- **Judgment Date:** 19/06/2003 **Decision of:** JUDGMENTS OF THE COURT

IN THE COURT OF APPEAL OF NEW ZEALAND **CA173/01**
CA75/02

BETWEEN

NGATI APA, NGATI KOATA, NGATI KUIA, NGATI RARUA, NGATI TAMA, NGATI TOA AND RANGITANE

First Appellants

AND

TE ATIAWA MANAWHENUA KI TE TAU IHU TRUST

Second Appellants

AND

THE ATTORNEY-GENERAL

First Respondent

AND

NEW ZEALAND MARINE FARMING ASSOCIATION INCORPORATED

Second Respondent

AND

PORT MARLBOROUGH LIMITED

Third Respondent

AND

MARLBOROUGH DISTRICT COUNCIL

Fourth Respondent

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

Hearing: 1, 2, 3, 4 July 2002

Counsel: H C Keyte QC, L G Powell and M T Lloyd for Appellants
K L Ertel and E M Cleary for Te Atiawa Appellants

J M Dawson and A M McGregor for Te Runanga o Muriwhenua (supporting appellants)
W M Wilson QC for Maori not otherwise represented
T Arnold QC, H M Aikman and F Sinclair for First Respondent
G W R Palmer and M C W Hickford for Second Respondent
M J Hunt for Third Respondent
B P Dwyer for Fourth Respondent

Judgment date: 19 June 2003

JUDGMENTS OF THE COURT

The appeal

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

[2] The Maori Land Court has jurisdiction under s18(1)(h) of the 1993 Act to determine for the purposes of any proceeding in that Court "or for any other purpose" whether any specified land "is or is not Maori customary land or Maori freehold land or General land owned by Maori or General land or Crown land". The Court also has jurisdiction to make declarations by way of status orders under s131(1) that land has the status of Maori customary land. This jurisdiction is not exclusive. The jurisdiction of the High Court to determine any question relating to the particular status of any land is not affected (s131(3)). The Maori Land Court has however exclusive jurisdiction under s132 to investigate the title to such land and to grant an order vesting it in those found on investigation to be entitled to it. The effect of a vesting order is to change the status of land from Maori customary land (held according to tikanga Maori) to Maori freehold land (held in fee of the Crown and in respect of which under ss139-141 the District Land Registrar must issue a fee simple title under the Land Transfer Act 1952).

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

[4] Preliminary objection was taken in the Maori Land Court by the Attorney-General and the non-Maori parties that the applications could not succeed as a matter of law. The objections were based on common law and statute. First,

it was said that *In Re the Ninety-Mile Beach* [1963] NZLR 461 establishes that all foreshore in New Zealand which lies between the high and low water marks and in respect of which contiguous landward title has been investigated by the Maori Land Court is land in which Maori customary property has been extinguished. Only foreshore contiguous to Maori customary land on the shore on this view is capable of being Maori customary land. There may be no such land within the area of the application, although the factual position has not yet been investigated. It is generally accepted that few mainland pockets of customary land remain in New Zealand. Secondly, it was said that by legislation (s7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 and s9A of the Foreshore and Seabed Endowment Revesting Act 1991) any Maori customary property in the seabed and foreshore of New Zealand was extinguished because the legislation vests all property in foreshore and seabed in the Crown.

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

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

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

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

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

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

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

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

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

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

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

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

-The Public Reserves Management Act 1867 (Marlborough)

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

-The Havelock Harbour Board Act 1905

-Section 30 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1907

-The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1910

-The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915

-The Marlborough Harbour Amendment Act 1960

-The Reserves and Other Lands Disposal Act 1973

-The Marlborough Harbour Amendment Act 1977?

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

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

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

Ellis J accepted that the Maori Land Court had jurisdiction under Te Ture Whenua Maori Act to inquire into whether foreshore land between the high and low water marks was Maori customary land. But he applied *In Re the Ninety-Mile Beach* in holding that any Maori customary property in the foreshore had been extinguished once the contiguous land above high water mark had lost the status of Maori customary land. Such status could be lost by Crown purchase or vesting order made by the Maori Land Court where the sea was described as the boundary. He answered the questions of law posed for him accordingly. The present appeal is brought from this decision by the Maori parties.

