

[104] It is interests in land in the nature of ownership that are the present focus. The status of the land under s129 is for the purposes of Te Ture Whenua Maori Act. Part VI of that Act continues the long history of statutory provisions designed to enable the interests of Maori in Maori customary land to be brought under the Land Transfer system conferring title as near as possible under that system to that previously enjoyed: *Kauwaeranga Judgment* (Chief Judge Fenton, Native Land Court, 3 December 1870), (1984) 14 VUWLR 227, 239.

[105] By s41 Te Ture Whenua Maori Act a vesting order made by the Maori Land Court under s132 in favour of the “owners of the land” as determined according to tikanga Maori (or trustees therefor) and transmitted to the District Land Registrar (s139), upon registration has the effect of vesting the land in the persons named in the order “for a legal estate in fee simple in the same manner as if the land had been granted to those persons by the Crown”.

[106] That consequence necessarily informs the interpretation of the words “land” and “owners” in the preceding sections. Under this Part of the Act we are concerned with land capable of supporting an estate in fee simple and ownership interests capable of conversion to registered estates under the Land Transfer Act. Interests in land in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition both in tikanga Maori and in a developed common law informed by tikanga Maori, are not interests with which the provisions of Part VI are concerned. The requirements of the statute must be met before the point is reached that calls for consideration of tikanga Maori. It is for this reason that, even if we hold that the Maori Land Court has the jurisdiction contended for, I have real reservations about the ability for the appellants to establish that which they claim. But that, of course, would be for the Maori Land Court.

[107] The applicants wish to take their claims to the Maori Land Court to establish that the foreshore and seabed to which their claim relates have the status of Maori customary land, that they always have had that status and that there nothing has occurred to extinguish that status. On the other hand, for the Crown, it is said that the seabed never had that status and the foreshore; if it had that status, it has been extinguished as a consequence of Crown purchases of the land adjacent to the

foreshore, by Maori Land Court investigations and consequent Crown grants or by subsequent legislation.

[108] At the present stage the matter must go to the Maori Land Court for investigation unless the Crown can establish that the applicants clearly cannot succeed.

[109] As the arguments developed it became clear that considerations differ in respect of the foreshore and the seabed. By the seabed is meant the land below the low-water mark. The claim with which we are concerned draws no distinction between open waters and enclosed waters.

[110] There have been, in the past, certificates of title issued for land under the sea within the claimed area. It is sufficient for present purposes to refer to s4(2)(c)(iii) Foreshore and Seabed Endowment Revesting Act 1991 which identifies titles for land in Port Marlborough (around and under the Picton Wharf). It cannot be said, therefore, that there can be no tenable argument that at least some seabed within the claim area could constitute "land in New Zealand" within s129 Te Ture Whenua Maori Act.

[111] For the Crown it was submitted that, to the extent that there may be seabed that is land, it cannot be Maori customary land because that would be inconsistent with legislation passed in respect of the seabed.

[112] We were referred to certain area-specific legislation which vested areas of foreshore or seabed in the Marlborough Sounds in the harbour boards, local authorities and others. Apart from an argument that some of this land has been re-vested in the Crown under the Foreshore and Seabed Endowment Revesting Act in terms that revived any Maori customary land status, there was no serious argument that any Maori customary land status was not extinguished by this area-specific legislation. That affects only small areas of the claim however.

[113] It was submitted for the Crown that s7 Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977 and its predecessor s7 Territorial Sea and

Fishing Zone Act 1965 either were consistent with the non-recognition of Maori customary land as part of the seabed, or alternatively, extinguished that status. I am not persuaded that is so. Those provisions deem the seabed “to be and always to have been vested in the Crown” but subject to the grant of any estate or interest therein whether made before or after the commencement of each of the Acts. Land held by the Crown but subject to grant is not inconsistent with so called radical title. Counsel referred to s11 of the 1965 Act which amended s4 Mining Act 1926 in terms suggesting that the operation of s7 was to vest title in the Crown “in fee simple”. To accept that line of argument would be to recognise extinguishment of customary rights by a most indirect route when express legislative enactment would have been expected. It is to be kept in mind that in 1965 and 1977 the current mechanism for vesting Maori customary land was by an order of the Maori Land Court which was deemed to be a Crown grant: s162 Maori Purposes Act 1953. I would not construe the minor change of wording adopted in s41 Te Ture Whenua Maori Act (“as if the land had been granted ... by the Crown”) as closing a door otherwise left open so to exclude claims to Maori Customary Land. To do that would require an express provision.

[114] Counsel for the Crown relied also on s5 Foreshore and Seabed Endowment Revesting Act which provided that all foreshore or seabed that was formerly alienated from the Crown and vested in a Harbour Board or local authority was revested in the Crown “as if it had never been alienated from the Crown”. Section 9 provided for the issue of certificates of title under the Land Transfer Act for the revested land. The lands affected, having been alienated by the Crown and revested in terms envisaging the issue of certificates of title in the name of Her Majesty the Queen, is inconsistent with the definition of Maori customary land as land held by Maori in accordance with tikanga Maori.

[115] Section 9A, introduced by the 1994 Amendment Act, is of broader scope. It reads:

**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.
  - (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.

This section relates to all foreshore and seabed within the coastal marine area. It is declared to be land of the Crown to be held in perpetuity and inalienable except pursuant to the Resource Management Act 1991 or by special Act of Parliament. But s2(2) of the 1994 Amendment Act provided that:

- (2) Notwithstanding anything in section 9A of the principal Act (as inserted by subsection (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.

[116] The argument for the Crown is that title to Maori customary land could not be an interest in that land within para (b). However, I am not persuaded that title according to tikanga Maori to undeclared Maori customary land could not constitute an interest in land.

[117] I turn to the foreshore. That is the land between the mean high and low-water marks. Insofar as the Foreshore and Seabed Revesting Acts relate to the foreshore, the views already expressed in respect of the seabed apply.

[118] Counsel for the appellants claiming before the Maori Land Court did not contend that the decision of this Court in *In re the Ninety-Mile Beach* [1963] NZLR 461 was wrongly decided. The argument was that, properly construed, the judgments in that case do not hold that whenever land adjacent to the sea has ceased to be Maori customary land any claim to the foreshore has been automatically extinguished. It was submitted that a factual investigation is necessary in each instance.

[119] Counsel for Te Runanga o Muriwhenua, an appellant having been accorded party status by the Maori Appellate Court, though having no claim to the foreshore or seabed in the Marlborough Sounds, advanced a strong argument that the *Ninety-Mile Beach* decision is incorrect and should not be allowed to stand. Muriwhenua is presumably representative of interests directly affected by that decision who may be bound by it.

[120] A careful reading of the two substantive judgments delivered discloses that, but for s150 Harbours Act 1950 and its predecessor s7 Harbours Act 1878, grants in respect of foreshore found on investigation to be Maori customary land, would have been within jurisdiction. That was consistent with the view of Chief Judge Fenton in *Kauwaeranga*: (per North J at 473 and T A Gresson J at 477 and 479). Both Judges also expressed the view that if, following investigation of an application by the Maori Land Court, a grant had been made specifying the boundary as the sea, there would not remain an uninvestigated piece of land below high-water mark which could be the subject of a further freehold order: (North J at 473, T A Gresson J at 479). Those views were expressed by reference to assumed facts.

[121] Some of the reasoning in the judgments in the *Ninety Mile Beach* case is open to criticism and the second of the conclusions stated in the preceding paragraph should be viewed as subject to the facts of particular cases. But I consider that those conclusions are consistent with the intended application of the provisions of the successive Native Lands Acts. Interests in Native Lands bordering the sea, after investigation by the Native Land Court (which encompassed ascertaining interests of any other complainants), were extinguished and substituted with grants in fee simple. It does not seem open now to find that there could have been strips of land between the claimed land bordering the sea and the sea that were not investigated and in which interests were not identified and extinguished once Crown grants were made. If there should be any residue (as by the operation of s35 Crown Grants Act 1908) or its predecessor) it must be regarded as having been reserved out of the grant, in which case the radical title would remain, now no longer subject to any Maori customary claims. Of course, if it is shown that the land investigated was not claimed as bordering the sea, the position might be different. The Court in the *Ninety-Mile Beach* case did not rule on that factual situation.

