the Iron and Steel Industry Act, and its replacement by the Crown Minerals Act 1991 which did not contain an equivalent to s 3(2) of the Iron and Steel Industry Act, under which prospecting or mining operations could take place "without further authority than this Act".

> the context of comprehensive direct negotiations, the early return of the blocks could be considered.

[639] However, negotiations did not progress for more than a decade while Ngāti Te Ata resolved internal mandate issues. That process was resolved in 2010, and in 2011 the Crown unconditionally recognised the Ngāti Te Ata Claims Support Whanau Trust's mandate to negotiate the historical Treaty of Waitangi claims. On 29 June 2011, the terms of negotiation for settlement of Ngāti Te Ata's historical Treaty claims were signed by the Minister for Treaty of Waitangi Negotiations, Hon Christopher Finlayson KC, and the trustees of the Ngāti Te Ata Claims Support Whanau Trust.

[640] As a result of the negotiations which followed, the Minister presented an offer to Ngāti Te Ata in April 2013. The details of the offer were not in evidence. However, the offer was rejected by Ngāti Te Ata's negotiators who indicated their intention to commence litigation against the Crown in the High Court for breach of fiduciary duty. A further meeting between the Ngāti Te Ata negotiators and the Minister for Treaty of Waitangi Negotiations took place on 21 December 2013. The Minister learned later that the 2013 proceeding had by then already been filed. In his affidavit he said that as a consequence he suspended Treaty of Waitangi settlement negotiations with Ngāti Te Ata on 31 January 2014. Although the Crown was unwilling to negotiate a historical Treaty settlement while the same issues were the subject of litigation in the courts, it remained willing to achieve an outcome involving what the Minister described as "an appropriate balance" which "protects Ngāti Te Ata's interests while discharging the Crown's obligations to [NZ Steel] and to the public".

[641] Following a Cabinet approval, the Minister of Energy and Resources, the Hon Simon Bridges, endeavoured to progress a resolution of the wāhi tapu issues. The engagement focused on contemporary issues, leaving historical grievances for the Treaty of Waitangi settlement process. The Cabinet agreed negotiation parameters that included the possible transfer of ownership of the wāhi tapu areas, or possibly all of the Crown-owned lands at Maioro to a Crown approved entity representing Ngāti Te Ata, potentially including Crown-owned ironsands and the funds resulting from the mining of the ironsands. This would be subject to NZ Steel's continued exercise of its rights under the Licence.

[642] In 2014, Michael Dreaver, who was the Chief Crown Negotiator contracted to the Office of Treaty Settlements, was engaged to attempt to negotiate resolution of the wāhi tapu issues with Ngāti Te Ata and NZ Steel along these lines. He met with Richard and Roimata Minhinnick to discuss the Crown's proposal for resolution on 14 May 2014, but was advised that Ngāti Te Ata were not prepared to engage outside the context of a comprehensive Treaty settlement, including payment of $170 million in addition to market rentals for the ironsands.

[643] As noted above, on 15 May 2014 NZ Steel applied to the High Court to discontinue its 1990 judicial review proceedings, and to be released from its November 1990 undertakings not to mine the wāhi tapu pending the determination of the proceedings. The High Court granted leave on 4 July 2014.[456] On 14 July 2014, NZ Steel filed a notice of discontinuance of its 1990 proceedings. This Court dismissed Ngāti Te Ata's appeal against the granting of leave for NZ Steel to discontinue the proceedings and be released from the undertakings on 17 November 2015.[457]

Claims arising from the 1990 commitments

Judgment under appeal

[644] We turn now to the issues raised at the trial about what the third amended statement of claim referred to as "public commitments" to Ngāti Te Ata in the 1990s, referred to by the Judge as "the 1990 commitments".[458] These were the declaration made on 25 July 1990 that the wāhi tapu were to be held for conservation purposes pursuant to s 7(1) of the Conservation Act; the MOU; correspondence with NZ Steel following the MOU about the Crown's commitment to implementing the MOU; the Crown's active opposition to NZ Steel's judicial review application; and, after the stay of the judicial review proceeding, the Crown's efforts to reach a settlement under which the wāhi tapu would be returned to Ngāti Te Ata and removed from the Licence area, including the offer of compensation to NZ Steel.

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456 Undertaking and discontinuance decision, above n 13.
457 Undertaking and discontinuance appeal, above n 13.
458 Judgment under appeal, above n 1, at [404].