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

[9] Whether or not the appellants will succeed in establishing in the Maori Land Court any customary property in the foreshore and seabed lands claimed and the extent of any interest remains conjectural. In the past, claims to property in areas of foreshore and seabed seem to have identified relatively

discrete areas comprising shellfish sandbanks, reefs, closely-held harbours or estuaries, and tidal areas or fishing holes where particular fish species were gathered. (See, for example, the references in the proceedings of the Maori Parliament at Orakei in 1860 reported in (1879) AJHR G-8, the evidence of Chief Judge Fenton to the Native Affairs Committee recorded in the Journal of the House of Representatives, 18 June 1880, and court cases such as *Waipapakura v Hempton* (1914) 33 NZLR 1065). Nor will the appeal resolve questions of the nature of any property interest in land (whether it approximates a fee simple interest or whether it is lesser property).

[10] Depending on the nature of any interest accepted by the Maori Land Court as a matter of tikanga, subsequent questions of law may arise. They could include, for example, whether the Maori Land Court (in its statutory jurisdiction) or the High Court (in its inherent jurisdiction) can recognise interests in land not equivalent to rights of ownership of the fee simple and whether any interest is affected by the terms of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Such matters cannot sensibly be considered until the facts have first been found. If the land below high water mark is mainly Crown land, as the respondents maintain, it is not clear whether there may be a basis on the facts for the application under s18(1)(i) of Te Ture Whenua Maori Act for a declaration that it is held in a fiduciary capacity.

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

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

[13] I have had the advantage of reading in draft the judgments of the other members of the Court. Like them, I am of the view that the appeal must be allowed and the applicants must be permitted to go to hearing in the Maori Land Court. I am of the view that the judgment of Judge Hingston in the Maori Land Court was correct. For the reasons given below, I consider that in starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty (as appears from the passage from the judgment set out at

paragraph [7] above), the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law. I agree that the legislation relied on in the High Court does not extinguish any Maori customary property in the seabed or foreshore. I agree with Keith and Anderson JJ and Tipping J that *In Re the Ninety-Mile Beach* was wrong in law and should not be followed. *In Re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied in *In Re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as "revolutionary".

The legal status of customary interests in land

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

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

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

Similarly, in the *William Webster Claim* (reproduced in FK Nielsen *American and British Claims Arbitration* (1926, Washington); reported in VI Reports of International Arbitral Awards (United Nations 1955) 166; (1926) 20 AJIL 391) the Anglo-American Claims Tribunal (on which Roscoe Pound was the nominee of the United States) held in 1925 that cession of sovereignty under the Treaty of Waitangi did not constitute "a conveyance of property". The Crown's right of pre-emption enabled it to regulate alienation of land in exercise of the rights of sovereignty, not property.

[16] The Treaty of Waitangi, as HS Chapman J pointed out in *R v Symonds* (1847) NZPCC 387 at 390, did not assert "either in doctrine or in practice any thing new and unsettled" in guaranteeing native property and in providing that the Queen had exclusive rights to extinguish it by purchase. In a passage approved by the Privy Council in *Nireaha Tamaki v Baker* at 579, he declared

"it cannot be too solemnly asserted" that native property over land is entitled to be respected and cannot be extinguished ("at least in times of peace") otherwise than by the consent of the owners.

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

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

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

[19] While the content of customary property differed in other colonies, the principle of respect for property rights until they were lawfully extinguished was of general application. In New Zealand, as is explained below, land was not available for disposition by Crown grant until Maori property was extinguished. In the North American colonies land occupied or used by Indians was treated as vacant lands available for Crown grant. Even so, as the Supreme Court of the United States in *Johnson v M*  *Intosh* (1823) 21 US (8 Wheaton) 543 held, the Crown  s interest and any grant made by it of the land was subject to the native rights (at 574, 603 per Marshall CJ). They were rights at common law, not simply moral claims against the Crown (at 603):