[122] It appears to me that subject to investigation of the facts, there can be no different approach in the case of the foreshore in the Marlborough Sounds. If land adjacent to the sea was the subject of Crown purchase which specified the sea as the boundary, there would not remain any strip between the land and the sea that could be the subject of a vesting order as Maori customary land. It will be for the Maori Land Court to investigate the factual situation.

[123] We heard extensive argument from Sir Geoffrey Palmer for the second respondent to the effect that the claims to the foreshore and seabed are inconsistent with the comprehensive control of the coastal marine area under the Resource Management Act 1991. Of course, should any land become the subject of a vesting order as a result of the claim, it would continue to be subject to all of the relevant provisions of the Resource Management Act. But those provisions are not wholly inconsistent with some private ownership.

[124] I am of the view that the appeal should be allowed. I agree that only the first question should be answered and that the matter should be disposed of as indicated in the judgment of the Chief Justice.

[125] I emphasise that the answer is given as a matter of law. Whether in the particular case that will lead to any outcome favourable to the appellants will be for the Maori Land Court after investigating the facts.

**KEITH AND ANDERSON JJ (DELIVERED BY KEITH J)**

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**An application to declare that certain marine areas are Maori customary land**

[126] Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa applied to the Maori Land Court for an order that certain land is customary Maori land. The land is the foreshore and seabed of the Marlborough Sounds. The area includes seabed under waters within the Sounds, such as Pelorus Sound and Port Underwood, and under waters on the seaward side of the land such as the west coast of D’Urville Island.

[127] Judge Hingston in the Maori Land Court gave an interim decision on a preliminary question favouring the iwi. The Attorney-General and others appealed to the Maori Appellate Court which then stated questions of law for the High Court. Ellis J in the High Court answered the questions favourably to the appellants ([2002] 2 NZLR 661). The iwi appeal to this Court.

[128] The questions concern substantive matters about the existence and extinguishment of Maori customary title to the foreshore, seabed and the related waters, and jurisdictional matters about the power of the Maori Land Court under Te Ture Whenua Maori Act 1993 to determine the status of those areas.

[129] The significance of any ruling at this stage in favour of the iwi is limited : the questions are asked before any facts are found – it is not, for instance, known whether related coastal land has been sold, has been the subject of Native or Maori Land Court investigation, or has been otherwise disposed of; the questions are abstract; they do not identify the nature of the customary land or title in issue nor do they identify possible incidents of any status which is determined; they do not ask the Court to draw any consequences from any finding that customary land or title does exist; and the answers are not, in our view, affected by statutes which provide for the regulation and management of marine areas, including their resources, as opposed to their status or the title to, or the ownership of, them. The impact of that

legislation on whatever property might be established might be very substantial, but that matter is not before us.

[130] We have had the advantage of reading in draft the judgments of the Chief Justice, the President and Tipping J. Because of what they say, we need not repeat much of the background including the reasoning of Judge Hingston and Ellis J or set out the legislation and the questions.

### **The marine areas in issue**

[131] The questions relate to three marine areas. The first is foreshore – the area of beach frontage between the mean high water mark and the mean low water mark. The seabed and related waters below the mean low water mark divide into two: internal or inland waters and their seabed, inside harbours and bays, within straight closing lines drawn across their mouths; and the territorial seas and their seabed, bounded on the landward side by the mean low water mark or the straight baseline drawn across the mouths of harbours and bays. While the questions do not distinguish between inland waters and territorial waters, both international law and the law of England have long recognised the different character of inland waters, as has the law of New Zealand. Over 80 years ago Hoskings J in *Adams v Bay of Islands County* [1916] NZLR 65, 69-73, provided an instructive account, holding that the waters of a bay or inlet were part of the territory of New Zealand.

[132] English law, consistently with much international practice, has also long recognised two different Crown interests in land areas, including land below the sea, sometimes referred to as imperium and dominium or in the words of a leading European international lawyer of the mid 18th century as “l’Empire” (or “Souveraineté”) and “le Domaine” (Vattel, *Droit des Gens* (1758) book 1, paras 204-205). Lord Chief Justice Hale in 1667 in *De Iure Maris* ch IV similarly distinguished between the King’s right of jurisdiction or royalty and his right of propriety or ownership in marine areas. That right of ownership was however subject to the liberty of the common people of England to fish in the sea and its creeks and arms unless the King or some subject had gained a propriety exclusive of that common liberty.

## **Private property in marine areas under the common law in British and colonial territories**

[133] It was also early established, but again without prejudice to public (or common) rights especially of navigation (including anchoring), that the Crown could grant and did grant to subjects the soil below low water mark including areas outside ports and harbours : eg *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192, 207-208, 213-214, 218, 219-220, 11 ER 191; *Attorney-General v Wright* [1897] 2 QB 318, 321, 323; *The Lord Advocate v Wemyss* [1900] AC 48, 66 (submarine mining; see also the Cornwall Submarine Mines Act 1858); Hale chs 5 and 6; and 49(2) *Halsbury's Laws of England* (4<sup>th</sup> ed reissue) paras 2 and 3. Those rights could also arise by prescription or usage. That law was considered in the nineteenth century by the Law Officers in London to apply to colonies (eg D P O'Connell and Ann Riordan (eds) *Opinions on Imperial Constitutional Law* (1971) 333-337). It might be mentioned here that the public or common rights limiting the rights of ownership could arise not just from national law but also from international law such as the customary international law relating to innocent passage by foreign vessels through the territorial sea or treaties such as those of 1884 and later regulating the laying of submarine cables.

[134] Accordingly, under the law of England which became part of the law of New Zealand in 1840 "so far as applicable to the circumstances of New Zealand", private individuals could have property in sea areas including the seabed. The "circumstances" qualification is well and relevantly demonstrated by the judgment of Stout CJ in *Baldick v Jackson* (1910) 30 NZLR 343. He held that a statute of Edward II concerning the King's revenue and treating whales as a Royal fish was not applicable to the circumstances of the colony:

I am of opinion that this statute has no applicability to New Zealand, and that though the right to whales is expressly claimed in the statute of 17 Ed. II, c.2, as part of the Royal prerogative, it is one not only that has never been claimed, but one that it would have been impossible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with – they were to be left in undisturbed possession of their lands, estates, forests, fisheries, &c.

[135] Subject to such qualifications arising from the circumstances of New Zealand, property in sea areas could be held by individuals and would in general be subject to public rights such as rights of navigation. A record of the exercises of the Crown's power to grant land within harbours and ports to Superintendents of the Provinces and other persons and to reserve land for any public purpose (but not granted) up to 1868 was included in a Return tabled in Parliament that year ([1868] AJHR C3). The waters included areas in all the major harbours and also at Timaru, the Bay of Islands, Hawkes Bay and Lake Ellesmere. Consistent with English law and colonial practice, several of the grants were to private individuals. Such grants were expressly authorised by s2 of the Public Reserves Act 1854.

