IN THE COURT OF APPEAL OF NEW ZEALAND

CA173/01
CA75/02

	BETWEEN	NGATI APA, NGATI KOATA, NGATI KUIA, NGATI RARUA, NGATI TAMA, NGATI TOA AND RANGITANE First Appellants
	AND	TE ATIAWA MANAWHENUA KI TE TAU IHU TRUST Second Appellants
	AND	THE ATTORNEY-GENERAL First Respondent
	AND	NEW ZEALAND MARINE FARMING ASSOCIATION INCORPORATED Second Respondent
	AND	PORT MARLBOROUGH LIMITED Third Respondent
	AND	MARLBOROUGH DISTRICT COUNCIL Fourth Respondent

Hearing: 1-4 July 2002

Coram: Elias CJ
Gault P
Keith J
Tipping J
Anderson J

Appearances: H C Keyte QC, L G Powell and M T Lloyd for Appellants
K L Ertel and E M Cleary for Te Atiawa Appellants
J M Dawson and A M McGregor for Te Runanga o Muriwhenua (supporting appellants)
W M Wilson QC for Maori not otherwise represented
T Arnold QC, H M Aikman and F Sinclair for First Respondent
G W R Palmer and M C W Hickford for Second Respondent
M J Hunt for Third Respondent
B P Dwyer for Fourth Respondent

Judgment: 19 June 2003

JUDGMENTS OF THE COURT

Judgments

ELIAS CJ

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The appeal

[1] For the purposes of Te Ture Whenua Maori Act 1993, all land in New Zealand has one of six statuses identified by s129(1) of the Act. The six possibilities are: Maori customary land; Maori freehold land; general land owned by Maori; general land; Crown land; and Crown land reserved for Maori.

[2] The Maori Land Court has jurisdiction under s18(1)(h) of the 1993 Act to determine for the purposes of any proceeding in that Court "or for any other purpose" whether any specified land "is or is not Maori customary land or Maori

freehold land or General land owned by Maori or General land or Crown land". The Court also has jurisdiction to make declarations by way of status orders under s131(1) that land has the status of Maori customary land. This jurisdiction is not exclusive. The jurisdiction of the High Court to determine any question relating to the particular status of any land is not affected (s131(3)). The Maori Land Court has however exclusive jurisdiction under s132 to investigate the title to such land and to grant an order vesting it in those found on investigation to be entitled to it. The effect of a vesting order is to change the status of land from Maori customary land (held according to tikanga Maori) to Maori freehold land (held in fee of the Crown and in respect of which under ss139-141 the District Land Registrar must issue a fee simple title under the Land Transfer Act 1952).

[3] Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane, and Te Atiawa applied to the Maori Land Court for declaratory orders that certain land below the mean high water mark in the Marlborough Sounds is Maori customary land. If successful in obtaining declaratory orders that the land has the status of Maori customary land, they seek an investigation of title to the land under s132 of the Act. If the Maori Land Court should find that the land is Crown land, not Maori customary land, the applicants seek a declaration that the Crown holds the land in a fiduciary capacity for their benefit under s18(1)(i) of Te Ture Whenua Maori Act.

[4] Preliminary objection was taken in the Maori Land Court by the Attorney-General and the non-Maori parties that the applications could not succeed as a matter of law. The objections were based on common law and statute. First, it was said that *In Re the Ninety-Mile Beach* [1963] NZLR 461 establishes that all foreshore in New Zealand which lies between the high and low water marks and in respect of which contiguous landward title has been investigated by the Maori Land Court is land in which Maori customary property has been extinguished. Only foreshore contiguous to Maori customary land on the shore on this view is capable of being Maori customary land. There may be no such land within the area of the application, although the factual position has not yet been investigated. It is generally accepted that few mainland pockets of customary land remain in New Zealand. Secondly, it was said that by legislation (s7 of the Territorial Sea,

Contiguous Zone, and Exclusive Economic Zone Act 1977 and s9A of the Foreshore and Seabed Endowment Revesting Act 1991) any Maori customary property in the seabed and foreshore of New Zealand was extinguished because the legislation vests all property in foreshore and seabed in the Crown.

[5] In an interim decision in the Maori Land Court Judge Hingston distinguished *In Re the Ninety-Mile Beach* and held that the legislation relied on was not effective to extinguish any customary property the applicants might establish if the case proceeded. The interim decision was appealed to the Maori Appellate Court by the Attorney-General and all parties who were not claimants. Te Runanga o Muriwhenua and Te Atiawa Manawhenua Ki Te Tau Ihu Trust obtained leave to join the proceedings. After some hesitation, the Maori Appellate Court agreed to a request to state a case for the opinion of the High Court on points of law which could substantially determine the applications. It was prevailed upon to do so in the hope that much time and cost could be saved by such a course. The Court's initial reluctance to state a case was based on concern that questions which necessarily invited abstract answers might risk erroneous assumptions of fact (as *In Re the Ninety-Mile Beach* may demonstrate) and might not prove helpful. For reasons later developed, I am of the view that the questions as eventually framed are indeed not helpful and that it is impossible to resolve many of the legal points raised in them in advance of determination of the facts. It is as well to keep in mind the warning of Lord Haldane in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 404 that, when considering questions of customary property,

> Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading.

[6] Eight questions were posed for the High Court:

1. What is the extent of the Maori Land Court's jurisdiction under Te Ture Whenua Maori Act 1993 to determine the status of foreshore or seabed and the waters related thereto?

2. Does the law of New Zealand recognise any Maori customary title to all or any part of the foreshore?

3. (If the answer to question 2 is Yes.) Irrespective of any fact in any particular case, when there has been an extinguishment of Maori customary title to land having the sea as a boundary without express mention of the foreshore in the instrument evidencing extinguishment, as a matter of law, can any Maori customary title to the foreshore remain?

4. Would the law of New Zealand prior to the enactment of the Territorial Sea and Fishing Zone Act 1965 have recognised any Maori customary title to all or any part of the seabed and the waters related thereto?

5. (If the answer to question 4 is Yes.)

    (i) Did s7 of the Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977 ("Territorial Sea Act"), or its predecessor, (s7 of the Territorial Sea and Fishing Zone Act 1965), extinguish any Maori customary title to the seabed?

    (ii) Can the exercise of any jurisdiction held by the Maori Land Court to determine the status of the foreshore and/or seabed and/or waters thereto amount to a "grant of any estate or interest therein" in terms of s7 of either of the Territorial Sea Acts?

6. Do s7 of the Territorial Sea Act and s129(3) of Te Ture Whenua Maori Act 1993 prevent the Maori Land Court from making a declaration under s131 of Te Ture Whenua Maori Act that the seabed is Maori customary land?

7. Does the following area specific legislation which vested areas of the foreshore and/or seabed in the Marlborough Sounds in Harbour Boards, local authorities and other persons, extinguish any Maori customary title to the foreshore and seabed in those areas:

- The Public Reserves Management Act 1867 (Marlborough)

- The Picton Recreation Reserve Act 1896 vested an area of Picton Harbour in the Picton Borough Council

- The Havelock Harbour Board Act 1905
- Section 30 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1907
- The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1910
- The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915
- The Marlborough Harbour Amendment Act 1960
- The Reserves and Other Lands Disposal Act 1973
- The Marlborough Harbour Amendment Act 1977?

> 8. Does s9A of the Foreshore and Seabed Endowment Revesting Act 1991 extinguish any Maori customary title to the foreshore and seabed?

[7] The case stated for the opinion of the High Court was heard by Ellis J. In a judgment reported at [2002] 2 NZLR 661 he held that land below low water mark in New Zealand was beneficially owned by the Crown at common law and was declared to be so owned by s7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 and s9A of the Foreshore and Seabed Endowment Revesting Act 1991. Accordingly, it could not be Maori customary land. In the case of land above low water mark, Ellis J (at 679-680) regarded successive Maori Land legislation as the means by which the Treaty of Waitangi guarantee of protection of their properties to Maori was discharged:

> I find in the present context, it attractive to hold that upon cession of sovereignty to the Crown, the Crown then held the land as against her subjects including Maori with "full and absolute dominion" including the fee. The Crown's Treaty obligations were then for the Crown to honour by transferring the fee to Maori in respect of customary land, where they could show rights more or less equivalent to their right to exclusive possession, an essential aspect of fee simple. In other words if the Crown grants or concedes a fee simple title to owners of Maori customary land, it must have it to grant.