[645] The statement of claim alleged that, as a result of the 1990 commitments, Ngāti Te Ata placed trust and confidence in the Crown, and the Crown owed fiduciary duties to Ngāti Te Ata to act in their best interests, with absolute loyalty, and to implement its commitment to revest the wāhi tapu in Ngāti Te Ata. On this issue, the pleading effectively advanced a fiduciary duty claim of the kind recognised in *Chirnside v Fay*.[459] In oral closing submissions, however, counsel for Ngāti Te Ata advanced an additional submission that the MOU amounted to a binding contractual arrangement between the Crown and Ngāti Te Ata.

[646] The Judge rejected these claims.[460] She found the MOU was not intended to be a binding contract.[461] She referred to the language used, questioned whether the reference to Ngāti Te Ata was a sufficient identification of a contracting party, and noted that the MOU had been superseded relatively quickly by further negotiations and arrangements without any suggestion by Ngāti Te Ata that continuing negotiations were inappropriate because a binding agreement had already been reached.[462]

[647] As to the claim that the 1990 commitments gave rise to a fiduciary duty, the Judge considered the focus on the MOU mischaracterised the relationship of the parties. Ngāti Te Ata and the Crown were Treaty partners and, as she had held in respect of other claims, she did not consider the Treaty relationship gave rise to a fiduciary duty. The fact that the parties were negotiating a settlement of acknowledged breaches of the Treaty of Waitangi did not alter the nature of the relationship so as to make it fiduciary in nature. In this context it could not be said that the Crown was obliged to act for and on behalf of Ngāti Te Ata: rather, it would inevitably have to have regard to matters of public policy.[463]

The arguments on appeal

[648] The amended notice of appeal alleged that the Judge was wrong to hold that the MOU gave rise to no enforceable obligations, and did not give rise to a legitimate

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459 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.
460 Judgment under appeal, above n 1, at [677].
461 At [669].
462 At [669].
463 At [673].

expectation that the Crown would fulfil its commitments under the MOU. We deal with the latter issue below in the course of discussing the sixth cause of action.

[649] As far as enforceability of the MOU is concerned, the argument advanced by Mr Harris on appeal did not directly engage with the Judge's reasoning as to why the Crown did not assume a binding commitment under the MOU. Rather, the argument advanced was that the Judge had overlooked the fact that the Crown admitted it had reached an agreement with Ngāti Te Ata (the MOU) in its statement of defence to the 1990 proceeding. Mr Harris argued that, once that pleading was taken into account, the claim was more appropriately analysed as one for "part performance or equitable estoppel". While the Judge dismissed the claim because she found that the Crown never made any binding commitment, in particular under the MOU, this reasoning could not stand because of the pleaded admission.

[650] It is not clear whether this argument is anything more than a claim that the Crown entered into a contractual commitment to Ngāti Te Ata in the MOU, and was estopped from denying it because of its pleading. But if the MOU were regarded as a contract, that would be the basis on which the respective rights of the parties were to be ascertained: it is unclear why there should be resort to fiduciary obligations in such circumstances, or whether there can be.

[651] Before we deal with the substance of Mr Harris's argument, it might be helpful to reiterate that in 1990, in response to NZ Steel's application for review, Ngāti Te Ata filed both a statement of defence and counterclaim, and a separate pleading, being a statement of claim seeking relief against the Minister of Energy and the Attorney-General. Mr Harris's argument that the Crown had accepted the MOU was a binding commitment arose in relation to the Crown's statement of defence to the latter proceeding.

[652] An important point to emphasise here is that the judgment under appeal did not arise from the 1990 pleadings as they existed back in 1990/1991. What happened, as we have covered earlier, is that the Judge directed that the claim should proceed on the basis of the 2013 proceeding, that is the proceeding commenced by Ngāti Te Ata

in 2013.[464] Leave was given to amend the statement of claim, which led to the third statement of claim, on which the trial took place. It relied on the 1990 commitments and made no mention of the contention now made that the MOU constituted a binding agreement.

[653] While we have allowed Ngāti Te Ata to pursue this new argument on appeal, its reliance on a pleading that was not current at the time of the trial is an unpromising starting point. We note that statements of defence to the third amended statement of claim were not filed, the respondents apparently being content to rely on their pleadings to the second amended statement of claim. That pleading contained the same allegations as the third amended statement of claim in so far as the 1990 commitments were concerned. The Crown's position was to deny all the allegations made in relation to the 1990 commitments. NZ Steel also denied the allegations, to the extent appropriate given the main thrust of the allegations was against the Crown.