[136] The colonising extension of the British Empire and of other European empires raised the issue whether property held at the time of the imperial expansion was to be recognised. Answers appear in Vattel, the judgment of Chief Justice Marshall for the United States Supreme Court in *Johnson v M'Intosh* 8 Wheaton 543; 5 US 503 (1823) and the account by Chancellor James Kent in his *Commentaries on American Law* (1826-30) (on which HS Chapman J drew in *Queen (on the prosecution of C H McIntosh) v Symonds* (1847) NZPCC 387) of the principles, decisions and practices in the American colonies and later in the United States (see para [142] below). While the European nations asserted their sovereignty over the new colonies against other European nations and asserted their dominion, they recognised a qualification to the consequences of the latter. As Chief Justice Marshall put it in 1823 in *Johnson v M'Intosh*:

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. (505)

[137] That recognition of existing native rights when colonies were settled was closely paralleled by the recognition of existing property rights when sovereignty was transferred by cession or even by conquest. Again we have the authority of that great Chief Justice speaking on this occasion of the continuity of title, originally

conferred in Florida by Spain, after the cession by the King of Spain to the United States by treaty of 1819 of Spanish territories in America, including Florida:

It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do no more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.

[138] Chief Justice Marshall went on to say that the treaty of cession conformed with this general principle. The cession to the United States “in full property and sovereignty, [of] all the territories which belong to [the King of Spain]” in the area in question passed sovereignty and not private property; *United States v Percheman* 7 Peters 31, 86-87; 10 US 393, 396-397 (1833). As Professor D P O’Connell noted in his discussion of acquired rights in his leading work *State Succession in Municipal Law and International Law* (1967) vol 1, 241, the survival of rights created under the previous system is inseparably connected with the survival of law. If the earlier legal order completely collapses acquired rights lapse. Accordingly, if the successor treats the law as abrogated – perhaps by invoking the Act of State doctrine – the acquired rights will lapse with that law. But the laws and usages of nations, according to Marshall and O’Connell, were to the contrary. We now turn to the New Zealand situation.

### **Recognition of existing native property and rights in New Zealand**

[139] From the outset, the situation in New Zealand conformed, in principle at least, with those long established laws and usages. The Treaty of Waitangi, after providing for the cession of sovereignty or kawanatanga in its first article, in its second “confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; ...”. According to the translation of the Maori

text of the Treaty, prepared by Professor Sir Hugh Kawharu, commonly used in the Courts, the Queen “agrees to protect [ka wakarite ka wakaae] the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship [te tino rangatiratanga] over their lands [wenua], villages [kainga] and all their treasures [ratou taonga katoa].” The Treaty clearly distinguishes in those two articles between imperium and dominium, a matter emphasised, as the Chief Justice shows, by the Anglo-American Claims Tribunal in 1925, in its decision written by the great American jurist, Professor Roscoe Pound, in the *William Webster* case (Fred K Nielsen *American and British Claims Arbitration* (1926) 537; 20 AJIL 391; 6 UN Reports of International Arbitral Awards 166 (1955)).

[140] To repeat, that recognition and guarantee in a treaty of cession of sovereignty, to adopt that Tribunal’s characterisation of the Treaty of Waitangi, of existing proprietary rights conformed with extensive law and practice of the time. New Zealand legislation, from the outset, also recognised and provided for the protection of rights in respect of land confirmed and guaranteed by the Crown in article 2 of the Treaty, as the Privy Council said in *Nireaha Tamaki v Baker* (1901) NZPCC 371, 373. In addition to doing that, the Lands Claim Ordinance (Sess 1, No 2) of 9 June 1841 declared unappropriated lands to be Crown lands or Domain lands – reflecting the Crown’s dominium or domain rather than its imperium or empire, the latter in general being a matter between States which in the normal course does not require regulation through national law:

2. And whereas it is expedient to remove certain doubts which have arisen in respect of titles of land in New Zealand, be it therefore declared enacted or ordained, That all unappropriated lands within the said Colony of New Zealand, *subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony*, are and remain Crown or Domain Lands of Her Majesty, her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, her heirs and successors, and that all titles to land in the said Colony of New Zealand which are held or claimed by virtue of purchases or pretended purchases gifts or pretended gifts conveyances or pretended conveyances leases or pretended leases agreements or other titles, either mediately or immediately from the chiefs or other individuals or individual of the aboriginal tribes inhabiting the said Colony, and which are not or may not hereafter be allowed by Her Majesty, her heirs and successors, are and the same shall be absolutely null and void : Provided and it is hereby declared that nothing in this Ordinance contained is intended to or shall affect the title to any land in

New Zealand already purchased from her Majesty's Government or which is now held under Her Majesty. (emphasis added)

[141] The Ordinance authorised the appointment of Commissioners who were to examine and report on pre 1840 land sales; on the basis of "the real justice and good conscience of the case" they were to recommend grants of land to the Governor, who at that time had the exclusive power to grant title, as Martin CJ and H S Chapman J very soon were to confirm, by reference to "the earliest settled principles of our law as well as the Ordinance", in *Queen v Symonds*.

[142] Coupled with that "invariable and most ancient practice" were measures to protect Native titles. To quote H S Chapman J:

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the *Cherokee Nation v State of Georgia* [30 US (5 Pet.) 1 (1831)] the Supreme Court threw its protective decision over the plaintiff nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws : *Kent's Comm.* Vol iii, lecture 51. Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what had been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled. (390)

### **The varying character of native title; extinguishment**

[143] The basic proposition that pre-existing native title and rights are to be recognised and are to continue under and subject to the law was accepted by the courts throughout the twentieth century as well. For instance, early in the century,

Viscount Haldane LC speaking for the Privy Council in a New Zealand case, *Manu Kapua v Para Haimona* (1913) NZPCC 413, 416-417, said this:

Prior to the [Crown] grant and the antecedent proceedings the land in question had been held by 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 to the grant, vested in the Crown subject to the burden of the Native customary title to occupancy.

And towards the end of the century Cooke P, speaking for this Court, both quoted from that passage and referred to another, later Privy Council case from Nigeria expounding the principle of the preservation of native title after the cession of sovereignty (*Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 654, citing *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399).

[144] That Nigerian judgment, also delivered by Viscount Haldane, includes an important caution, quoted by Ellis J in the High Court:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. (402-403)

[145] The judgment mentioned the principles at work in Canada, Scotland and India as well as in Southern Nigeria. The determination of the rights involved the study of the history of the particular country and its usages:

Abstract principles fashioned a priori are of but little assistance, and are often as not misleading. (404)

[146] That caution is to be related to the “applicable circumstances” qualification to the reception in New Zealand of the law of England (para [134] above) and to the

preamble to the Native Lands Act 1862 which recited the terms of article 2 of the Treaty of Waitangi and stated that it would greatly promote the peaceful settlement of the colony and the advancement and civilisation of the Natives if the ownership of such lands where ascertained, defined and declared were assimilated as nearly as possible to the ownership of land according to British law. While that formula appears to be more assimilationist than Lord Haldane's approach 60 years later it does not require complete equation; further, as we have already seen, the British law of 1862 to which it refers allowed property of a non-exclusive character in the seabed below low water mark to be held privately. The native land legislation of that time could not of course provide for the issue of a Torrens title and as the Chief Justice points out the 1993 Act, unlike its predecessors from 1894, does not provide for the automatic issue of Maori freehold title under the Land Transfer Act 1952 once the status of Maori customary land is determined.

[147] The native property or title or right can of course be extinguished, as H S Chapman J recognised in *Symonds* in the passage already quoted (para [142] above) and by Chancellor Kent in his *Commentaries*, when elaborating on the (British) colonial and later American practice and decisions. In 1912 the United States Supreme Court (in a taxation context) stated a related principle of interpretation in this way:

But in the Government's dealings with the Indians, the rule is exactly the contrary [of the rule that exemptions from taxation are to be read strictly]. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [Indian nations]. *Choate v Trapp* 224 US 665, 674-675 (1912)

[148] The protective approach adopted in the earlier American and Privy Council authorities is to be seen in more recent rulings of the Supreme Court of Canada, the High Court of Australia and this Court : the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain (eg *R v Sparrow* [1990] 1 SCR 1075, 1099, *Mabo v Queensland* (1988) 166 CLR 186, 213-214 (see also 195, 201, 241) and *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64, 111, 195-196 (referring to *Central Control Board (Liquor Traffic) v Cannon Brewery* [1919] AC 744, 752) and *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 655).