Ellis J accepted that the Maori Land Court had jurisdiction under Te Ture Whenua Maori Act to inquire into whether foreshore land between the high and low water marks was Maori customary land. But he applied *In Re the Ninety-Mile Beach* in

holding that any Maori customary property in the foreshore had been extinguished once the contiguous land above high water mark had lost the status of Maori customary land. Such status could be lost by Crown purchase or vesting order made by the Maori Land Court where the sea was described as the boundary. He answered the questions of law posed for him accordingly. The present appeal is brought from this decision by the Maori parties.

[8] The matter therefore comes before this Court on the preliminary and general questions of law posed by the Maori Appellate Court for the High Court. The significance of the determinations this Court is asked to make should not be exaggerated. The outcome of the appeal cannot establish that there is Maori customary land below high water mark. And the assertion that there is some such land faces a number of hurdles in fact and law which it will be for the Maori Land Court in the first instance to consider, if it is able to enter on the inquiry.

[9] Whether or not the appellants will succeed in establishing in the Maori Land Court any customary property in the foreshore and seabed lands claimed and the extent of any interest remains conjectural. In the past, claims to property in areas of foreshore and seabed seem to have identified relatively discrete areas comprising shellfish sandbanks, reefs, closely-held harbours or estuaries, and tidal areas or fishing holes where particular fish species were gathered. (See, for example, the references in the proceedings of the Maori Parliament at Orakei in 1860 reported in (1879) AJHR G-8, the evidence of Chief Judge Fenton to the Native Affairs Committee recorded in the Journal of the House of Representatives, 18 June 1880, and court cases such as *Waipapakura v Hempton* (1914) 33 NZLR 1065). Nor will the appeal resolve questions of the nature of any property interest in land (whether it approximates a fee simple interest or whether it is lesser property).

[10] Depending on the nature of any interest accepted by the Maori Land Court as a matter of tikanga, subsequent questions of law may arise. They could include, for example, whether the Maori Land Court (in its statutory jurisdiction) or the High Court (in its inherent jurisdiction) can recognise interests in land not equivalent to rights of ownership of the fee simple and whether any interest is affected by the terms of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Such

matters cannot sensibly be considered until the facts have first been found. If the land below high water mark is mainly Crown land, as the respondents maintain, it is not clear whether there may be a basis on the facts for the application under s18(1)(i) of Te Ture Whenua Maori Act for a declaration that it is held in a fiduciary capacity.

[11] The case is at an early stage. Determinations favourable to the respondents will not entirely dispose of the applications. It was acknowledged in the High Court that in respect of foreshore land which abuts Maori customary land onshore, the matter must proceed to hearing. If the judgment in the High Court is upheld, the scope of the hearing will be limited to any foreshore land contiguous to remaining Maori customary land above the high water mark. There may be no such land, in which case the applications will fail on a relatively limited factual inquiry. If however there is such customary land above the high water mark or if the Maori appellants succeed in the present appeal and can embark on the wider applications for status orders in relation to any foreshore and seabed within the area of claim, there is still a long way to go before such orders could be made in respect of any land.

[12] This appeal deals only with the initial question whether the Maori Land Court can enter into the substantive inquiry. It is only if it is clear without any evidence being necessary that the appellants cannot succeed as a matter of law that they can be prevented from proceeding to a hearing.

[13] I have had the advantage of reading in draft the judgments of the other members of the Court. Like them, I am of the view that the appeal must be allowed and the applicants must be permitted to go to hearing in the Maori Land Court. I am of the view that the judgment of Judge Hingston in the Maori Land Court was correct. For the reasons given below, I consider that in starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty (as appears from the passage from the judgment set out at paragraph [7] above), the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law. I

agree that the legislation relied on in the High Court does not extinguish any Maori customary property in the seabed or foreshore. I agree with Keith and Anderson JJ and Tipping J that *In Re the Ninety-Mile Beach* was wrong in law and should not be followed. *In Re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied in *In Re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as "revolutionary".

The legal status of customary interests in land

[14] Maori customary land is defined by Te Ture Whenua Maori Act as land that is "held by Maori in accordance with tikanga Maori" (s129(2)(a)). In earlier Maori land statutes since 1862 it was defined as lands "owned by Natives under their customs or usages". Such property is not the creation of the Treaty of Waitangi or of statute, although it was confirmed by both. It was property in existence at the time Crown colony government was established in 1840.

[15] That the common law recognised pre-existing property after a change in sovereignty was affirmed by the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* at 407-408:

> A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.

Similarly, in the *William Webster Claim* (reproduced in FK Nielsen *American and British Claims Arbitration* (1926, Washington); reported in VI Reports of International Arbitral Awards (United Nations 1955) 166; (1926) 20 AJIL 391) the Anglo-American Claims Tribunal (on which Roscoe Pound was the nominee of the United States) held in 1925 that cession of sovereignty under the Treaty of Waitangi

did not constitute "a conveyance of property". The Crown's right of pre-emption enabled it to regulate alienation of land in exercise of the rights of sovereignty, not property.

[16] The Treaty of Waitangi, as HS Chapman J pointed out in *R v Symonds* (1847) NZPCC 387 at 390, did not assert "either in doctrine or in practice any thing new and unsettled" in guaranteeing native property and in providing that the Queen had exclusive rights to extinguish it by purchase. In a passage approved by the Privy Council in *Nireaha Tamaki v Baker* at 579, he declared "it cannot be too solemnly asserted" that native property over land is entitled to be respected and cannot be extinguished ("at least in times of peace") otherwise than by the consent of the owners.

[17] In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand at 1840. The laws of England were applied in New Zealand only "so far as applicable to the circumstances thereof". The English Laws Act 1858 later recited and explicitly authorised this approach. But from the beginning the common law of New Zealand as applied in the courts differed from the common law of England because it reflected local circumstances.

[18] In *Re Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 at 49 the Court of Appeal accepted that all title to land "by English tenure" was derived by the Crown. But that did not prevent customary property being recognised by the common law:

> The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.

[19] While the content of customary property differed in other colonies, the principle of respect for property rights until they were lawfully extinguished was of general application. In New Zealand, as is explained below, land was not available for disposition by Crown grant until Maori property was extinguished. In the North American colonies land occupied or used by Indians was treated as vacant

lands available for Crown grant. Even so, as the Supreme Court of the United States in *Johnson v M'Intosh* (1823) 21 US (8 Wheaton) 543 held, the Crown's interest and any grant made by it of the land was subject to the native rights (at 574, 603 per Marshall CJ). They were rights at common law, not simply moral claims against the Crown (at 603):

> It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.

[20] The Privy Council on an appeal from Canada in *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46 described the Crown's "substantial and paramount estate" as encumbered by the rights of the Indian inhabitants. The Crown only received "a plenum dominium" (full ownership, combining legal title and beneficial entitlement) when the Indian title was surrendered or otherwise extinguished.

[21] Similarly, in New Zealand, the Crown's notional "radical" title, obtained with sovereignty, was held to be consistent with and burdened by native customary property (*R v Symonds*, *Lundon and Whitaker's Claims*, and *Nireaha Tamaki v Baker*). It was explained by the Privy Council in *Manu Kapua v Para Haimona* [1913] AC 761 at 765:

> Prior to the grant and the antecedent proceedings the land in question had been held by the natives under their customs and usages, and these appear not to have been investigated. As the land had never been granted by the Crown, the radical title was, up to the date of the grant, vested in the Crown subject to the burden of the native customary title to occupancy.

[22] In *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 this Court rejected an argument that native title was not recognisable in law. It held that the applicants could not be prevented from applying to the Native Land Court for investigation of their title to the bed of Lake Rotorua unless it was shown that native title had been extinguished by Proclamation, cession of the owners, or Crown grant (at 345 per Stout CJ, at 348 per Williams J, at 351 per Edwards J, at 356 per Chapman J). Whether there may be separate property in the bed of a lake was to be

determined according to native custom and usage (per Edwards J at 351). Cooper J at 352-353, after pointing to the definition of Crown lands in the Land Act which excluded customary lands, concluded

> Customary lands owned by Natives which have not been ceded to His Majesty or acquired from the Native owners on behalf of His Majesty cannot, in my opinion, be said to be land vested in His Majesty by right of his prerogative. It is true that, technically, the legal estate is in His Majesty, but this legal estate is held subject to the right of the Natives, recognized by the Crown, to the possession and ownership of the customary lands which they have not ceded to the King, and which His Majesty has not acquired from them.