[654] The 1990 pleading, on which Mr Harris relied, alleged that the Crown and Ngāti Te Ata agreed by both the MOU and "oral and written advices". The alleged agreement was that the Crown would remove the four wāhi tapu from the Licence and revest the lands in Ngāti Te Ata, and that Ngāti Te Ata would propose and accept conditions under which mining could proceed on the balance of the Maioro land lying outside the wāhi tapu, including a procedure for reinterment. This was the allegation the Crown admitted in its statement of defence filed in 1991. The pleading went on to allege that by exchange of letters with the Crown on 24 September 1990, Ngāti Te Ata agreed with the Crown on procedures for reinterment of kōiwi outside the wāhi tapu areas. It was said this meant that the Crown was obliged to transfer the wāhi tapu. The Crown accepted that agreement had been reached about reinterment procedures but denied that meant it was obliged to proceed with the transfer.

[655] Mr Harris claimed the Crown had admitted that Ngāti Te Ata had performed its obligations under the alleged agreement. The Crown's defence denied it was obliged to transfer the wāhi tapu lands to Ngāti Te Ata because of the proceeding

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464 At [40].

commenced by NZ Steel. But Mr Harris emphasised the admission that Ngāti Te Ata had performed its obligations under the MOU.

[656] Mr Harris submitted that the 1990/1991 pleadings represented a formal and considered acknowledgement by the Crown that the MOU recorded an agreement. He said there was no suggestion at the time that the MOU was merely a non-binding "political compact", the position taken by the Crown at the trial, and despite NZ Steel's proceeding, the Crown could have transferred the wāhi tapu subject to the rights of NZ Steel under the Licence.

[657] Both the Crown and NZ Steel support the Judge's conclusion that the MOU was not a binding contract. Whatever the position arising from the 1990 pleadings, the trial proceeded on the basis of pleadings in which the Crown denied that there was a binding commitment whether as a result of the MOU or otherwise. The Crown was not bound by the historic pleading, which could have been amended in any event should that have proved necessary.

Did the memorandum of understanding give rise to binding and enforceable obligations on the Crown?

[658] We consider the Judge was correct to hold that the MOU was not intended to contain binding and enforceable obligations. Although Ngāti Te Ata claimed the MOU was a contract and sought specific performance of it in 1990, that was not the allegation made in the third amended statement of claim. We have no doubt the MOU contained a basis on which the Crown would have been prepared to resolve issues at Maioro if agreement had been able to be reached with all parties on the outstanding matters it referred to. However, the language used showed it would be necessary for agreement to be reached with NZ Steel as to conditions on which NZ Steel would be able to carry on activities at Maioro outside the wāhi tapu areas. The Crown certainly began to proceed in accordance with the MOU but that led within a short space of time to the commencement of NZ Steel's application for review. The fact that Ngāti Te Ata agreed to the adjournment of NZ Steel's proceeding right down to 2014 (when the company sought to be relieved from its undertaking) is inconsistent with any suggestion Ngāti Te Ata thought it had a binding agreement with

the Crown. As is the fact that it took no action to advance its own claim commenced in December 1990.

[659] As to Mr Harris's argument based on the Crown's pleading admitting the MOU contained binding commitments, the context of the pleading must be remembered. It will be recalled that NZ Steel's application for review was accompanied by an application for interim relief under s 8 of the Judicature Amendment Act. The application was resolved by undertakings that NZ Steel would not mine the four wāhi tapu and the Crown would not remove them from the Licence "pending the final determination of [the] proceedings, or further order of the court".[465] The Crown was clearly entitled to rely on this in its statement of defence, having regard to the basis on which the proceeding had been adjourned.

[660] We see the MOU as representing a summary of the position that had been reached in discussions between Ngāti Te Ata and the Crown at the time it was signed, and their intent as to how issues should be progressed. But it was known that issues about ceasing activity on the wāhi tapu areas would have to be resolved having regard to the terms of NZ Steel's 16 June 1990 letter. In the circumstances, the terms on which mining could proceed at Maioro outside the wāhi tapu areas, as well as the removal of the wāhi tapu from the Licence, would be crucial elements of any resolution. That these important matters had yet to be agreed is another circumstance militating against the idea that a binding agreement had been reached. So also is the fact that when signed by a representative of Ngāti Te Ata, the agreement was returned to the Crown with a letter stating that it had been signed on the understanding that "negotiations continue as soon as possible".