[149] In the last case, this Court stressed that

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. (655)

See also *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691-692.

[150] We now turn to the question whether the legislation to which we have been referred has extinguished the property which is the subject of the present proceedings. We repeat the point made earlier about the abstract character of the questions before us : we do not have any findings about the specific characteristics of that property or the owners of it.

### **The Harbours and Crown Grants Acts**

[151] The Harbours Acts of 1878 and 1950 prohibited grants of the foreshore except by authority of a special Act. (The 1950 Act has been repealed. We come to the replacement legislation later.) Section 150 of the 1950 Act provided:

Except as hereinafter provided, no part of the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, where and so far up as the tide flows and reflows, nor any land under the sea or under any navigable river, except as may already have been authorized by or under any Act or Ordinance, shall be granted, conveyed, leased, or disposed of to any Harbour Board, or any other body (whether incorporated or not), or to any person without the authority of a special Act.

[152] The legislation contemplated of course that persons other than the Crown had already obtained and could continue to hold property in the foreshore and seabed and would be able to receive a grant, conveyance, lease or disposition of land in the future. The legislation was designed to restrict the means of obtaining such property *in the future*.

[153] Turner J in the Supreme Court in *In Re Ninety Mile Beach* [1960] NZLR 673 held that s150 operated as an effective restriction upon the jurisdiction of the Maori Land Court which was in effect forbidden to undertake the investigation of the application in respect of the foreshore. While the Court of Appeal addressed the

matter on a broader basis and found a further roadblock in the way of the claim based on the assumed Native Land Court investigation of the titles and the Crown Grants Act 1866 s12, it also ruled against the claimants on the basis of s150 (*In re the Ninety-Mile Beach* [1963] NZLR 461). North J said that

in my opinion the view expressed by Turner J. in the Court below is correct. I recognise that there may be some force in Mr Sinclair's submission that the words of exception in s147 of the Harbours Act 1878 (now s150 of the Harbours Act 1950) namely "except as may already have been authorised by or under any Act or Ordinance" had the effect of preserving the original jurisdiction of the Maori Land Court. But I think the better view is that the intention of the Legislature as expressed in this section was to ensure that the foreshores along the New Zealand coast were not disposed of except by special Act of Parliament unless express authority to that effect had already been given in particular cases. (474)

The reasons given by T A Gresson J were to the same effect:

No Act or Ordinance has been cited to the Court authorising the grant or conveyance of any part of the foreshore of the Ninety-Mile Beach, and there has been no special Act pursuant to this section. After 1878 I am satisfied it was no longer competent for the Maori Land Court to investigate title to or to issue any freehold order in respect of the foreshore in face of the prohibition contained in this section. I do not overlook Mr Sinclair's contention based upon the words "except as may already have been authorised by or under any Act or Ordinance", but in my view these words were intended to save earlier grants such as those which had been made under the Public Reserves Act 1854. In my opinion the clear purpose of this section was to ensure that the foreshore should not be disposed of except under the authority of a special Act of Parliament. (480)

Gresson P agreed with the reasons given by the two other members of the Court.

[154] We consider, with respect, that there are two compelling answers to this reasoning. The first is that the investigation and determination of a claim to existing customary Maori land did not in 1878 of itself involve "the *grant* ... of the land" (to use the statutory words) or "*dispose* of" or "*convey*" the land (to use the Judges' words). Parliament in 1878 prohibited the Crown making *grants in the future* of marine areas unless it conferred special legislative authority. By contrast, "*existing grants* ..." (such as those listed in the 1868 return, para [135] above) were saved. If the Act did not contemplate the confiscation of the existing titles which had been granted, on what possible basis could existing native (customary) property be seen differently? We do not see the later introduction of the land transfer system and the

deemed grant provided for in respect of native land from 1894 as affecting that analysis. The basis for the second, related answer was elaborated earlier – native property rights are not to be extinguished by a side wind, in this case by a general statute concerned with harbours. The need for “clear and plain” extinguishment is well established and is not met in this case. In the *Ninety-Mile Beach* case, the Court did not recognise that principle of interpretation. Accordingly, for both reasons, we consider that the Court seriously misread the provisions of the harbours legislation.

[155] The Court reached that conclusion when s150 of the 1950 Act was still in force. It was repealed from 1 October 1991 by the Resource Management Act 1991. Accordingly, if interpreted simply as a bar on applications (and not as an extinguishment), the provision no longer stands in the way of the present application. We come later to the 1994 provision which is said to have replaced s150 : paras [164]-[170] below. In a practical sense, however, legislation which would for over a century have prevented applications to the special court set up to determine Maori customary title may well be seen as confiscatory in effect.

[156] Section 12 of the Crown Grants Act 1866 was also critical in the reasoning in the *Ninety-Mile Beach* case (North J at 473 110 – 474 11 and T A Gresson J at 478 126 – 479 16). It read as follows:

Whenever in any grant the ocean sea or any sound bay or creek or any part thereof affected by the ebb or flow of the tide shall be described as forming the whole or part of the boundary of the land to be granted such boundary or part thereof shall be deemed and taken to be the line of high-water mark at ordinary tides.

It was carried forward with no substantive change into s41 of the Crown Grants Act 1883 and s35 of the Crown Grants Act 1908 which is still in force.

[157] According to North J, “*if* in the grant the ocean sea or any sound bay or creek affected by the ebb and flow of the tide was described as forming the boundary of the land then by virtue of the provisions of s12 ... the ownership of the [foreshore] likewise remained with the Crown”; and, in the opinion of TA Gresson J, once title had been investigated by the Native Land Court, the Crown Grants Act, *if applied*, restricted the seaward boundary of the land down to the highwater mark and it would

be “quite inconsistent with the terms of the grant to assert that there remained an uninvestigated piece of land below highwater mark which could be the subject of a further freehold order”. The conditional element which we have emphasised in each of those statements is consistent with the terms of s12 : it must be read as no more than a conveyancing presumption which may be rebutted by the terms of the grant. But the Judges then give the presumption a wider impact. According to them, the investigation of a claim and later grant of land down to high-water mark *of itself* determines that the foreshore is the Crown’s (and indeed *remains* the Crown’s). But the provision does not say that. Whether the foreshore was also investigated and was determined to be the Crown’s in the course of a particular process is a matter of fact, not a matter to be assumed. We do not see the Crown Grants Act as having any general significance for the alleged extinguishment in this case. It is a provision to be applied in interpreting particular grants and we have no such grants before us. Richard Boast’s valuable study warns against the difficulties of assuming facts in cases such as this : “In Re Ninety Mile Beach revisited : the Native Land Court and the Foreshore in New Zealand Legal History” (1993) 23 VUWLR 145, 148-150.

[158] For the above reasons and those given by the Chief Justice (drawing on the considerable authority of Sir Kenneth Roberts-Wray among others), we conclude that *Ninety-Mile Beach* was wrongly decided. It does not stand in the way of the appellants’ application to the Maori Land Court.

### **The Territorial Sea Acts**

[159] The Territorial Sea and Fishing Zone Act 1965 deemed the seabed and subsoil from low water mark to the three mile limit “to be and always to have been vested in the Crown”, subject to grants made before or after the Act (s7). The Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 contains the same provision (also in s7), but with the three mile limit being extended by a 12 mile limit. That very extension emphasises the fictional character of the deemed vesting. The vesting relates to the bed of both internal waters and the territorial sea, as the heading to both sections makes plain.