[23] The New Zealand courts had not always held to this view. In *Wi Parata v Bishop of Wellington* Prendergast CJ, delivering the judgment of the Full Court comprising himself and Richmond J, held that the rule of the common law that native customary property survived the acquisition of sovereignty had no application to the circumstances of New Zealand. Maori had, he considered, insufficient social organisation upon which to found custom recognisable by the new legal order. In such circumstances, he said (at 78)

> the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.

In *Wi Parata* it was held that the courts were required to assume that the Crown had properly respected its obligations and could not question its actions.

[24] The Privy Council rejected this approach, saying in *Nireaha Tamaki v Baker* at 577-578, that it was "rather late in the day" for it to be argued in a New Zealand court that there is "no customary law of the Maoris of which the Courts of law can take cognizance":

> The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act, and one is rather at a loss to know what is meant by such expressions as "Native Title", native lands", "owners", and "proprietors", or the careful provision against sale of Crown

> lands until the Native title has been extinguished, if there be no such title cognizable by the law and no title therefore to be extinguished.

[25] Although the reasoning in *Wi Parata* was rejected by the Privy Council, it continued to influence thinking in New Zealand. In particular, the Crown continued to argue in litigation that, through the acquisition of sovereignty, all land in New Zealand became owned by it. It was the argument of the Solicitor-General in *In Re the Ninety-Mile Beach* at 403. According to the argument, the Crown's Treaty obligation to protect Maori customary rights of occupation was a moral duty, not a legal one, discharged when the Crown granted title to the Maori occupiers. Only then could the courts give effect to a property right. Before Crown grant no customary property rights could be recognised because to do so would be to question the sovereign power. Thus in the "Protest of Bench and Bar" (reported at (1903) NZPCC 730), made in response to the decision of the Privy Council in *Wallis v Solicitor-General* (1903) NZPCC 23, Stout CJ asserted at 732 that "All lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant."

[26] The error in this approach was, as Cooper J in *Tamihana Korokai v Solicitor-General* suggested, its equation of sovereignty with ownership (conflating *imperium* and *dominium*). Despite the strictures of the Privy Council in *Nireaha Tamaki v Baker* and in *Wallis v Solicitor-General*, the idea that the Crown had acquired property in all land with the assumption of sovereignty proved hardy. That may have been in part because of the influence of Sir John Salmond. Salmond had been largely responsible for drafting the major restatement of Maori land law in the Native Lands Act 1909. He was Solicitor-General in the critical years at the beginning of the 20th century, when questions of customary title to lands and fisheries were before the courts.

[27] Salmond was alive to the distinction between sovereignty and property. But he considered that the consequence of Crown ownership of all land arose on the introduction into New Zealand of English law with its system of estates derived from feudal land tenure (JW Salmond *Jurisprudence* (6th ed., 1920) 495):

> When we say that certain lands belong to or have been acquired by the Crown, we may mean either that they are the territory of the Crown or that they are the property of the Crown. The first conception pertains to the domain of public law, the second to that of private law. Territory is the subject-matter of the right of sovereignty or *imperium*, while property is the subject-matter of the right of ownership or *dominium*. These two rights may or may not co-exist in the Crown in respect of the same area. Land may be held by the Crown as territory but not as property, or as property but not as territory, or in both rights at the same time. As property, though not as territory, land may be held by one state within the dominions of another. This distinction between territorial sovereignty and ownership is to some extent obscured by the feudal characteristics of the British constitution. In accordance with the principles of feudal law all England was originally not merely the territory but also the property of the Crown; and even when granted to subjects, those grantees are in legal theory merely tenants in perpetuity of the Crown, the legal ownership of the land remaining vested in the Crown. So, in accordance with this principle, when a new colonial possession is acquired by the Crown and is governed by English law, the title so acquired is not merely territorial, but also proprietary. When New Zealand became a British possession, it became not merely the Crown's territory, but also the Crown's property, *imperium* and *dominium* being acquired and held concurrently.

Salmond himself may have taken the view that the Crown's proprietary interest was burdened by native title, as Frame suggests (A Frame *Salmond, Southern Jurist* (1995, Wellington) 125-126). But he viewed such burden not a legal one but as a political obligation for Parliament to address.

[28] Sir Kenneth Roberts-Wray in his 1966 book *Commonwealth and Colonial Law* at 626 comments of Salmond's view of the effect of the introduction of the common law and English systems of land tenure that:

> This reasoning does not take into account the vital rule that, when English law is in force in a Colony, either because it is imported by settlers or because it is introduced by legislation, it is to be applied subject to local circumstances; and, in consequence, English laws which are to be explained merely by English social or political conditions have no operation in a Colony.

This "vital rule" of the common law (earlier applied in *R v Symonds*) was made explicit in New Zealand by the English Laws Act 1858. By it, English law was part

of the law of New Zealand with effect from 1840 only "so far as applicable to the circumstances of New Zealand" (s1).

[29] More recently, the effect of the radical title acquired by the Crown with sovereignty has been considered by this Court in *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641 and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20. The position was restated by Cooke P for the Court in *Te Ika Whenua* at 23-24:

> On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. It was so stated by Chapman J in *R v Symonds* (1847) NZPCC 387, 390, in a passage later expressly adopted by the Privy Council, in a judgment delivered by Lord Davey, in *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384.

[30] The radical title of the Crown is a technical and notional concept. It is not inconsistent with common law recognition of native property, as *R v Symonds, Manu Kapua v Para Haimona* and *Nireaha Tamaki v Baker* make clear. Brennan J described such radical title in *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1, 50 as

> merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).

[31] Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature, as the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* held. The content of such customary interest is a question of fact discoverable, if necessary, by evidence (*Nireaha Tamaki v Baker* at 577*)*. As a matter of custom the burden on the

Crown's radical title might be limited to use or occupation rights held as a matter of custom (as appears to be the position described in *St Catherine's Milling and Lumber Co v The Queen* and as the Tribunal in *William Webster's Claim* seems to have thought might be the extent of Maori customary property). On the other hand, the customary rights might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference" (*Amodu Tijani v Secretary, Southern Nigeria* at 410). The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructory rights to exclusive ownership with incidents equivalent to those recognised by fee simple title (see, for example, *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at paragraphs 110-119 per Lamer CJ).

[32] The existence and content of customary property is determined as a matter of the custom and usage of the particular community (*Tamihana Korokai v Solicitor-General* at 351 per Edwards J). The Native Rights Act 1865, enacted to remove doubts as to the jurisdiction of the general Courts in respect of Maori and their property, had earlier declared as much in s4:

> IV. Every title to or interest in land over which the Native Title shall not have been extinguished shall be determined according to the Ancient Custom and Usage of the Maori people so far as the same can be ascertained.

The Act enabled the general courts to obtain the opinion of the Native Land Court on matters of custom and usage. Provisions to similar effect to permit the general courts to refer questions of Maori custom and usage to the Maori Land Court were continued in the successive Maori land legislation (Native Land Act 1909 s91; Native Land Act 1931 s119; Maori Affairs Act 1953 s161(2)).

[33] Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria* emphasised at 404 that ascertainment of the right according to native custom "involves the study of the history of the particular community and its usages in each case". He recognised at 404 the need for caution in applying English legal concepts to native property interests, speaking of the necessity for "getting rid of the assumption that

the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle". The danger of such assumption cuts both ways: it may be dismissive of customary interests less than recognisable English legal estates; and it may cause lesser customary interests to be inflated to conform with familiar legal estates.

[34] The extent of any customary property in foreshore and seabed is not before us. For present purposes what matters is that the customary rights of the native community continued at common law to exist until lawfully extinguished. Property rights may be abrogated or redefined through lawful exercise of the sovereign power. But in New Zealand the basis of conferral of prerogative power and later successive lands legislation, both that relating to Maori land and that relating to general and Crown lands, is consistent with the continuation of Maori customary interests in land.