[661] After the MOU was signed, negotiations continued in the shadow of the High Court proceedings, a further indication that the parties did not consider the MOU had recorded a binding agreement.[466] We have already referred to the fact

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465 Interim orders minute, above n 10, at [2]–[3].

466 As to the relevance of subsequent conduct to the issue of whether a contract had been formed, see *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [56]; and *Verissimo v Walker* [2006] 1 NZLR 760 (CA) at [40]–[41].

that on 16 July 1991, counsel for Ngāti Te Ata accepted on their behalf a proposed settlement with the Crown and NZ Steel which contemplated:

(a) cancellation of the Licence over the wāhi tapu and their return to Ngāti Te Ata;

(b) the possible grant of a further mining licence to NZ Steel in respect of the wāhi tapu (following consultation with Ngāti Te Ata) with payment of a royalty agreed between the company and Ngāti Te Ata;

(c) ongoing mining elsewhere on Maioro with an agreed "proper reinterment procedure";

(d) the Crown making a payment of $4.875 million to NZ Steel; and

(e) discontinuance of all High Court proceedings relating to the wāhi tapu.

[662] Obviously this settlement, involving as it did NZ Steel, was different from what was provided for in the MOU, and agreeing to it was inconsistent with the idea that the MOU was a binding agreement. It is significant that, as mentioned above, when, in November 1994, Ngāti Te Ata wanted to secure the right to pursue remedies in relation to any future licence for mining in the wāhi tapu areas, this was approached on the basis of a change to the proposed 1991 settlement. The same was true of further changes sought in May 1995. The MOU had ceased to be a matter for discussion.

[663] We do not consider it matters for present purposes that the 1991 settlement was not ultimately documented in a deed of settlement, and the Crown's offer was later withdrawn in the circumstances we have already mentioned. The MOU itself was never incorporated in a deed. There was a sufficient agreement in terms of the exchanges of correspondence in 1991 to show that the parties had moved on from the arrangements set out in the MOU. Overall, the history of negotiations earlier set out is inconsistent with the proposition that a binding commitment had been entered in terms of the MOU.

[664] For these reasons we are satisfied this ground of appeal cannot succeed.

Legitimate expectation

[665] A further ground of appeal claimed the Judge erred in holding that Ngāti Te Ata did not have a legitimate expectation that its claims in respect of the Crown's breaches of obligations under the Treaty of Waitangi would have been fairly addressed by now and not rendered nugatory by Crown action.[467]

[666] The sixth cause of action pleaded in the third amended statement of claim was headed "Claim of Right". It included an assertion that the unresolved claims in the Waitangi Tribunal (Wai 8 and Wai 31) were proprietary in nature and were "things in action". It referred to recommendations 9 and 12 of the Waitangi Tribunal's report in Wai 8;[468] Cabinet decisions made in response; the Deputy Prime Minister's advice to Dame Ngāneko of 24 February 1987 that land subject to a Waitangi Tribunal claim would remain subject to that claim when transferred to a state-owned enterprise; the decision of this Court in the *Lands* case;[469] the sale of the Crown's shareholding in NZ Steel; negotiations leading up to and execution of the MOU; the further discussions leading to the terms of settlement recorded by the Minister in Charge of Treaty Negotiations on 5 August 1991; and the fact that there was no good reason for Ngāti Te Ata to be denied fair redress in settlement of its claims.

[667] The pleading alleged a legitimate expectation that the Waitangi Tribunal claims would have been "fairly redressed by now" and that the claims "would not be rendered nugatory by Crown action or omission". The case in the High Court was that in breach of Ngāti Te Ata's legitimate expectation the Crown had not provided redress for their claims; rather, "fundamentally by selling its shares in [NZ Steel] without reference to Ngāti Te Ata", the Crown had "impaired the resolution of the claims" to Maioro and the ironsands.