[160] Do the provisions deny the existence of Maori customary land in the territorial sea area or extinguish that land if it did exist? We think not, for three reasons. The first is that the fact that the seabed is “vested” in the Crown is not inconsistent with the continuing existence of Maori customary property. The vesting in the Crown is of the radical title. That is clear for instance from the drafting of the 1841 Ordinance and the 1909 and later Acts. Section 2 of the 1841 measure is set out earlier (para [140]) and, under s2 of the 1909, 1931 and 1953 Acts, “customary land” meant land which, being *vested* in the Crown, is held by Natives or the descendants of Natives under the customs and usages of the Maori people.

[161] The principal focus of the 1965 Act was on establishing as against the world the 12 mile fishing zone, that is with a matter of the exercise of sovereignty, not beneficial ownership. Section 7, added late in the Bill’s process, was motivated by anticipated mining of the seabed as appears from the consequential amendments made by the 1965 Act to the Mining Act 1926. The mining legislation is however drafted significantly differently from the 1965 and 1977 Acts. That difference provides our second reason for concluding that the 1965 and 1977 Acts cannot be read as a non-recognition of Maori customary property or as extinguishing it. The Solicitor-General contends that the wording of s7 of the 1965 Act was substantially borrowed from s206 of the Coal Mines Act 1925 (initially enacted in the Coal Mines Act Amendment Act 1903 s14 following *Mueller v Taupiri Mines* (1900) 20 NZLR 89) which declared that the beds of navigable rivers, except where granted by the Crown, “shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown”. There is a critical difference between that provision and those of 1965 and 1977. The latter do not include the “absolute property” phrase. That phrase recognises the coexistence of the radical title of the Crown and other (beneficial) property; in the particular case of the 1903 Act the Crown had both and was the “absolute” owner, to use the statutory language.

[162] The third reason for our conclusion that the 1965 and 1977 Acts cannot be read as a non-recognition or extinguishing of Maori customary title reinforces the possibility of the coexistence of Maori customary land and fundamental Crown title :

legislative measures claimed to extinguish indigenous property and rights must be clear and plain. That clarity of purpose does not appear in legislation which, as the Solicitor-General acknowledges, was primarily directed in 1965 to extending New Zealand fishing waters to 12 miles and in 1977 to establishing an exclusive economic zone extending a further 188 miles – that is with international or, to return to the earlier terminology, with matters of sovereignty.

[163] These reasons for holding that the territorial sea statutes do not affect existing Maori customary land are close to those given in relation to s150 of the Harbours Act 1950, a provision which was still in force when the 1965 and 1977 Acts were enacted.

### **Foreshore and Seabed Endowment Revesting Act 1991**

[164] The 1950 provision was repealed by the Resource Management Act 1991 on 1 October 1991. Section 5 of the Foreshore and Seabed Endowment Revesting Act 1991, which came into force on 3 October 1991, revoked all the previous vestings in harbour boards and local authorities of land which was foreshore, seabed or unlawfully reclaimed land still vested in the Boards and authorities and revested the land in the Crown as if it had never been alienated and free from all subsequent trusts, reservations, restrictions and conditions. In 1994, s9A was added by s2 of the Foreshore and Seabed Endowment Revesting Amendment Act:

#### **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 of Conservation; 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.

[165] Section 2(2) of the 1994 Amendment Act includes this savings provision:

- (2) Notwithstanding anything in section 9A of the principal Act (as inserted by subsection (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.

[166] The High Court considered that “the original vesting of the fee simple in those lands extinguished the present claims”. Further, the tenor of s9A argued strongly against the suggestion that s2(2) preserves claims that any of the land is Maori customary land.

[167] The Solicitor-General’s submission is that s9A is inconsistent with any Maori customary title to the foreshore and seabed. The provision refers to *all* foreshore and seabed and not just to land re-vested under s5 of the principal Act. The argument continues that s9A was inserted to cover a gap in the law caused by the repeal of s150 of the Harbours Act 1950. According to the responsible Minister, the Bill had other, administrative purposes as well:

Clause 87 is one of the most significant clauses in the Bill. At present almost all New Zealand’s Crown foreshore and seabed, with only a few tiny exceptions, is on [un]allocated Crown land. As such, it is land for the purposes of the Land Act. Responsibility for most administrative functions over the foreshore and seabed, particularly the issuing of consents for private occupation, lies with regional councils and the Minister of Conservation under the Resource Management Act. Other functions at present lie with the Commissioner of Crown Lands under the Land Act, which includes provisions that potentially duplicate many of those under the Resource Management Act.

This clause removes these residual functions from the Land Act and creates instead a new category of Crown land under the Foreshore and Seabed Endowment Revesting Act. The clause bases the residual functions, primarily weed and nuisance control, with the Minister of Conservation, whose department is better placed to carry them out, and removes the possibility of duplication under the Resource Management Act. It also reinstated the previous prohibition contained in the Harbours Act on the sale of Crown foreshore and seabed except by a special Act of Parliament. (1994 Hansard 4783)

[168] The purpose and effect of s5 of the 1991 Act is to revoke the earlier vesting of land in harbour boards and local authorities and re-vest it in the Crown. The theory of the present claim must be that customary property has continued to exist since before 1840. That property had not been “vested” in its Maori owners and accordingly there is no question of such a “vesting” being reversed. We note that the questions put to the Court do not relate to the original 1991 Act and that the Solicitor-General also does not depend on it.

[169] Section 9A does however appear in the questions. We agree with the Solicitor-General that that provision does have a wider geographic scope than the original s5 and indeed the 1991 Act itself. That wider scope appears first from the terms of subs (1) – *all* land that is or was foreshore and seabed within the coastal marine area (from highwater mark to the outer limit of the territorial sea) – and, second, from subs (5) which makes s4 inapplicable. Section 4 applies the Act to land formerly alienated from the Crown and vested in a harbour board or local authority which on 3 October 1991 was foreshore or seabed and was vested in a local authority or was unlawfully reclaimed land.

[170] Does s9A proceed on the assumption that Maori customary property no longer exists or does it extinguish that property? The provision is not about re-vesting land in the Crown. Under s9A(1)(b) the land is already vested in it, and the implication of that paragraph and of the introductory words to subs (2) is that the Crown (already) owns it beneficially. Subsection (2), as the Minister said, repeats the essence of the repealed s150 of the Harbours Act 1950 by placing limits on the Crown’s power to dispose (beneficially) of that land. The legislation also has a major purpose of changing the government’s administrative arrangements for the foreshore and seabed, as the Minister also explained to Parliament. Further, the legislation is careful to save existing property and rights as appears from s2(2) of the Amendment Act as well as the saving in s9A(1)(b). Indeed, as the President demonstrates, s2(2) alone provides a sufficient basis at this stage for the application to proceed. Just as there is no general confiscatory purpose in the 1994 Amendment Act, there is nothing in it which has the clear and plain character required to extinguish existing Maori customary property.

**Does “land” include sea areas?**

[171] The Te Ture Whenua Maori Act in its critical Part VI (headed Status of Land) uses the word “land”, as in “all land in New Zealand” in s129(1). That land has one of six statuses, beginning in the statutory list, as chronologically, with Maori customary land. The related powers of the Maori Land Court equally apply to “land”. Under s131 the Court has jurisdiction to determine and to declare, by a

status order, the particular status of any parcel of “land”. Sea areas or indeed any areas covered by water are not expressly mentioned in the 1993 Act, except for one mention of the sea in the definition of improvements in s207 which refers to land reclaimed from the sea. (See also s338 relating to fishing grounds.)

[172] The respondents contend that the seabed is not “land”. Land in its ordinary and natural meaning is to be distinguished from water, sea and air. Many dictionaries support that ordinary definition and ordinary usage. Neither the 1993 Act nor the Land Transfer Act 1952 (which is relevant given the land may become subject to it following an investigation) contain indications that the term “land” was intended to cover the seabed. Other Acts such as the territorial sea, foreshore reversion, resource management and fisheries statutes provide the framework for the seabed. Further, the argument continues, where necessary Parliament specifically includes “seabed”.