[35] Thus, the Letters Patent of 1840 setting up government in New Zealand authorised the Governor to make grants of the waste lands of New Zealand

> *Provided Always*, that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said Colony of New Zealand, to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any Lands in the said Colony now actually occupied or enjoyed by such natives.

[36] The Land Claims Ordinance 1841 confirmed the exclusive Treaty right of pre-emption in the Crown. Such pre-emption was explicable only in terms of recognition of existing property rights according to Maori custom.

[37] New Zealand was never thought to be *terra nullius* (an important point of distinction from Australia). From the beginning of Crown colony government, it was accepted that the entire country was owned by Maori according to their customs and that until sold land continued to belong to them (see the opinions as to the nature of native tenure collected in 1890 NZPP G1, and the authorities cited to the same effect by Stout CJ in *Tamihana Korokai v Solicitor-General* at 341). Originally Crown purchases were required to extinguish Maori ownership and free the land for

settlement under subsequent Crown grant. Subsequently, statutes provided authority for other modes of extinguishing Maori customary title.

[38] The land became subject to the disposing power of the Crown by Crown grant only once customary ownership had been lawfully extinguished. In *R v Symonds* Martin CJ at 394 said of the 1841 Ordinance that it

> everywhere assumed that where the native owners have fairly and freely parted with their lands the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown.

[39] Similarly, under successive Land Acts beginning with the Imperial Waste Lands Act 1842, land was able to be disposed of by the Crown only when freed from Maori proprietary interest. So too, when the New Zealand legislature was empowered in 1852 to make laws for the sale of waste lands they were defined as those lands "wherein the title of Natives shall be extinguished" (s72 of the New Zealand Constitution Act 1852). The Land Act 1877 defined the "demesne lands of the Crown" (estates in which could be granted by the Crown) as "all lands vested in Her Majesty wherein the title of the aboriginal inhabitants has been extinguished" (s5). After the establishment of the Native Land Court (effectively from 1865) the principal manner in which customary title was extinguished was through the operation of the Court in investigating ownership and granting freehold titles.

[40] The Native Lands and Maori Lands Acts from 1862 until enactment of Te Ture Whenua Maori Act 1993 were a mechanism for converting Maori customary proprietary interests in land into fee simple title, held of the Crown. Only such land could be alienated by the Maori owners to private purchasers. The explicit policy of the legislation was "to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown" (Preamble to the Native Lands Act 1865). The statement is further legislative acknowledgement that Maori customary property is a residual category of ownership not dependent upon title derived from the Crown.

[41] From the enactment of the Native Lands Act 1909, Maori owners have been prevented from taking action in the courts for recovery of possession of customary land or to prevent or claim damages for trespass to such land (Native Land Act 1909 s88; Te Ture Whenua Maori Act 1993 s144). Only the Crown can bring such proceedings to court on behalf of the beneficial owners. In such proceedings, the land is "deemed" to be Crown land within the meaning of the Land Act 1948. For present purposes, the fact that such deeming for limited purposes is necessary emphasises that customary land is property recognised by New Zealand law which is not owned by the Crown.

[42] Under successive Maori land statutes, an order vesting title in Maori owners after investigation by the Court changed the status of customary land into freehold land no longer held according to Maori custom but in fee of the Crown. Thus, under s46 of the Native Lands Act 1865, a Crown grant could be obtained by Maori after investigation of title by the Land Court. Such Crown grant was as effectual "as if the land comprised therein had been ceded by the native proprietors to Her Majesty". Similar provisions have been continued in all succeeding Maori Land legislation. Under Te Ture Whenua Maori Act a vesting order registered with the District Land Registrar transforms ownership into a legal estate in fee simple "in the same manner as if the land had been granted to those persons by the Crown" (s141(1)(b)). It was made clear in successive statutes from 1909 that no Crown grant can be questioned in any court on the basis that the Maori customary title in the land has not been extinguished.

[43] From 1873 legislation permitted customary title to be cleared away by Proclamation or by determination by the Court that land had been ceded to the Crown. In such cases it vested "absolutely as demesne lands of the Crown, freed and discharged from all Native titles, customs or usages" (ss75, 77, and 105 of the Native Land Act 1873). As indicated at paragraph [39] above, the 1877 Land Act, consistently with this approach, defined the "desmesne lands of the Crown" as those lands "vested in Her Majesty wherein the title of the aboriginal inhabitants has been extinguished".

[44] Before 1894, it was possible for the ownership of land held according to Maori custom to be ascertained on application to the Native Land Court without also obtaining a vesting order changing its status from land held in accordance with custom to land held in fee of the Crown. But from enactment of the Native Land Act 1894 until enactment of Te Ture Whenua Maori Act 1993 investigation of title of customary land automatically resulted in the conversion of customary ownership into Maori freehold land, held in fee of the Crown as though by Crown grant.

[45] Under Te Ture Whenua Maori Act a vesting order obtained under s132 continues to change the status of customary land to Maori freehold land. But the Maori Land Court may now make a declaration of status of customary land under s131 without that consequence. The current legislation is therefore no longer an inexorable mechanism for conversion of customary land into freehold land.

[46] It is not clear to what extent the new jurisdiction equips the Maori Land Court to recognise interests in land according to custom which do not translate into fee simple ownership. In New Zealand, the common law recognition of property interests in land under native custom is little developed. That may have been in part because of the success of the Maori Land Court in converting occupation interests in land into estates in fee simple. The 1894 legislation (making freehold title the inexorable outcome of a successful application to the Court) may have stifled the apparent early willingness of the Court, described by Judge Fenton in his evidence to the Native Affairs Committee in 1890 and referred to in his judgment in the 1870 *Kauwaeranga* case (reprinted in A Frame "*Kauwaeranga* judgment" (1984) 14 *VUWLR* 227), to recognise lesser interests by way of easements or other mechanisms known to English law. They might better have approximated some customary interests. Lack of development may be in part because, following the enactment of s88(1) of the Native Land Act 1909, there has been limited opportunity for Maori to apply to the High Court for protection of customary property (despite the jurisdiction of that Court earlier acknowledged "for the avoidance of doubt" by the Native Rights Act 1865). It may be because between 1909 and the enactment of Te Ture Whenua Maori Act in 1993 the legislation prevented customary title to land being available or enforceable "in any Court" against the Crown (s84 Native Land Act 1909; s112 Native Land Act 1931; s155 Maori Affairs Act 1953). For present purposes it is

enough to note that any property interests in foreshore and seabed land according to tikanga may not result in vesting orders leading to fee simple title and that the Maori Land Court may not be the only forum available for recognition of such property.

[47] What is of significance in the present appeal is that New Zealand legislation has assumed the continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority. The Maori lands legislation was not constitutive of Maori customary land. It assumed its continued existence. There is no presumption of Crown ownership as a consequence of the assumption of sovereignty to be discerned from the legislation. Such presumption is contrary to the common law. Maori customary land is a residual category of property, defined by custom. Crown land, by contrast, is defined as land which is not customary land and which has not been alienated from the Crown for an estate in fee simple. The Crown has no property interest in customary land and is not the source of title to it. That is the background against which the arguments based upon *In Re the Ninety-Mile Beach* and the legislation said to vest ownership of the seabed and foreshore in the Crown must be assessed.

[48] It is accepted by the Solicitor-General in his submissions that in New Zealand the Crown had no property in what was described in submissions as "ordinary land" (land above high water mark) until it first validly extinguished the proprietary interests of Maori. It was only when native proprietary interests were extinguished that the land became part of what Martin CJ in *R v Symonds* at 396 called "the heritage of the whole people". It is argued however that the position is otherwise in relation to foreshore and seabed lands. The difference in approach to foreshore and seabed is said to arise both at common law and because of legislation vesting such lands in the Crown. In addition, it is argued that the statutory language of Te Ture Whenua Maori precludes its jurisdiction in relation to foreshore and seabed because those areas are not properly to be understood as "land". Against the background described, I now address these arguments.