Judgment under appeal

[668] The Judge was prepared to accept that there could be a claim for breach of a legitimate expectation in the context of Treaty of Waitangi negotiations—at least of a

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467 Judgment under appeal, above n 1, at [722].
468 Wai 8 report, above n 7.
469 *Lands* case, above n 256.

procedural kind—such as where the Crown had made a clear and unambiguous promise or undertaking that it would proceed in a certain way.[470] But she did not consider the various matters on which Ngāti Te Ata relied established a legitimate expectation that the claims would be "fairly redressed by now" had arisen. In this respect:

(a) The nature of Ngāti Te Ata's claims in Wai 8 and Wai 31 and the Waitangi Tribunal's recommendations on them were not a promise, undertaking, policy or practice of the Crown.[471]

(b) The other facts set out in the statement of claim effectively recorded the course of the Treaty of Waitangi negotiations, entry into the MOU and the Crown's statement in the MOU that it would remove the four wāhi tapu from the Licence. As she had held the MOU did not give rise to a binding contractual commitment, the Judge considered it could not give rise to the kind of promise or undertaking that might found a legitimate expectation.[472]

(c) Other matters relied on by Ngāti Te Ata, including the Deputy Prime Minister's letter of 24 February 1987 and this Court's decision in the *Lands* case, could not found a legitimate expectation.[473]

(d) The fact that there was no good reason for Ngāti Te Ata to be denied fair redress in settlement of its claims would be relevant to breach, if a legitimate expectation had been otherwise established.[474]

[669] Moreover, the broad nature of the pleaded legitimate expectation was such that there would be no satisfactory yardstick by which to judge whether it had been breached. This tended to demonstrate that an unambiguous promise, policy or practice sufficient to found a legitimate expectation had not been established. The extensive

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470 Judgment under appeal, above n 1, at [695].
471 At [713].
472 At [714].
473 At [715]–[716].
474 At [717].

history of negotiation between the parties showed that there were a "whole host of reasons" why the claims had not been resolved, including the involvement of NZ Steel as a third party, the issues involving the cross-claim to Maioro that had been referred to the Māori Appellate Court, and the introduction of the Resource Management Act.[475]

[670] The second legitimate expectation claim was that Ngāti Te Ata's claims would not be rendered nugatory by Crown action or omission. As to this, the Judge was not convinced that the sale of the Crown's shares in NZ Steel had rendered the claims nugatory. The fact that the parties had come close to resolving the claims showed they remained capable of resolution.[476]

The arguments on appeal

[671] Mr Harris's argument on this aspect of the appeal had two strands. The first was that since the MOU recorded a binding obligation, the Judge was wrong to hold that the MOU could not found a legitimate expectation, and the promise or undertaking necessary for a legitimate expectation had not been made out. We have already upheld the Judge's conclusion about the enforceability of the MOU as a contract. Mr Harris argued that the claimed legitimate expectation based on the MOU could overlap with a claim in contract, arguing that the "elements of the claim for legitimate expectation [were] made out to the extent of the commitments made under the MOU".

[672] The second strand of the argument, which appears to have a different emphasis from the claim advanced in the High Court, was that the Crown has breached a legitimate expectation that it would pursue a settlement of Ngāti Te Ata's Treaty of Waitangi claims, most recently by withdrawing from negotiations in 2014 in response to the commencement of the present proceeding. The legitimate expectation was expressed as being that the claims would have been "fairly addressed by now and not rendered nugatory by Crown action".

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475 At [718].
476 At [719]–[721].

[673] Mr Harris developed this aspect of the legitimate expectation argument by referring to the terms of negotiation agreed by Ngāti Te Ata and the Crown in June 2011. He pointed out that document set out various "guiding principles" including "working together to achieve a settlement and best outcomes that are manifestly fair and just". There were also stated objectives, such as negotiating in good faith a settlement that is "comprehensive, final, durable and fair in the circumstances" and recognising the "nature, extent and injustice of breaches of the Crown's obligations to Ngāti Te Ata under Te Tiriti o Waitangi/The Treaty of Waitangi".

[674] Mr Harris noted that the Crown had represented to Ngāti Te Ata throughout the period from 1990 to the suspension of negotiation in early 2014 that it was committed to resolving their grievances, and claimed it was clear from the 2011 terms of negotiation that settlement would involve a transfer of land and other financial and cultural redress. That would include the return of the wāhi tapu.