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

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

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

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

[22] In *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 this Court rejected an argument that native title was not recognisable in law. It held that the applicants could not be prevented from applying to the Native Land Court for investigation of their title to the bed of Lake Rotorua unless it was shown that native title had been extinguished by Proclamation, cession of the owners, or Crown grant (at 345 per Stout CJ, at 348 per Williams J, at 351 per Edwards J, at 356 per Chapman J). Whether there may be separate property in the bed of a lake was to be determined according to native custom and usage (per Edwards J at 351). Cooper J at 352-353, after pointing to the definition of Crown lands in the Land Act which excluded customary lands, concluded

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

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

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

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

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

The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act, and one is rather at a loss to know what is meant by such expressions as "Native Title", native lands", "owners", and "proprietors", or the careful provision against sale of Crown lands until the Native title has been extinguished, if there be no such title cognizable by the law and no title therefore to be extinguished.

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

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

[27] Salmond was alive to the distinction between sovereignty and property. But he considered that the consequence of Crown ownership of all land arose on the introduction into New Zealand of English law with its system of estates

derived from feudal land tenure (JW Salmond *Jurisprudence* (6th ed., 1920) 495):

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

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

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

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

This "vital rule" of the common law (earlier applied in *R v Symonds*) was made explicit in New Zealand by the English Laws Act 1858. By it, English law was part of the law of New Zealand with effect from 1840 only "so far as applicable to the circumstances of New Zealand" (s1).

[29] More recently, the effect of the radical title acquired by the Crown with sovereignty has been considered by this Court in *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641 and *Te Runanganui o Te Ika Whenua*

Inc Society v Attorney-General [1994] 2 NZLR 20. The position was restated by Cooke P for the Court in *Te Ika Whenua* at 23-24:

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

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

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

[31] Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature, as the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* held. The content of such customary interest is a question of fact discoverable, if necessary, by evidence (*Nireaha Tamaki v Baker* at 577*)*. As a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom (as appears to be the position described in *St Catherine's Milling and Lumber Co v The Queen* and as the Tribunal in *William Webster's Claim* seems to have thought might be the extent of Maori customary property). On the other hand, the customary rights might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference" (*Amodu Tijani v Secretary, Southern Nigeria* at 410). The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructory rights to exclusive ownership with incidents equivalent to those recognised by fee simple title (see, for example, *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at paragraphs 110-119 per Lamer CJ).

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

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

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

[33] Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria* emphasised at 404 that ascertainment of the right according to native custom "involves the study of the history of the particular community and its usages in each case". He recognised at 404 the need for caution in applying English legal concepts to native property interests, speaking of the necessity for "getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle". The danger of such assumption cuts both ways: it may be dismissive of customary interests less than recognisable English legal estates; and it may cause lesser customary interests to be inflated to conform with familiar legal estates.

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

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

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

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

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

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

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

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

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

[41] From the enactment of the Native Lands Act 1909, Maori owners have been prevented from taking action in the courts for recovery of possession of customary land or to prevent or claim damages for trespass to such land (Native Land Act 1909 s88; Te Ture Whenua Maori Act 1993 s144). Only the Crown can bring such proceedings to court on behalf of the beneficial owners. In such proceedings, the land is "deemed" to be Crown land within the meaning of the Land Act 1948. For present purposes, the fact that such

deeming for limited purposes is necessary emphasises that customary land is property recognised by New Zealand law which is not owned by the Crown.

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

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

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

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

[46] It is not clear to what extent the new jurisdiction equips the Maori Land Court to recognise interests in land according to custom which do not translate into fee simple ownership. In New Zealand, the common law recognition of property interests in land under native custom is little developed. That may have been in part because of the success of the Maori Land Court in converting occupation interests in land into estates in fee simple. The 1894 legislation (making freehold title the inexorable outcome of a successful

application to the Court) may have stifled the apparent early willingness of the Court, described by Judge Fenton in his evidence to the Native Affairs Committee in 1890 and referred to in his judgment in the 1870 *Kauwaeranga* case (reprinted in A Frame "*Kauwaeranga* judgment" (1984) 14 *VUWLR* 227), to recognise lesser interests by way of easements or other mechanisms known to English law. They might better have approximated some customary interests. Lack of development may be in part because, following the enactment of s88(1) of the Native Land Act 1909, there has been limited opportunity for Maori to apply to the High Court for protection of customary property (despite the jurisdiction of that Court earlier acknowledged "for the avoidance of doubt" by the Native Rights Act 1865). It may be because between 1909 and the enactment of Te Ture Whenua Maori Act in 1993 the legislation prevented customary title to land being available or enforceable "in any Court" against the Crown (s84 Native Land Act 1909; s112 Native Land Act 1931; s155 Maori Affairs Act 1953). For present purposes it is enough to note that any property interests in foreshore and seabed land according to tikanga may not result in vesting orders leading to fee simple title and that the Maori Land Court may not be the only forum available for recognition of such property.