[173] One of those inclusive definitions highlights the difficulty, acknowledged in the submissions, of arguing across statutes in a case such as this, and also the limits on the role of ordinary usage in answering the questions before us. Under s2 of the Resource Management Act 1991, land includes not just land covered by water but also the air space above the land. While the dictionary might exclude the air space above the ground from the ordinary meaning of “land” it is plainly included within it in the 1993 Act, the 1952 Act and many others. And certificates of title over seabed, for instance within ports, have been granted under the 1952 Act and its predecessors.

[174] The respondents also have to accept that a purely literal approach does not apply in other respects to the work of the Maori Land Court nor to the Act. It has long been acknowledged (although in particular cases the executive may have resisted) that the Court has jurisdiction over rivers and lakes (in the absence of course of legislation to the contrary). They also accept that the Court in the present case may have jurisdiction over certain areas of the foreshore (although the extent of that jurisdiction is in dispute, given, among other things, that the facts are not yet settled). That acceptance is relevant incidentally to their predictions of the dire consequences of the recognition of Maori customary land in marine areas for the

exercise of long established rights of other New Zealanders on the beach and in marine areas.

[175] As indicated earlier, the law has also treated enclosed waters as having an essentially territorial status: they have been variously seen as being within the county (and the jurisdiction of the county) and within the territorial limits of the country, as a matter of both national and international law; eg *Direct United States Cable Co v Anglo American Telegraph Company* (1877) 2 App Cas 394, 416-417, 419-421; *In Re Award of Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394, 407-408; and Sir Robert Phillimore (citing Vattel, Kent and Wheaton) in *R v Keyn* (1876) 2 Ex D 63, 71, 73-74.

[176] The meaning of “land” in the 1993 Act must also be related to that Act and to its history. Indeed they provide primary contexts relevant to the determination of the meaning. The Act in its preamble says this:

Na ate mea i riro na te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: a, na te mea e tika ana kia whakautia ano te wairua o te wa i riro atu ai te kawanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: a, na te mea e tika ana kia marama ko te *whenua* he taonga tuku iho e tino whakaaro nuitia ana e te iwi Maori, a, na tera he whakahau kia mau tonu taua whenua ki te iwi nona, ki o ratou whanau, hapu hoki, a, a ki te whakangungu i nga wahi tapu hei whakamama i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mo te hunga nona, mo o ratou whanau, hapu hoki: a, na te mea e tika ana kia tu tonu he [Te Kooti], a, kia, whakatakotia he tikanga hei awahina i te iwi Maori kia taea ai enei kaupapa te whakatinana:

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

[177] The respondents stress the use of the word “whenua” or “land” (as emphasised) in that preamble, but that begs the question. The immediately preceding passage reaffirms the spirit of the exchange of kawanatanga for the

protection of rangatiratanga. Te tino rangatiratanga is over whenua and taonga, among other things, or in the English text over land and fisheries. That rangatiratanga plainly extended in fact to some marine areas, although given the preliminary and abstract nature of this present appeal, we should not and do not pursue that matter further. Some indication of the possible extent of such areas in one part of the country is seen in legislation such as s29 of the Thames Harbour Board Act 1876 and the provisions of the 1878 Act which repealed it.

[178] Given the long history of Maori customary property and rights in areas covered by water a much clearer indication would have had to appear in the 1993 Act for it to be a measure preventing the Maori Land Court from investigating claims in those areas. It is convenient to mention here that given the particular history and context of Maori land legislation we do not find helpful the general definitions of “New Zealand” and the “territorial limits of New Zealand” in the Interpretation Act 1999.

[179] We accordingly do not see the word “land” in the 1993 Act as standing in the way of the appellants’ claims. We should also add that we do not see s129(3) as causing any difficulty. It provides as follows:

(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.

[180] On one view, Maori customary land has not acquired its status “by virtue of” any of the matters listed. Whether that is so or not, it continues under s129(3) to have that status unless and until it is changed under the Act. The applicants’ position is of course one of continuity.

### **The effect of the area specific legislation**

[181] We consider that the impact of these specific statutes is best determined when the facts are established.

## **Conclusion**

[182] We would accordingly allow the appeal in the terms stated by the Chief Justice. We recall the comment made at the outset of this judgment (para [129]) about the limited significance of the ruling at this stage of the overall proceeding.

## **TIPPING J**

### **Introduction**

[183] When the common law of England came to New Zealand its arrival did not extinguish Maori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not therefore acquire wholly unfettered title to all the land in New Zealand. Land held under Maori customary title became known in due course as Maori customary land. So much is established by the judgment of the Chief Justice whose discussion I will not seek to emulate.

[184] It is also important to recognise that the concept of title, as used in the expression Maori customary title, should not necessarily be equated with the concepts and incidents of title as known to the common law of England. The incidents and concepts of Maori customary title depend on the customs and usages (tikanga Maori) which gave rise to it. What those customs and usages may be is essentially a question of fact for determination by the Maori Land Court.

[185] It follows that as Maori customary land is an ingredient of the common law of New Zealand, title to it must be lawfully extinguished before it can be regarded as ceasing to exist. In this respect Maori customary title is no different from any other common law interest which continues to exist unless and until it is lawfully abrogated. In the case of Maori customary land the only two mechanisms available for such abrogation, short of disposition or lawful change of status, are an Act of Parliament or a decision of a competent court amending the common law. But in

view of the nature of Maori customary title, underpinned as it is by the Treaty of Waitangi, and now by the Te Ture Whenua Maori Act 1993, no court having jurisdiction in New Zealand can properly extinguish Maori customary title. Undoubtedly Parliament is capable of effecting such extinguishment but, again in view of the importance of the subject matter, Parliament would need to make its intention crystal clear. In other words Parliament's purpose would need to be demonstrated by express words or at least by necessary implication. As to what necessary implication means I refer to the words of Lord Hobhouse of Woodborough in *R (Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299, 1131. His Lordship's statement was adopted as authoritative in the recent decision of the Privy Council in *Russell McVeagh v Auckland District Law Society* (P.C. Appeal 34/02 judgment 19 May 2003). This is what his Lordship said:

A necessary implication is not the same as a reasonable implication ... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

[186] When a claim is made that a particular piece of land has the status of Maori customary land, the Maori Land Court must investigate the claim in accordance with the statutory provisions in that behalf. A claim may fail as a matter of fact but the Maori Land Court's investigation into the facts must be allowed to proceed unless it can be shown beyond doubt that the land cannot, as a matter of law, have the status asserted for it. In my view it follows that in principle, and subject to any clear statutory indication of extinguishment, the question whether Maori customary title existed and continues to exist over the seabed and the foreshore is essentially a matter of fact which is both general and specific to the site in question. It is a question which necessarily involves an examination of tikanga Maori which is the "exclusive jurisdiction" of the Maori Land Court: see section 132(1) of the Te Ture Whenua Maori Act.

## **Land**

[187] I was initially attracted to the view that it was difficult to read the word “land” in the Te Ture Whenua Maori Act as encompassing the seabed. The Crown and the other respondents accepted that the foreshore was land for present purposes; but they argued that the word “land” could not reasonably be construed as encompassing the seabed. Having reflected upon the matter I find myself unable to conclude that Parliament has indicated with sufficient clarity that if Maori customary title (with its own unique incidents) did extend in some respects to the seabed then such title must be taken as having been extinguished by the use of the word “land”. That would be an unduly literal approach. It is also an approach which would risk a constructional begging of the question. If one assumes for the moment that the facts may show that Maori customary title did exist in some way in relation to the seabed, I am not persuaded that by its use of the word “land” in the Te Ture Whenua Maori Act, designed as that Act is to foster and protect Maori rights and values, Parliament has by necessary implication extinguished a species of Maori customary title and the associated land status. I note that in relevant statutes to be mentioned later (see paragraphs [198], [199], and [200] below), Parliament has used the word “land” in reference to the seabed.