[675] Mr Harris argued that the Crown's acknowledgement of its obligations to provide redress for Ngāti Te Ata's grievances, and Ngāti Te Ata's reliance on those acknowledgements (by engaging in the negotiations) gave rise to a legitimate expectation. The question was whether the commencement of the present proceeding justified the Crown from refusing to negotiate further on the Treaty claims, and "withdrawing from returning the wāhi tapu". Mr Harris submitted commencement of the proceeding was not a sufficient reason to justify the Crown "withdrawing from implementation of the wāhi tapu withdrawal" and from negotiations about the historic Treaty claims. Negotiation could have continued so as to finalise the solution for the wāhi tapu, especially given the context, including the ongoing threat presented by NZ Steel's mining activities, the Waitangi Tribunal recommendation that the wāhi tapu be protected from mining, and the sale of the Crown's shares in NZ Steel which had effectively introduced an independent third party determined to retain the wāhi tapu in the Licence area. Since the Crown withdrew from negotiations the ongoing mining and export of ironsands, approved by the Crown, had exacerbated the threat to the wāhi tapu, damaging Ngāti Te Ata's ancestral lands and stripping away their economic value. The commencement of the proceeding was not a sufficient reason to

justify suspending negotiations, and by doing so the Crown breached Ngāti Te Ata's legitimate expectations.

[676] Mr Harris submitted the remedial response to this breach should be confronted at the next stage of the proceeding.

[677] Mr Kinsler for the Crown submitted that that the non-binding nature of the MOU meant that the claim based on legitimate expectation failed at the first hurdle. The Judge was right to conclude that the MOU could not give rise to the type of promise or undertaking that might found a legitimate expectation. There was no satisfactory yardstick, as the Judge had found, that could be used to measure performance of the broad and ambiguous expectation claimed.

[678] Mr Kinsler also submitted Ngāti Te Ata's claims had not been rendered "nugatory" in any sense, noting evidence of the Director of the Office of Treaty Settlements, Lilian Anderson, at the trial.[477] Ms Anderson gave evidence that the Crown had been willing to return the lands at Maioro, including the wāhi tapu, to Ngāti Te Ata, as part of the settlement of historical Treaty of Waitangi grievances. It remained committed to addressing the historical Treaty grievances through the settlement process once the litigation is resolved but did not want to negotiate while the same issues were the subject of ongoing litigation. Mr Kinsler submitted it was wrong to suggest that the Crown should bear sole responsibility for the continuing impasse over Maioro when there had been a series of settlement offers over time made in good faith to resolve Ngāti Te Ata's grievances.

[679] As to the Waitangi Tribunal's recommendations, Mr Kinsler submitted that while the Tribunal had made non-binding recommendations which would properly carry considerable weight, they did not provide directly enforceable legal rights which could be the subject of a claimed legitimate expectation enforceable in the High Court. That would circumvent the non-binding nature of Waitangi Tribunal recommendations which is a feature of the statutory scheme in the Treaty of Waitangi Act.

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[477] Ms Anderson's brief of evidence was taken as read.

[680] As to the sale of the Crown's shares in NZ Steel, the High Court had correctly concluded this was a policy matter for the Crown taken in the context of significant losses to the taxpayer. Any consequences for the Crown's response to the Waitangi Tribunal's recommendations was in the realm of policy, political and fiscal considerations, which is properly the domain of the executive and not the courts.

[681] The Crown was entitled to take the view that historical Treaty grievances were appropriately settled through the Treaty settlement process with negotiation between mandated iwi representatives and Crown negotiators, followed by agreement between senior Ministers and iwi leaders, with Parliament providing the final confirmation through settlement legislation.

Did the memorandum of understanding give rise to a legitimate expectation?

[682] Mr Harris did not seek to rely on authorities different to those discussed by Fitzgerald J in the judgment under appeal. These included this Court's decisions in *GXL Royalties Ltd v Minister of Energy*, *Comptroller of Customs v Terminals (NZ) Ltd* and *Green v Racing Integrity Unit Ltd*, and the decision of the High Court in *New Zealand Association for Migration and Investments Inc v Attorney-General*.[478]

[683] With the Judge, we see no reason in principle why a legitimate expectation could not be established in the context of Treaty of Waitangi settlement negotiations, given a clear promise by the Crown to act in a certain way which has been relied on by the plaintiff and when there is no good reason for the Crown not to proceed in accordance with its promise.[479] In this context we would not distinguish between procedural and substantive expectation. But it will often be necessary to bear in mind the observations of Arnold J (writing also for Elias CJ) in *Ririnui v Landcorp Farming Ltd*, that many decisions about the "nature, form and amount of redress" made in connection with Treaty settlements are "quintessentially the result of policy, political

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478 *GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185, [2010] NZAR 518; *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137; *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623; and *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC).