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

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

Ownership of foreshore and seabed at common law

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

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

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

Whatapaka or the patiki grounds at Kauwaeranga, and on the other to the hapuka grounds of the Hauraki Gulf described by Chief Judge Fenton (see paragraph [52] below) or the reefs described in the *Motunui-Waitara* decision of the Waitangi Tribunal (1989, Wai 6).

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

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

Judge Fenton had never decided a case about the beach rather than tidal rivers and mudflats. He doubted such property but "should not like to say decidedly" what the position might be. In particular, he referred to "a valuable shell fishery on the West Coast between Hokianga and Kaipara called Toheroa, where the natives obtain a large clam."

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

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

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

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

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

[55] I am of the view that seabed and foreshore is "land" for the purposes of s129(1) of Te Ture Whenua Maori Act. Dictionary definitions of the meaning of land cannot be conclusive, for the reasons given by Keith and Anderson JJ. Moreover, many dictionary definitions are wholly consistent with foreshore and seabed being "land" (thus, they fit readily within the description "the solid portion of the earth's surface" when contrasted with "water"). As a matter of language (as opposed to legal treatment of property) I am unable to draw a distinction between lake beds or river beds and seabed. Both lake beds and river beds have been the subject of claims to the Maori Land Court without jurisdictional impediment, as *Tamihana Korokai v Solicitor-General*, the *Omapere Lakes* decision of Judge Acheson in the Maori Land Court of 1 August 1929, and *In Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) and [1962] NZLR 600 (CA) illustrate. As already indicated, I also find it difficult to understand why seabed and foreshore should be separately treated for the purpose of the jurisdiction of the Maori Land Court. It may be that property interests according to Maori custom are less easily shown as a matter of fact in relation to seabed rather than foreshore (just as it may be easier to establish occupation and exclusion of others in relation to dry land than to foreshore). But properties in both were not considered by Judge Fenton to be unthinkable. Indeed he was able to identify areas below low water mark in respect of which property interests might well have been established as a matter of Maori custom. Much legislation concerned with "land" applies to seabed and foreshore (as the certificates of title to Harbour Boards and local authorities in the Marlborough Sounds illustrate).

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

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

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

[58] The questions posed by the Maori Appellate Court ask whether nine Acts said to vest areas of the Marlborough Sounds in harbour boards, local

authorities and other persons extinguish any Maori customary title to the foreshore and seabed in those areas. There seems no argument that, if the legislation confers freehold interests, it extinguishes any pre-existing Maori customary property rights inconsistent with such interests. The terms of the legislation were not however the subject of argument. And it is artificial to consider the question further in the absence of identification of any customary property. I consider it preferable to avoid answering the question in its terms, while indicating that any customary property in the areas vested seems unlikely to survive.

The Harbours Acts 1878 and 1950

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

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

[60] Such legislation, by its terms, applied to future grants. It did not disturb any existing grants. Indeed, substantial areas of seabed and foreshore had already passed into the ownership of Harbour Boards and private individuals by 1878. I agree with the conclusion of Keith and Anderson JJ that the legislation cannot properly be construed to have confiscatory effect. Although a subsequent vesting order after investigation under the Maori Affairs Act 1953 was "deemed" a Crown grant (s162), that was a conveyancing device only and applied by operation of law. It was not a grant by executive action. Only such grants from Crown land were precluded for the future by the legislation. More importantly, the terms of s150 are inadequate to effect an expropriation of Maori customary property.