Ownership of foreshore and seabed at common law

[49] Any prerogative of the Crown as to property in foreshore and seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Maori custom and usage recognising property in foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law, unless such property interests have been lawfully extinguished. The existence and extent of any such customary property interest is determined in application of tikanga. That is a matter for the Maori Land Court to consider on application to it or on reference by the High Court. Whether any such interests have been extinguished is a matter of law. Extinguishment depends on the effect of the legislation and actions relied upon as having that effect. At this stage it can only be considered against an assumption that the appellants will succeed in establishing property interests as a matter of tikanga. Other legislation (such as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) may limit the legal efficacy of such property. Whether such limits apply to any property cannot sensibly be considered in advance of findings as to the existence and incidents of any customary property.

[50] On behalf of the Attorney-General, however, it is contended that "the legal assumption of an original native title over the surface of New Zealand has always ended where the land ends and the sea begins". This amounts in substance to the argument addressed to the Court in *Re the Ninety-Mile Beach* that there is a presumption against private ownership of land on the margins of the sea or land covered by it and in favour of Crown ownership. The Court did not accept the contention in relation to foreshore land, and the Solicitor-General in the present case is content to limit it here to seabed land. In addition to the common law as a source of such presumption, it is suggested that it arises inherently because of the different qualities of foreshore and seabed from land on shore and because of the public interest in navigation, recreation, and other use which makes private property interests somehow unthinkable.

[51] There are a number of responses. In the first place, as the review undertaken in the judgment of Keith and Anderson JJ demonstrates, interests in the soil below low water mark were known under the laws of England. They included interests which had arisen by custom and usage. Many such interests were created by Crown grant in New Zealand. Indeed, the Waitangi Tribunal in the *Manukau Harbour Report* (1985, Wai 8) at 35 refers to a Crown grant at Whatapaka which, in converting Maori customary title into freehold title, included a pipi bank in the Manukau Harbour. Such properties are subject to public rights of navigation and other regulation. The Gold Fields Act Amendment Act 1868, the Shortland Beach Act 1869 and the Thames Harbour Board Act 1876 all contain legislative acknowledgement that there may be Maori customary lands lying below high water mark. Although it was suggested in argument that these Acts must have been confined to foreshore land above low water mark, their terms do not suggest any such limitation. More importantly, it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank at Whatapaka or the patiki grounds at Kauwaeranga, and on the other to the hapuka grounds of the Hauraki Gulf described by Chief Judge Fenton (see paragraph [52] below) or the reefs described in the *Motunui-Waitara* decision of the Waitangi Tribunal (1989, Wai 6).

[52] Fenton's evidence to the Native Affairs Committee of the House of Representatives on June 18, 1880 is instructive (above, paragraph [9]). He was asked to discuss the continuing complaints by Maori about interference with their fisheries and pipi beds. Fenton did not remember ever having a case dealing with interests below low water mark, although he thought it "quite possible that such exist":

> I remember there is a rock to the North of Waiheke which is a great fishing ground for whapuka, and I am aware that the Ngatipoa defended that ground against attacks from the North. I cannot say that the Court has decided that case, or that it has decided any such.

Judge Fenton had never decided a case about the beach rather than tidal rivers and mudflats. He doubted such property but "should not like to say decidedly" what the position might be. In particular, he referred to "a valuable shell fishery on the West

Coast between Hokianga and Kaipara called Toheroa, where the natives obtain a large clam."

> That fishery is of great value to them, but whether they have ever exercised rights of property to the exclusion of others I do not know, but that is the essence of their title according to my judgment. They must prove exclusive use.

Judge Fenton confirmed that claims to fisheries or pipi beds would be heard "as well as a claim to dry land" by the Court.

[53] It is notable that Judge Fenton did not find anything incongruous about property interests in foreshore or seabed. In the *Kauwaeranga* judgment (concerned with foreshore land only) he expressed some doubt whether such interests would support a freehold interest in the soil rather than an easement. But, as his evidence to the Native Affairs Committee makes clear, any property interests in foreshore and seabed would be determined according to what he called "Maori Common Law".

[54] The proper starting point is not with assumptions about the nature of property (which, as was recognised in *Amodu Tijani*, may be culturally skewed if they if they are "conceived as creatures of inherent legal principle"), but with the facts as to native property. The nature of Maori customary interests is, as the Privy Council said in *Nireaha Tamaki v Baker* at 577, "either known to lawyers or discoverable by them by evidence".

The jurisdictional objection that "land" in Te Ture Whenua Maori Act excludes sea areas

[55] I am of the view that seabed and foreshore is "land" for the purposes of s129(1) of Te Ture Whenua Maori Act. Dictionary definitions of the meaning of land cannot be conclusive, for the reasons given by Keith and Anderson JJ. Moreover, many dictionary definitions are wholly consistent with foreshore and seabed being "land" (thus, they fit readily within the description "the solid portion of the earth's surface" when contrasted with "water"). As a matter of language (as opposed to legal treatment of property) I am unable to draw a distinction between lake beds or river beds and seabed. Both lake beds and river beds have been the

subject of claims to the Maori Land Court without jurisdictional impediment, as *Tamihana Korokai v Solicitor-General*, the *Omapere Lakes* decision of Judge Acheson in the Maori Land Court of 1 August 1929, and *In Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) and [1962] NZLR 600 (CA) illustrate. As already indicated, I also find it difficult to understand why seabed and foreshore should be separately treated for the purpose of the jurisdiction of the Maori Land Court. It may be that property interests according to Maori custom are less easily shown as a matter of fact in relation to seabed rather than foreshore (just as it may be easier to establish occupation and exclusion of others in relation to dry land than to foreshore). But properties in both were not considered by Judge Fenton to be unthinkable. Indeed he was able to identify areas below low water mark in respect of which property interests might well have been established as a matter of Maori custom. Much legislation concerned with "land" applies to seabed and foreshore (as the certificates of title to Harbour Boards and local authorities in the Marlborough Sounds illustrate).

[56] I query whether the question of jurisdiction is properly addressed by first asking whether Parliament can have intended to permit recognition of or to create property in the seabed under the 1993 Act. The Maori Lands legislation has never been constitutive of customary property. If the Maori Land Court does not have jurisdiction, the ascertainment of any property interests will have to be undertaken by the High Court (which may refer questions of tikanga for the opinion of the Maori Land Court). That does not seem a sensible or intended result.

[57] The first question is whether Parliament has extinguished any property rights which Maori may be shown to have had. For the reasons given below, I do not consider that the legislation relied upon here has that effect. Other legislation will remain to be considered if any customary rights are established but those matters are not at present before us. It may well be that any customary property will be insufficient to permit a vesting order with the consequence of fee simple title. But that does not seem to me to be a reason to prevent the applicants proceeding to establish whether any foreshore or seabed has the status of customary land. I consider that the Maori Land Court has jurisdiction to entertain the application.

Area-specific legislation vesting foreshore or seabed in the Marlborough Sounds

[58] The questions posed by the Maori Appellate Court ask whether nine Acts said to vest areas of the Marlborough Sounds in harbour boards, local authorities and other persons extinguish any Maori customary title to the foreshore and seabed in those areas. There seems no argument that, if the legislation confers freehold interests, it extinguishes any pre-existing Maori customary property rights inconsistent with such interests. The terms of the legislation were not however the subject of argument. And it is artificial to consider the question further in the absence of identification of any customary property. I consider it preferable to avoid answering the question in its terms, while indicating that any customary property in the areas vested seems unlikely to survive.

The Harbours Acts 1878 and 1950

[59] In *In Re the Ninety-Mile Beach* the Court of Appeal affirmed the decision in the Supreme Court of Turner J that from 1878 the Harbours Act deprived the Maori Land Court of jurisdiction to investigate land below high water mark. The provision originally introduced in the Harbours Act 1878 was replaced with an equivalent restriction on disposal by Crown grant by s150 of the Harbours Act 1955. It provided:

> No part of the shore of the sea or of any creek, bay, arm of the sea, or navigable river communicating therewith, wherein so far up as the tide flows and re-flows, nor any land under the sea or under any navigable river, except as may already have been authorised by or under any Act or Ordnance, shall be leased, conveyed, granted or disposed of to any Harbour Board, or any other body (whether incorporated or not), or to any person or persons without the special sanction of an Act of the General Assembly.