479 Judgment under appeal, above n 1, at [695].

and fiscal considerations that are properly the domain of the executive rather than the courts".[480]

[684] A claim for breach of legitimate expectation must have as its foundation a commitment made by the public authority against which the claim is made, whether in terms of a specific promise, or in terms of a settled practice or policy.[481] As we understand it, Mr Harris's argument asserts first that the MOU contained a commitment that was sufficiently clear on its own to found a legitimate expectation. While it might be the case that a claim based in contract might overlap with a claim based on legitimate expectation, it is not clear whether the latter would involve anything other than a duplication of the factual basis of the former. For reasons we have already addressed, we do not think the MOU amounted to such a clear commitment, and we need not repeat them here.

[685] The second basis of the legitimate expectation argument rested on the discussions and negotiations that had taken place in the period from 1990 until the Crown withdrew from the negotiations in response to the commencement of this litigation. Viewing the course of the conduct of the Crown over that period, we think it is clear that Ngāti Te Ata could properly have a legitimate expectation that it would receive redress for its historical Treaty grievances and that part of the settlement would involve the return of the wāhi tapu to Ngāti Te Ata. That was the tenor of the MOU and it was repeated in the June 2011 terms of negotiation which we have earlier addressed. Mr Kinsler confirmed, in accordance with the position set out in Ms Anderson's evidence, that the Crown remained committed to addressing the historical Treaty grievances through the settlement process, once the litigation is resolved. But it did not want to negotiate while the same issues were the subject of ongoing litigation.

[686] The legitimate expectation as framed has a temporal element that the claims would have been "fairly redressed by now" and not rendered nugatory by Crown action or omission. While it is implicit that the grievances would be given redress at

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480 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [89] per Elias CJ and Arnold J.

481 *Comptroller of Customs*, above n 478, at [125].

a stage when that was still possible, it is clear that could still be the case. That presumably is why the present litigation has been pursued. And as we understand it, throughout the lengthy period of the litigation NZ Steel has not mined within the wāhi tapu areas despite being released from its undertaking.

[687] We do not see how it is possible to construe the narrative so as to find the temporal aspect of the legitimate expectation which Ngāti Te Ata now assert. To do so would be to decide that the Crown's response to the commencement of litigation was unavailable to it and we do not consider that would be appropriate. In saying that, we also bear in mind that the June 2011 terms of negotiation specifically provided that:[482]

> During these negotiations, the Trustees agree not to initiate, or to pursue, before any court or tribunal, any legal proceedings relating to any of the claims that are within the scope of the negotiations except as provided in cl 20.

[688] Another clause reserved the right of both parties to withdraw from negotiations if they became "untenable". It is difficult to square these provisions with the suggestion, implicit in Ngāti Te Ata's argument, that the Crown was obliged to continue negotiating notwithstanding the commencement of litigation.

[689] We also consider the Judge was right to conclude that the delays that have occurred in the settlement process are not properly attributable to the actions of the Crown alone. We have set out the history of the negotiations in some detail. The narrative shows that the intervention of NZ Steel and the commencement of its application for review effectively derailed what seemed to be an imminent resolution of some of Ngāti Te Ata's claims, after a process that had in fact commenced in the mid-1980s, in response to the Waitangi Tribunal's report in Wai 8. After that, another imminent settlement was overtaken by the enactment of the Resource Management Act and subsequent changes of negotiating position by both Ngāti Te Ata and the Crown. The present proceeding was commenced at a time when the Crown was engaged in further negotiations under the 29 June 2011 terms of negotiation, with the direct involvement of the Minister for Treaty of Waitangi Negotiations. Other

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[482] The Trustees were acting for the mandated representatives of Ngāti Te Ata.

delays were attributable to the Māori Appellate Court process and the resolution of the Ngāti Te Ata mandate process.

[690] Consequently, we are not able to find that there was a legitimate expectation having the temporal element claimed.

Affirmative defences

[691] We have concluded that the appeal cannot succeed. As a consequence, like the Judge we do not need to consider the affirmative defences. We would have been reluctant to do so in any event, given the absence of relevant factual findings by the High Court.

COSTS

[692] The respondents do not seek costs and we make no order accordingly.

RESULT

[693] The application for leave to file an amended notice of appeal is granted.

[694] The appeal is dismissed.

[695] There is no order as to costs.

Solicitors:
Corban Revell Lawyers, Auckland for Appellant
Meredith Connell, Wellington for First Respondent
Chapman Tripp, Wellington for Second and Third Respondents