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

Territorial Seas Acts

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

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

Section 9A Foreshore and Seabed Endowment Revesting Act 1991

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

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

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

9A. **Foreshore and seabed to be land of the Crown** &#65533;

(1) All land that &#65533;

(a) Either &#65533;

(i) Is foreshore and seabed within the coastal marine area (within the meaning of the Resource Management Act 1991; or

(ii) Was foreshore, seabed, or both, within the coastal marine area (within the meaning of that Act) on the 1st day of October 1991 and has been reclaimed (whether lawfully or otherwise) on or after that date; and

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

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

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

(a) Pursuant to the Resource Management Act 1991; or

(b) By the authority of a special Act of Parliament; or

(c) By a transfer to the Crown, where the land will not be land to which the Land Act 1948 applies.

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

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

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

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

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

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

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

(a) Any agreement to sell, lease, licence, or otherwise dispose of that land that was entered into before the date of commencement of that section, where the disposal has not been completed before that date; or

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

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

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

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

[71] In context, the reference in s9A(1) to land vested in the Crown lands defines those foreshore and seabed lands which would otherwise be available for disposition as property of the Crown. Such Crown land since the Waste Lands Acts of the mid 19th century has always been defined to exclude Maori customary land, as the current Land Act continues to exclude it.

[72] The principal Act is designed to divide responsibilities within government for Crown lands. Section 9A reinstates and restates the restriction on disposing of foreshore and seabed lands of the Crown earlier found in the Harbours Act. The restatement takes account of the major realignment of

governmental responsibilities in relation to the coastline and is part of the package of statutes which includes the Conservation Act 1987 and the Resource Management Act 1991. Both Acts contain acknowledgements of the Treaty of Waitangi and the relationship of Maori with their lands, waters and other taonga. In that context, it is inconceivable that s9A was intended to effect an expropriation of Maori customary land.

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

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

The Resource Management Act 1991

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

[76] The management of the coastal marine area under the Resource Management Act may substantially restrict the activities able to be undertaken by those with interests in Maori customary property. That is the case for all owners of foreshore and seabed lands and indeed for all owners of land above high water mark. The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.

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

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

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

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

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

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

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

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

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

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

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

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

[83] The Native Land Acts on that basis were the discharge by the Crown of its moral obligation, as a matter of what North J at 468 described as the "grace and favour" of the Queen, through the provision of a mechanism to

obtain a Crown grant. The Court found that the jurisdiction was not limited to land above high water mark (although North J remarked at 472 that it was likely in considering whether to grant a title to the land that the Court would have "due regard . . . to the common law rule that the Crown was entitled to every part of the foreshore between high and low water mark"). But the Court went on to hold that investigation of title and subsequent Crown grant determined the entire Maori interest, leaving no entitlement to a further investigation. After investigation, the land to the seaward side of the title granted through the Native Land Court (whether to high water or low water mark) "remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi" (per North J at 473). The investigation of title was "complete for all purposes".

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

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

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

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

[88] Just as the investigation through the Maori Land Court of the title to customary land could not extinguish any customary property in contiguous land on shore beyond its boundaries, I consider that an investigation and grant of coastal land cannot extinguish any property held under Maori custom in lands below high water mark. Whether there are such properties is a matter for the Maori Land Court to investigate in the first instance as a question of tikanga. On the facts it may be that where the sea was described as the boundary for land sold or in respect of which a vesting order was obtained, an inference can be drawn that the customary interest of the seller or grantee is exhausted. The terms of any sale and the terms of any application for vesting order may permit such inference to be drawn. That is a matter of fact for the Maori Land Court to consider. It may be that the selling owners or the owners able to obtain a vesting order had only a partial or shared interest in contiguous foreshore and seabed which made a vesting order in them or a sale by them of those areas inappropriate. That could well be the case, for example, if the foreshore or seabed property was a tribal one and the contiguous property sold or vested was based on the occupation of a smaller family group. Such differences in approach as a matter of custom and usage are referred to in Smith *Maori Land Law* (1960) 89-94, drawing on the judgments of the Maori Land Court. They are also referred to in opinions on the nature of Native tenure summarised by the report of Alexander McKay to the Native Minister published in 1890 NZPP G 1 at 1. Thus, McKay reported the "general consensus of opinion" to be

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

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

Conclusion

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

Result

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

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

The Maori Land Court has jurisdiction to determine the status of foreshore and seabed.