[60] Such legislation, by its terms, applied to future grants. It did not disturb any existing grants. Indeed, substantial areas of seabed and foreshore had already passed into the ownership of Harbour Boards and private individuals by 1878. I agree with the conclusion of Keith and Anderson JJ that the legislation cannot properly be

construed to have confiscatory effect. Although a subsequent vesting order after investigation under the Maori Affairs Act 1953 was "deemed" a Crown grant (s162), that was a conveyancing device only and applied by operation of law. It was not a grant by executive action. Only such grants from Crown land were precluded for the future by the legislation. More importantly, the terms of s150 are inadequate to effect an expropriation of Maori customary property.

[61] As is indicated more fully below at paragraphs [77] to [89] I am of the view that the approach taken by Turner J in the Supreme Court and by the Court of Appeal in *In Re the Ninety-Mile Beach* can be explained only on the basis that they were applying the approach taken in *Wi Parata v Bishop of Wellington*. On that approach Maori property had no existence in law until converted into land held in fee of the Crown. Until then it was assumed to be Crown property, as the references in the judgments of North J (at 474) and TA Gresson J (at 480) to "disposal" of the foreshore suggests. For the reasons already given, such view is contrary to the common law and to successive statutory provisions recognising Maori customary property.

Territorial Seas Acts

[62] Both the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 deem the seabed and its subsoil from the low water mark to the limits of the territorial sea (3 miles and 12 miles respectively in the two Acts) to "be and always to have been vested in the Crown". Existing grants made before and after the Act are specifically preserved.

[63] No expropriatory purpose in the Act in relation to Maori property recognised as a matter of common law and statute can be properly read into the legislation. It is principally concerned with matters of sovereignty, not property. I agree with the reasons given in the judgment of Keith and Anderson JJ. The language of deeming, the preservation of existing property interests, the compatibility of radical title in the Crown and Maori customary property, and the absence of any direct indication of intention to expropriate make it impossible to construe the legislation as extinguishing such property.

Section 9A Foreshore and Seabed Endowment Revesting Act 1991

[64] As its long title explains, the Foreshore and Seabed Endowment Revesting Act 1991 was one "to revoke certain endowment of foreshore and seabed, and re-vest those endowments in the Crown". With some exceptions, under s5 of the Act all land formerly vested in harbour boards or local authorities is re-vested in the Crown "as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions and conditions". On the request of the Minister any certificates of title in existence were cancelled under the authority of s8.

[65] Section 9 provided for certificates of title to be re-issued at the Minister's request. As originally enacted, the legislation contained no restriction on future alienation by the Crown equivalent to that earlier contained in s150 of the Harbours Act 1950. Section 150 of the Harbours Act was however repealed by s362 of the Resource Management Act 1991 on 1 October 1991. The removal of the restriction on alienation of seabed and tidal land seems not to have been appreciated. Section 9A of the Foreshore and Seabed Endowment Revesting Act was enacted in 1994, apparently to remedy the oversight.

[66] Section 9A is broader in reach than the lands re-vested in the principal Act because it reinstates the Harbours Act provision which was of more general application. It reads:

> 9A. **Foreshore and seabed to be land of the Crown –**
>
> (1) All land that –
>
> (a) Either –
>
> (i) Is foreshore and seabed within the coastal marine area (within the meaning of the Resource Management Act 1991; or
>
> (ii) Was foreshore, seabed, or both, within the coastal marine area (within the meaning of that Act) on the 1st day of October 1991 and has been reclaimed (whether lawfully or otherwise) on or after that date; and

(b) Is for the time being vested in the Crown, but for the time being is not set aside for any public purpose or held by any person in fee simple, -

shall be land of the Crown to which this section applies and shall be administered by the Minister; but the provisions of the Land Act 1948 shall not apply to such land.

(2) All land of the Crown to which this section applies shall be held by the Crown in perpetuity and shall not be sold or otherwise disposed of except –

(a) Pursuant to the Resource Management Act 1991; or
(b) By the authority of a special Act of Parliament; or
(c) By a transfer to the Crown, where the land will not be land to which the Land Act 1948 applies.

(3) Subject to subsection (4) of this section,—

(a) The Minister shall have and may exercise, in relation to land of the Crown to which this section applies, all the functions, duties, and powers that the Crown has as owner of the land; and

(b) In exercising such functions, duties and powers, the Minister shall manage all land of the Crown to which this section applies so as to protect, as far as is practicable, the natural and historic resources of the land.

(4) Nothing in this section derogates from the Forest and Rural Fires Act 1977 or the Resource Management Act 1991.

(5) The provisions of this section shall apply notwithstanding anything in section 4 of this Act.]

[67] The 1994 Amendment Act provided by s2(2):

(2) Notwithstanding anything in s9A of the principal Act (as inserted by sub-section (1) of this section), in relation to any land of the Crown to which that section applies, nothing in that section shall limit or affect –

(a) Any agreement to sell, lease, licence, or otherwise dispose of that land that was entered into before the date of commencement of that section, where the disposal has not been completed before that date; or
(b) Any interest in that land held by any person other than the Crown

[68] The Crown argues that s9A effects a vesting of all foreshore and seabed land in the Crown. But the sense of s9A is to set up a different regime for lands already "for the time being vested in the Crown," according to whether or not they are foreshore and seabed lands. Lands of the Crown which are foreshore and seabed are administered by the Minister of Conservation and are not subject to the provisions of the Land Act 1948. Lands of the Crown which are above foreshore are subject to the Lands Act 1948 and are administered by the Commissioner of Crown Lands. It is only in respect of the lands in foreshore and seabed administered by the Minister of Conservation that the operative part of s9A(2) and (3) (restricting sale or disposal and conferring upon the Minister of Conservation power to exercise the functions of land owner) applies.

[69] The identification of land of the Crown in s9A(1)(b) as being land which is "for the time being vested in the Crown, but for the time being is not set aside for any public purpose or held for any person in fee simple" echoes the definition of "Crown land" in the Land Act 1948 which is "land vested in Her Majesty which is not for the time being set aside for any public purpose or held by any person in fee simple". That Land Act definition specifically excludes "any Maori land". "Maori land" in turn is defined in terms of the Maori Affairs Act 1953 to include "customary land or Maori freehold land". As Maori freehold land will be land "held by any person in fee simple" it is clearly excluded by the wording of s9A(1)(b).

[70] The argument for the Crown entails reading s9A to effect an appropriation to the Crown of Maori customary land in respect of foreshore and seabed when no such appropriation is made in the Land Act 1948. The language of s9A(1) is not capable of being read as itself effecting a vesting of land. It simply identifies the subject of the operative provisions of s9A as foreshore and seabed which "is for the time being vested in the Crown". That is clearly not a reference to the notional radical title because all land in New Zealand is so vested for all time and the reference to "for the time being" is incomprehensible if applied to radical title.

[71] In context, the reference in s9A(1) to land vested in the Crown lands defines those foreshore and seabed lands which would otherwise be available for disposition as property of the Crown. Such Crown land since the Waste Lands Acts of the mid

19th century has always been defined to exclude Maori customary land, as the current Land Act continues to exclude it.

[72] The principal Act is designed to divide responsibilities within government for Crown lands. Section 9A reinstates and restates the restriction on disposing of foreshore and seabed lands of the Crown earlier found in the Harbours Act. The restatement takes account of the major realignment of governmental responsibilities in relation to the coastline and is part of the package of statutes which includes the Conservation Act 1987 and the Resource Management Act 1991. Both Acts contain acknowledgements of the Treaty of Waitangi and the relationship of Maori with their lands, waters and other taonga. In that context, it is inconceivable that s9A was intended to effect an expropriation of Maori customary land.

[73] Read in context, it is clear that s9A applies only to lands which are property of the Crown. In conformity with the Land Act 1948 and the common law discussed above, Maori customary land is necessarily excluded.

[74] On the view I take it is unnecessary to consider the effect of s2(2) of the Amendment Act. It is further confirmation that no expropriation was intended by Parliament. If (contrary to the view expressed above) such expropriation had been achieved, I consider that a Maori customary interest would be an interest in land protected by subsection (2).