[188] I am therefore unable to accept the Crown’s submission that the word “land” in the Te Ture Whenua Maori Act is incapable in law of referring to the seabed. All the Crown’s points in support of that proposition fail, in my view, because neither singly nor together do they establish that Parliament was in its use of the word “land” signalling with sufficient clarity that such Maori customary title as may have existed in relation to seabed was being extinguished.

## **The Resource Management Act 1991**

[189] I turn next to Sir Geoffrey Palmer’s forcefully presented argument that the possibility of Maori customary land existing in relation to either the seabed or the foreshore was inconsistent with those provisions of the Resource Management Act

which concern the coastal marine area, defined as it is to include both foreshore and seabed within the territorial limits of New Zealand.

[190] In s6(a) of the Resource Management Act, Parliament has said that the maintenance and enhancement of public access to and along the coastal marine area is a matter of national importance. Public access is not, however, so necessarily inimical to the existence of Maori customary title of some kind as to entitle the court to draw the inference of intended extinguishment. I recognise also that the national importance of public access to the coastal marine area is underlined by the rigorous controls which the Resource Management Act provides for activities within it. Broadly speaking a coastal permit is required before any activities can be undertaken: see ss12, 15A and 15B.

[191] The Resource Management Act states that, unless expressly or implicitly provided otherwise, no coastal permit will of itself give any exclusivity of use or occupation of the coastal marine area: see s122(5) and *Hume v Auckland Regional Council* [2002] 3 NZLR 363. The coastal marine area generally, ie. those parts which are not subject to a coastal permit, must be the subject of an even stronger presumption of non exclusivity of use, occupation and enjoyment.

[192] But without knowing precisely what the status of Maori customary land, if any, might involve, it is not possible to hold that such status is so totally inconsistent with the Resource Management Act's approach to the coastal marine area that Parliament must have intended its extinguishment. The Resource Management Act represents a formidable barrier to the existence of any "as of right" activity within the coastal marine area which may be said to derive from the establishment of the status of Maori customary land. But the prescribed restrictions on activities within the coastal marine area, stringent as they are, do not inevitably lead to the view that the potential for an underlying status of Maori customary land has thereby been extinguished. While Sir Geoffrey Palmer's points have substantial practical force, they do not carry his clients all the way to their intended destination.

## **Maori customary land and the Land Transfer Act 1952**

[193] Section 131 of the Te Ture Whenua Maori Act gives the Maori Land Court the power to determine and declare certain land to be Maori customary land. The section is concerned only with declarations of status. It appears to me to be possible for the Maori Land Court to make a status order, as referred to in s131, without the Court necessarily granting any further relief. I also note that s130 specifically provides that no land shall acquire or lose the status of Maori customary land otherwise than in accordance with the Te Ture Whenua Maori Act or as expressly provided in any other Act. Section 130 therefore reinforces the ordinary common law position discussed above and indeed now narrows the capacity for extinguishment of the status of Maori customary land to the mechanism of the Act itself or the express provisions of other enactments. Section 130 may therefore leave no room for extinguishment by implication.

[194] A status order under s131 has the effect of determining and declaring the status of the land for the purposes of the Te Ture Whenua Maori Act. Section 132(1) continues the Maori Land Court's "exclusive jurisdiction" to investigate the title to Maori customary land. Section 132(2) provides that every title to and interest in Maori customary land is to be determined according to tikanga Maori. Section 132(4) empowers the Maori Land Court to vest Maori customary land of a defined area in such persons and in such shares as the Court thinks fit. A vesting order under s132(4) leads to a provisional title under the Land Transfer Act 1952. This is the effect of s139 which provides that the land to which any vesting order made under s132 applies, shall, on the making of the vesting order, become subject to the Land Transfer Act. On receipt of a copy of the vesting order the District Land Registrar must embody the order in the provisional register and all the provisions of the Land Transfer Act as to provisional registration then apply, subject to the Te Ture Whenua Maori Act.

[195] I was initially troubled by the apparent incongruity of having a provisional land transfer title in respect of parts of the foreshore and the territorial seabed. That consequence seemed to suggest that Parliament cannot have intended the seabed and

indeed perhaps also the foreshore to be capable of having the status of Maori customary land. The difficulty, however, with such an approach is similar to that in respect of the Resource Management Act. It is not possible to see this potential incongruity as amounting to either an express or an implied extinguishment of such Maori customary land as may have lain within the foreshore or the territorial seabed.

[196] The combined effect of ss132 and 139 of the Te Ture Whenua Maori Act is that on the District Land Registrar's receipt of a vesting order under s132, the persons in whom the land is vested are automatically entitled to a provisional title under the Land Transfer Act. But it is material to note that if the Maori Land Court makes a status order under s131, it does not necessarily follow that a vesting order under s132 will be appropriate. Declining to make a vesting order would, in the words of the heading to s132, involve declining to change Maori customary land to Maori freehold land. There may, however, be circumstances, such as when the foreshore or the seabed are involved, when it would not be appropriate to change the status of the land in that way. There is no inevitability that a status order under s131 will convert to a Land Transfer Act title under s139. I am therefore persuaded that what I earlier saw as a potential impediment to acceptance of the appellants' argument should not be viewed in that light. There may be cases where a status order is the only order that should properly be made under Part 6 of the Te Ture Whenua Maori Act.

### **The Harbours Acts 1878 and 1950**

[197] The essential thrust of this legislation (ss147 and 150 respectively), so far as is presently relevant, was that no part of the foreshore or seabed was to be "leased, conveyed, granted or disposed of" to any Harbour Board or to any other body or person without the special sanction of an Act of Parliament. The reasoning of this Court in the *Ninety Mile Beach* case [1963] NZLR 461, to be discussed later, was based to some extent on these provisions. For present purposes it is sufficient to say that the statutory embargo on the Crown disposing of the foreshore and the seabed other than as sanctioned by an Act of Parliament does not meet the point that unless and until lawfully extinguished, Maori customary title and the status of the land to

which it pertained continues to exist as part of the common law of New Zealand. The common law was reinforced by the Te Ture Whenua Maori Act and the earlier statutory provisions to similar effect. It was not a matter of the Crown granting Maori customary land to Maori. The correct analysis, as earlier discussed, is that the Crown acquired sovereignty over New Zealand land subject to Maori customary title. The proper inquiry therefore concerns extinguishment rather than grant. This fundamental point was not adequately recognised in the *Ninety Mile Beach* judgments.

### **The Foreshore and Seabed Endowment Revesting Act 1991**

[198] Section 150 of the Harbours Act 1950 was repealed at the same time as the Resource Management Act and the Foreshore and Seabed Endowment Revesting Act 1991 were passed. Initially the latter Act, which contained no definition of land, made provision for revesting in the Crown only of Harbour Board or local authority land, ie. “land” either on the foreshore or, be it noted, below low water mark to which the various Harbour Boards and local authorities had title under earlier arrangements: s4(1)(b)(i). But it came to be realised that there was in the original Revesting Act nothing comparable to the now repealed s150 of the Harbours Act 1950.

[199] Hence in 1994, after the passing of the 1993 Act, s9A was introduced into the Revesting Act in these terms:

#### **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.

[200] Thus “land” in the coastal marine area (which includes the foreshore and the seabed) not set aside for any public purpose or held by any person in fee simple (in earlier terminology land not yet alienated from the Crown) is land to which s9A applies and is to be administered by the Minister of Conservation. It is to be held by the Crown in perpetuity and cannot be sold or disposed of save in one of the ways specified in subs(2). It is, in terms of subs(3), owned by the Crown.