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

GAULT P

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

[94] The appellants, certain iwi of the Northern part of the South Island encompassing the Marlborough Sounds, applied in the Maori Land Court for an order under s131 Te Ture Whenua Maori Act 1993 declaring that certain

land has the status of Maori customary land. The land to which the application relates is described as:

All that land (including the foreshore and seabed below mean high water mark and the waters related thereto) having as its landward boundary the mean high water mark and having as its seaward boundary the boundaries of the proposed Marlborough Sounds Resource Management Plan (publicly notified 31 July 1995) Cape Soucis to Rarangi and thence to the point of intersection of the baseline of the Territorial Sea and the boundary of the Marlborough Sounds Resource Management Plan as defined in the Proposed Plan Volume 3 Zoning Map 4).

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

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

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

129. All land to have particular status for purposes of Act - (1)

For the purposes of this Act, all land in New Zealand shall have one of the following statuses:

(a) Maori customary land:

(b) Maori freehold land:

(c) General land owned by Maori:

(d) General land:

(e) Crown land:

(f) Crown land reserved for Maori.

(2) For the purposes of this Act, -

(a) Land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land:

(b) Land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order, shall have the status of Maori freehold land:

(c) Land (other than Maori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by more than 4 persons of whom a majority are Maori, have the status of General land owned by Maori:

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

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

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

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

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

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

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

132. Change from Maori customary land to Maori freehold land by vesting order – (1) The Maori Land Court shall continue to have exclusive jurisdiction to investigate the title to Maori customary land, and to determine the relative interests of the owners of the land.

(2) Every title to and interest in Maori customary land shall be determined according to tikanga Maori.

(3) In any application for the exercise of the Court's jurisdiction under this section, the applicant may specify —

(a) The person or persons in whom it is proposed the land shall be vested; and

(b) Any trusts, restrictions, or conditions to which it is proposed the land shall be subject.

(4) On any investigation of title and determination of relative interests under this section, the Court may make an order defining the area dealt with and vesting the land in —

(a) Such person or persons as the Court may find to be entitled to the land in such relative shares as the Court thinks fit, or otherwise in accordance with the terms of the application; or

(b) A Maori incorporation or a Maori Trust Board or trustees for or on behalf of such persons, and on such terms of trust, and in such relative shares, as the Court thinks fit.

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

[99] By s129 all land in New Zealand must have one of the statuses listed in that subsection. Subsection (2), if intended to be comprehensive, leaves some difficult questions as to the status of some land not easily fitting the descriptions provided. The underlying intention seems to be that once land has been vested in fee simple (i.e. a Crown grant has issued), so long as the estate subsists (whoever may own it) it cannot have the status of Maori customary land. That is consistent with the conventional approach to native title claims. They are extinguished in respect of land that has been alienated by the Crown as by Crown grant or consequent upon Crown purchase: *R v Symonds* [1847] NZPCC 387, 391, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. It is common ground also that they cannot survive the enactment of legislative provisions that are clearly inconsistent with their continued existence.

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

[101] "Maori customary land" is land that is held by Maori in accordance with tikanga Maori (Maori customary values and practices). Land that is not Maori customary land and has never been alienated from the Crown is Crown land.

With the exception of Crown land reserved for Maori, land not alienated from the Crown may have the status either of Maori customary land or Crown land. There is no "default" status. It is one or the other. Which one is determined only by a declaration of status. That is not inconsistent with the underlying interest of the Crown in all land from which title is derived: see *Nireaha Tamaki v Baker* [1900] NZPCC 371.

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

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

[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 revested 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 lst 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 apples 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)

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&#65533;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 &#65533; 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 colonialterritories

[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* (4th 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 Sates, 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* &#65533; of the land" (to use the statutory words) or "*dispose* of" or "convey" the land (to use the Judges&#65533; 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 &#65533;" (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 &#65533; 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 *l*10 ◆ 474 *l*1 and T A Gresson J at 478 *l*26 ◆ 479 *l*6). 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 revested 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 revest 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 revesting 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 revesting, 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, whakatakototia he tikanga hei awhina 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&#65533;

(a) Either&#65533;

(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,&#65533;

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&#65533;

(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 revesting 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 Revesting 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 Revesting 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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