The Resource Management Act 1991

[75] It was argued on behalf of the New Zealand Marine Farming Association that the present claims to ownership of property in foreshore and seabed are inconsistent with the controls of the coastal marine area under the Resource Management Act. It was suggested that any Maori customary property interests amounting to rights less than ownership can be recognised now only under the statutory regime provided by the Act.

[76] The management of the coastal marine area under the Resource Management Act may substantially restrict the activities able to be undertaken by those with

interests in Maori customary property. That is the case for all owners of foreshore and seabed lands and indeed for all owners of land above high water mark. The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.

Investigation of title to land bounded by sea (*In Re the Ninety-Mile Beach)*

[77] In *In Re the Ninety-Mile Beach* it was argued by the Crown that, on the assumption of sovereignty, the Crown "by prerogative right" became the owner of the foreshores in New Zealand. This result was said to follow from the fact that the common law had become "the law of the colony until abrogated or modified by ordinance or statute".

[78] Neither North J nor TA Gresson J (with whose separate judgments Gresson P concurred) found it necessary to decide explicitly whether the common law presumption in relation to foreshore lands applied in New Zealand. North J at 470 was of the view that the case turned on the jurisdiction conferred by legislation on the Maori Land Court.

> [T]he prerogative rights of the Crown to the foreshore is a thing apart from the question of the jurisdiction which Parliament thereafter conferred on the Maori Land Courts.

[79] Despite the indication that the case turned on a question of statutory interpretation, it is clear that the premise upon which the Court based its conclusions (both as to the effect of the Harbours Act and the effect of investigation of title to land with the sea as a boundary) was an assumption that the English common law of tenure displaced customary property in land upon the assumption of sovereignty.

[80] Turner J at first instance ([1960] NZLR 673 at 675) had expressed a view later repeated by him in the Court of Appeal in *In Re the Bed of the Wanganui River* [1962] NZLR 600 that, with the establishment of British rule in New Zealand,

> the whole of its area became the property of the Crown, from whom all titles must be derived.

At 675 he also applied the common law presumption that the Crown is entitled to the foreshore unless it has been the subject of Crown grant, citing *Waipapakura v Hempton*:

> The principles of the common law governing title to land became applicable to New Zealand immediately upon the assumption of sovereignty here by Queen Victoria; and these rules are still applicable except in so far as they have been abrogated by statute.

[81] The review of authority undertaken above supports the opinion of Sir Kenneth Roberts-Wray that this statement is "revolutionary doctrine" in application to the circumstances of New Zealand. It was, however, affirmed on appeal (at 468 by North J and at 475 by TA Gresson J).

[82] TA Gresson J at 475 explained the consequences of reception of the common law of tenure:

> For the purposes of this case it is, I think, immaterial whether sovereignty was assumed by virtue of the Treaty of Waitangi in 1840, or by settlement or annexation before this date. In either event, after 1840, all titles had to be derived from the Crown, and it was for the Crown to determine the nature and incidents of the title which it would confer. Furthermore, as Prendergast CJ pointed out when speaking of the position in 1877 in *Wi Parata v Bishop of Wellington and Attorney-General* (1877) 3 NZ Jur (NS) SC 72; "It was for the supreme executive Government to acquit itself as best it may, of its obligation to respect Native proprietary rights, and of necessity it must be the sole arbiter of its own justice" (*ibid.*, 78).

[83] The Native Land Acts on that basis were the discharge by the Crown of its moral obligation, as a matter of what North J at 468 described as the "grace and favour" of the Queen, through the provision of a mechanism to obtain a Crown grant. The Court found that the jurisdiction was not limited to land above high water mark (although North J remarked at 472 that it was likely in considering whether to grant a title to the land that the Court would have "due regard . . . to the common law rule that the Crown was entitled to every part of the foreshore between high and low water mark"). But the Court went on to hold that investigation of title and subsequent Crown grant determined the entire Maori interest, leaving no entitlement to a further investigation. After investigation, the land to the seaward side of the title granted through the Native Land Court (whether to high water or low water mark)

"remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi" (per North J at 473). The investigation of title was "complete for all purposes".

[84] This conclusion can only have been based on the premise that the Crown had acquired the property of land in New Zealand with its sovereignty. On no other basis could the land have "remained with the Crown" after the jurisdiction of the Court had been exercised. The decision is understandable only as a denial of any legal recognition to customary property. Crown grant alone could be the basis of property recognisable in law. This reasoning was expressly applied in the High Court in the present case in the passage quoted at paragraph [7] above.

[85] I agree with the further opinion of Roberts-Wray that the judgments represent "extreme views". They are not supported by authority. The applicable common law principle in the circumstances of New Zealand is that rights of property are respected on assumption of sovereignty. They can be extinguished only by consent or in accordance with statutory authority. They continue to exist until extinguishment in accordance with law is established. Any presumption of the common law inconsistent with recognition of customary property is displaced by the circumstances of New Zealand (see Roberts-Wray, at 635).

[86] The reasoning in *In Re the Ninety-Mile Beach* was based upon that accepted in *Wi Parata*. So, too, was the reasoning in *Waipapakura v Hempton*, a case suggested to be of "dubious authority" by this Court in *Te Runanga o Muriwhenua v Attorney-General* at 654. The approach adopted in the judgment under appeal in starting with the expectations of the settlers based on English common law and in expressing a preference for "full and absolute dominion" in the Crown pending Crown grant (paragraph [7] above) is also the approach of *Wi Parata*. Similarly, the reliance by Turner J upon English common law presumptions relating to ownership of the foreshore and seabed (an argument in substance re-run by the respondents in relation to seabed in the present appeal) is misplaced. The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room

for a contrary presumption derived from English common law. The common law of New Zealand is different.

[87] As indicated above, the reasoning in *In Re the Ninety-Mile Beach* is contrary to *R v Symonds*; *Re the Lundon and Whittaker's Claims Act 1871*; *Nireaha Tamaki v Baker*; *Manu Kapua v Para Haimona; Amodu Tijani v Secretary, Southern Nigeria; Te Runanga o Muriwhenua Inc v Attorney-General*; *Te Runanga o te Ikawhenua Inc v Attorney-Genera*; the Canadian cases dealing with native title and property interests; and the majority judgments in *Mabo v Queensland.* In addition to the criticisms by Roberts-Wray, the validity of the reasoning has been doubted by a number of modern writers and authorities. It is sufficient to refer to The New Zealand Law Commission's Preliminary Paper *The Treaty of Waitangi and Maori Fisheries* (1989, NZLC PP9) at Section 15; RP Boast "*In Re The Ninety Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 *VUWLR* 145; FM Brookfield "The New Zealand Constitution: The Search for Legitimacy" in I Kawharu (ed.), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (1989) 10-12; and PG McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) 117-126. In my view, it should not be followed.

[88] Just as the investigation through the Maori Land Court of the title to customary land could not extinguish any customary property in contiguous land on shore beyond its boundaries, I consider that an investigation and grant of coastal land cannot extinguish any property held under Maori custom in lands below high water mark. Whether there are such properties is a matter for the Maori Land Court to investigate in the first instance as a question of tikanga. On the facts it may be that where the sea was described as the boundary for land sold or in respect of which a vesting order was obtained, an inference can be drawn that the customary interest of the seller or grantee is exhausted. The terms of any sale and the terms of any application for vesting order may permit such inference to be drawn. That is a matter of fact for the Maori Land Court to consider. It may be that the selling owners or the owners able to obtain a vesting order had only a partial or shared interest in contiguous foreshore and seabed which made a vesting order in them or a sale by them of those areas inappropriate. That could well be the case, for example,

if the foreshore or seabed property was a tribal one and the contiguous property sold or vested was based on the occupation of a smaller family group. Such differences in approach as a matter of custom and usage are referred to in Smith *Maori Land Law* (1960) 89-94, drawing on the judgments of the Maori Land Court. They are also referred to in opinions on the nature of Native tenure summarised by the report of Alexander McKay to the Native Minister published in 1890 NZPP G 1 at 1. Thus, McKay reported the "general consensus of opinion" to be

> …that each Native had a right in common with the whole tribe over the disposal of the land of the tribe, and an individual right, subject to the tribal rights, to land used for cultivation or for bird-, rat-, or pig-hunting. But to obtain a specific title to land held in common there must be some additional circumstance to support the pretension, and the claimants must be able to substantiate some sort of title to give them the preference over such land.