[201] Mr Keyte argued, in conjunction with Ms Ertel and Mr Wilson, that s2(2)(b) of the Foreshore and Seabed Endowment Revesting Amendment Act 1994 nevertheless preserved the ability of Maori to seek a status declaration that the seabed was Maori customary land. Section 2(2)(b) provides:

(2) Notwithstanding anything in section 9A of the principal Act (as inserted by subsection (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) ...

(b) Any interest in that land held by any person other than the Crown.

[202] Although s9A is wider in its terms than the earlier sections in the Harbours Acts, its principal purpose seems to me to be the same. Notably the re-vesting was not to “limit or affect” any interest in the land held by any person other than the Crown. I agree therefore that it is not appropriate to regard either the Re-vesting Act in its original form or s9A as being designed to extinguish the status of such Maori customary land as might have been involved. Status orders under s131 of the Te Ture Whenua Maori Act can still therefore be made; but it must be said that it would be very difficult in the light of the Re-vesting Act to justify the making of a vesting order leading to a provisional Land Transfer title. The interest of which s2(2)(b) speaks can fairly be regarded as the interest inherent in obtaining a status order. I doubt it can be construed as extending to such interest as may ultimately ripen into a Land Transfer title. That would set up a very severe conflict with the terms of s9A and in particular ss(2) and (3) thereof.

[203] There is no need to discuss the Territorial Sea legislation. It cannot possibly be regarded as having extinguished the status of any Maori customary land that may have been involved.

### ***The Ninety Mile Beach case***

[204] The decision in *Ninety Mile Beach* has stood for forty years. Furthermore, it must have been regarded as correctly stating the law by those responsible for subsequent legislation. Hence a cautious approach should be taken to the suggestion that the case was wrongly decided. That said, I am driven to the conclusion that it was. While the reasoning in the two principal judgments has internal logic and consistency, the problem is that they do not sufficiently recognise the appropriate starting point, namely that Maori customary title, and the associated status in respect of the land involved, became part of the common law of New Zealand from the start.

As already noted, it was not a matter of the Crown granting customary title to Maori. They already held it when sovereignty was proclaimed and continued to hold it thereafter unless and until it was lawfully extinguished. As the Chief Justice has said, the contrary approach conflates sovereignty with absolute ownership. The Crown's ownership is and never has been absolute in this respect. It is and always has been subject to the customary rights and usages of Maori as regards their lands.

[205] Against that background it is difficult to see how a change in status of land above high water mark from Maori customary land to Maori freehold land should in and of itself lead to adjacent Maori customary land on the foreshore losing its status as such. That is the fundamental step in the reasoning of this Court in *Ninety Mile Beach* which I find problematic. I do not consider it to be justified on the a priori basis that in English law there is a difference, as the Solicitor-General put it, "where the land ends and the sea begins". Whether that is so and, if it is, the extent to which the distinction between land and sea affects the present issue must be determined in accordance with tikanga Maori rather than the English common law. Tikanga Maori is to this extent part of the law of New Zealand.

[206] In his judgment in *Ninety Mile Beach* at 467, North J recorded that the Crown's main submission was that on the assumption of sovereignty the foreshore of the lands of New Zealand became and had ever since remained vested in the Crown. By that he understood the submission to mean absolutely vested in the sense of extinguishing Maori customary title to the foreshore. His Honour said at 468 that there was an attractive simplicity to this argument but that the better view was that "in early times" the jurisdiction of the Maori Land Court was not limited to the investigation of title to customary lands above high water mark. The necessary consequence of that view must be that His Honour concluded that for some time after sovereignty was proclaimed Maori customary title could and did exist in relation to the foreshore. It is important therefore to see by what means His Honour concluded that such title had been extinguished.

[207] The learned Judge proceeded, however, in his next paragraph to say that:

the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to

disregard the Native title to any lands in New Zealand, whether above high water mark or below high water mark.

[208] It is at this point that I consider, with respect, that His Honour's reasoning started to go wrong. Maori customary title was, as I have already discussed, not a matter of grace and favour but of common law. Having become part of the common law of New Zealand, it could not be ignored by the Crown unless and until Parliament had clearly extinguished it, and then only subject to whatever might have been put in its place.

[209] The mechanism of extinguishment, which North J held to have been effective, was in my view insufficient for the purpose. It was essentially that on the freeholding of a block of land immediately above high water mark, the adjacent foreshore land must necessarily be deemed to have been the subject of investigation. The suggested consequence was that if the adjacent foreshore was not part of the freehold title, any customary title to it must be taken to have been extinguished. As earlier foreshadowed, I do not consider this reasoning to be correct. Against a proper understanding of the legal background, which has been fully set out in the judgment of the Chief Justice, it does not follow that the freeholding of certain Maori customary land, ie. that above high water mark, of itself extinguished the status of contiguous Maori customary land, ie. that on the foreshore.

[210] Such a suggested mechanism does not satisfy the need for an indication of sufficient clarity from Parliament that the posited consequence was to follow. As earlier noted, I do not consider that the Harbours Acts had any extinguishing effect. They simply prohibited grants and other specified dispositions without Parliamentary sanction.

[211] In his judgment at 475 T A Gresson J started from the premise that on assumption of sovereignty all of New Zealand, including the foreshore, became vested in the Crown. He added that 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 it would confer. This, with respect, was an erroneous starting point. We have already seen that "all titles" after 1840 did not derive from the Crown in the sense in which T A Gresson J was using that expression. Maori customary title did not derive from

the Crown. On acquisition of sovereignty the Crown acquired its rights in and over New Zealand subject to Maori customary title. Hence, in my view, the learned Judge's approach to the matter was flawed from the start.

[212] This initial difficulty is compounded in the Judge's next paragraph. There T A Gresson J observed that on the establishment of British rule in New Zealand, the common law of England became the law of the colony until abrogated or modified by ordinance or statute. While substantially correct, this statement was in context an incomplete one. It omitted the vital ingredient that Maori customary land, and its incidents, became part of the common law. That is to say the common law of New Zealand. I have deliberately referred to the common law of New Zealand in this context to distinguish it from the common law of England which of course lacked any ingredient involving Maori customary title or land. His Honour's subsequent reference to the common law on page 476 suffers from the same difficulty. At 478 His Honour appears to recognise the need for "an express enactment" to extinguish what he called Maori customary rights; but I am unable to find any convincing reference in his judgment to an express enactment achieving that purpose.

[213] Section 2 of the Land Claims Ordinance 1841, which was subsequently referred to by His Honour, did not do so. It simply gave the Crown a right of pre-emption. It thereby clearly recognised the rights of Maori, as Lord Davey said, in giving the judgment of the Privy Council in *Nireaha Tamaki v Baker* [1900] NZPCC 371, 373. A right of pre-emption must denote that there is something to buy and sell.

[214] I note that in its judgment in *Baker* the Privy Council said that the 1841 Ordinance did not "create a right in the Native occupiers cognisable in a Court of Law". This observation is, however, apt to be misunderstood. What their Lordships were saying was not that the "Native occupiers" had no rights, but simply that the ordinance itself gave them no rights. It did, however, clearly recognise pre-existing rights. Again, with great respect, I do not consider this important distinction was sufficiently recognised in the *Ninety Mile Beach* case.

[215] In essence I agree with what the Chief Justice has written about the *Ninety Mile Beach* decision. I have added some words of my own because of the considerable importance of the issue before us and the fact that this Court is now overruling a longstanding decision of its own. I have found that aspect one of considerable anxiety. I was initially hesitant but am now satisfied that the case for overruling *Ninety Mile Beach* is clearly made out. Once the necessary background is properly appreciated, there is force in Sir Kenneth Roberts-Wray's view, mentioned by the Chief Justice, that *Ninety Mile Beach* represented "revolutionary doctrine". While the case has stood for a long time, it is better in the end that the law now be set upon the correct path.

[216] There is, in my view, no basis for saying that in law the present applications to the Maori Land Court are bound to fail. I would therefore allow the appeal, and answer the questions as the Chief Justice proposes.

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