[89] It is conceivable that valuable tribal resources (perhaps such as the foreshore of the Ninety-Mile Beach with its toheroa fishery) were not susceptible to subdivided ownership, while the land upon which habitations and cultivations were situated was. Again, that is a matter the Maori Land Court would have to consider as a question of custom and usage. But an approach which precludes investigation of the fact of entitlement according to custom because of an assumption that custom is displaced by a change in sovereignty or because the sea was used as a boundary for individual titles on the shore is wrong in law.

Conclusion

[90] For the reasons given, I am of the view that the appellants must be permitted to proceed with their applications to the Maori Land Court. I consider that it is appropriate to answer only the first question posed for determination, and then in terms slightly different from the wide way in which it was worded. The subsequent questions depend on the facts. Any answers given would be so heavily qualified as to be unhelpful and perhaps misleading. Depending on the facts, consequential questions of law may arise which may not be adequately anticipated. It is not possible therefore to answer what the law of New Zealand may be in the circumstances. Abstract answers will lack necessary context. I decline to attempt

answers except to the first question.

Result

[91] In accordance with the judgments of the Court, the appeal is allowed. The answer to Question 1 is as follows:

> What is the extent of the Maori Land Court's jurisdiction under Te Ture Whenua Maori Act 1993 to determine the status of foreshore or seabed and the waters related thereto?
>
> The Maori Land Court has jurisdiction to determine the status of foreshore and seabed.

[92] The first and second appellants are entitled to costs in the sum of $20,000 each, to be paid in equal shares by the four respondents.

GAULT P

[93] At its present stage, this case calls for determination only of a question of whether, at law, applications to the Maori Land Court cannot succeed. The appeal is against the judgment of Ellis J in the High Court delivered on 22 June 2001 and now reported at [2002] NZLR 661.

[94] The appellants, certain iwi of the Northern part of the South Island encompassing the Marlborough Sounds, applied in the Maori Land Court for an order under s131 Te Ture Whenua Maori Act 1993 declaring that certain land has the status of Maori customary land. The land to which the application relates is described as:

> All that land (including the foreshore and seabed below mean high water mark and the waters related thereto) having as its landward boundary the mean high water mark and having as its seaward boundary the boundaries of the proposed Marlborough Sounds Resource Management Plan (publicly notified 31 July 1995) Cape Soucis to Rarangi and thence to the point of intersection of the baseline of the Territorial Sea and the boundary of the Marlborough

Sounds Resource Management Plan as defined in the Proposed Plan Volume 3 Zoning Map 4).

[95] The claim is essentially that the whole of the foreshore and seabed of the Marlborough Sounds, extending to the limits of New Zealand's territorial sea, is Maori customary land as defined in the Act.

[96] To the extent that this first application is successful, the applicants seek secondly an investigation of the title to the land by the Maori Land Court under s132 and an order determining the relative interests of the owners of the land.

[97] The immediately relevant provisions of the Act are ss129, 131 and 132 in Part VI.

> **129. All land to have particular status for purposes of Act** - (1) For the purposes of this Act, all land in New Zealand shall have one of the following statuses:
>
> (a) Maori customary land:
>
> (b) Maori freehold land:
>
> (c) General land owned by Maori:
>
> (d) General land:
>
> (e) Crown land:
>
> (f) Crown land reserved for Maori.
>
> (2) For the purposes of this Act, -
>
> (a) Land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land:
>
> (b) Land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order, shall have the status of Maori freehold land:
>
> (c) Land (other than Maori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by more than 4 persons of

whom a majority are Maori, have the status of General land owned by Maori:

(d) Land (other than Maori freehold land and General land owned by Maori) that has been alienated from the Crown for a subsisting estate in fee simple shall have the status of General land:

(e) Land (other than Maori customary land and Crown land reserved for Maori) that has not been alienated from the Crown for a subsisting estate in fee simple shall have the status of Crown land:

(f) Land (other than Maori customary land) that has not been alienated from the Crown for a subsisting estate in fee simple but is set aside or reserved for the use or benefit of Maori shall have the status of Crown land reserved for Maori.

(3) Notwithstanding anything in subsection (2) of this section, where any land had, immediately before the commencement of this Act, any particular status (being a status referred to in subsection (1) of this section) by virtue of any provision of any enactment or of any order made or any thing done in accordance with any such provision, that land shall continue to have that particular status unless and until it is changed in accordance with this Act.

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

(2) Without limiting the classes of person who may apply to the Court for the exercise of its jurisdiction, the District Land Registrar for the Land District in which any land is situated may apply to the Court for the exercise of its jurisdiction under this section in respect of that land.

(3) Nothing in subsection (1) of this section shall limit or affect the jurisdiction of the High Court to determine any question relating to the particular status of any land.

132. Change from Maori customary land to Maori freehold land by vesting order – (1) The Maori Land Court shall

> continue to have exclusive jurisdiction to investigate the title to Maori customary land, and to determine the relative interests of the owners of the land.
>
> (2) Every title to and interest in Maori customary land shall be determined according to tikanga Maori.
>
> (3) In any application for the exercise of the Court's jurisdiction under this section, the applicant may specify –
>
> (a) The person or persons in whom it is proposed the land shall be vested; and
>
> (b) Any trusts, restrictions, or conditions to which it is proposed the land shall be subject.
>
> (4) On any investigation of title and determination of relative interests under this section, the Court may make an order defining the area dealt with and vesting the land in –
>
> (a) Such person or persons as the Court may find to be entitled to the land in such relative shares as the Court thinks fit, or otherwise in accordance with the terms of the application; or
>
> (b) A Maori incorporation or a Maori Trust Board or trustees for or on behalf of such persons, and on such terms of trust, and in such relative shares, as the Court thinks fit.

[98] The definitions in s4 of "Crown Land", "General Land", "Maori customary land" and "Maori freehold land" simply refer to the status in terms of Part VI. That means the status identified in s129 or any changed status resulting from the application of other provisions of Part VI.

[99] By s129 all land in New Zealand must have one of the statuses listed in that subsection. Subsection (2), if intended to be comprehensive, leaves some difficult questions as to the status of some land not easily fitting the descriptions provided. The underlying intention seems to be that once land has been vested in fee simple (i.e. a Crown grant has issued), so long as the estate subsists (whoever may own it) it cannot have the status of Maori customary land. That is consistent with the conventional approach to native title claims. They are extinguished in respect of land that has been alienated by the Crown as by Crown grant or consequent upon

Crown purchase: *R v Symonds* [1847] NZPCC 387, 391, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. It is common ground also that they cannot survive the enactment of legislative provisions that are clearly inconsistent with their continued existence.

[100] Land which at one time has been alienated from the Crown for an estate in fee simple, but which now is vested in the Crown, would seem, therefore, to have the status of General land. Crown land under the section thus has a comparatively narrow meaning.

[101] "Maori customary land" is land that is held by Maori in accordance with tikanga Maori (Maori customary values and practices). Land that is not Maori customary land and has never been alienated from the Crown is Crown land. With the exception of Crown land reserved for Maori, land not alienated from the Crown may have the status either of Maori customary land or Crown land. There is no "default" status. It is one or the other. Which one is determined only by a declaration of status. That is not inconsistent with the underlying interest of the Crown in all land from which title is derived: see *Nireaha Tamaki v Baker* [1900] NZPCC 371.

[102] Under the common law all land is held by the Crown upon assumption of sovereignty. Title is obtained by grant or other alienation from the Crown. The interest of the Crown is sometimes referred to as "radical title" in contexts seeking to identify the title of the Crown flowing from sovereignty that is subject to aboriginal or native title capable at common law of being asserted against the Crown. That is similar in concept to the underlying interests of the Crown which may be subject to a declaration under the Act that its status is that of Maori customary land. Section 129 seems to have been drafted on that assumption.

[103] In the course of argument counsel were anxious to distinguish between aboriginal title at common law and Maori customary land under the Act. While I understand the reason for that, I prefer to reserve the question of whether it is a real distinction insofar as each is directed to interests in land in the nature of ownership.