

Land law in the New Zealand Supreme Court

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This paper addresses two aspects of the Supreme Court's land law jurisprudence. First, it considers the Court's development of the principles of the Torrens system. This section focuses upon *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433, which engages debates in overseas jurisprudence about the proper scope of the in personam jurisdiction. I argue that the inclusion of an unconscionability requirement in cases engaging the in personam jurisdiction is inappropriate and should be reconsidered.

Second, the paper considers perhaps the most significant land law judgments in this first ten years – the decisions in *Paki v Attorney-General*. Focusing first on the Supreme Court's 2012 decision, *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, I review the Court's approach to interpreting statutes that limit property rights. Second, I consider the recent decision in *Paki v Attorney-General* [2014] NZSC 118 and reflect upon its implications. Finally, I examine the Court's use of historical research and engagement with the past.

I The reach of indefeasibility and the in personam jurisdiction

In its first ten years, the Supreme Court has made a number of significant decisions relating to land. Many of these however focus on related fields: the sale and purchase of land,² agency law,³ and commercial law.⁴ There has been a

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² See e.g. *Otago Station Estates Ltd v Parker* [2005] NZSC 16, [2005] 2 NZLR 734; *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577; *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805.

³ *Dollars & Sense Finance Ltd v Nathan* (2008) 9 NZCPR 116. In this case, the Court resisted the argument that the policy of the Torrens system precluded a conclusion that a principal was liable for the undetected fraud of its agent in relation to a mortgage document innocently registered by the principal. The Court cited with approval Peter Watt's conclusion that: "[t]he odds against the plaintiff are stacked too high if purchasers can use agents to do the work of acquisition but then disavow their proven dishonesty": Peter Watts "Imputed Knowledge in Agency Law – Knowledge Acquired Outside Mandate" [2005] NZ Law Rev 307 at 334.

⁴ *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31 on which see E W Thomas "A Critique of the Reasoning of the Supreme Court in *GE Custodians v Bartle*" (2011) 17 NZBLQ 97.

small cluster of cases relating directly to the principle of indefeasibility under the Land Transfer Act 1952.⁵ Of these, *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, [2010] 1 NZLR 82 is significant and has attracted some academic commentary.⁶ I have, however, chosen to focus this part on *Regal Castings Ltd v Lightbody*. Though aspects of this judgment have been the subject of comment,⁷ my focus will be on *Regal Castings* and the in personam jurisdiction.

This part thus examines the reach of indefeasibility and the application of the in personam exception. The proper scope of the in personam exception is one of the most vexed questions in land law to the extent that opinion is divided over even its nomenclature; commentators offering a number of alternatives based on their analytic preferences. I argue that the in personam exception is perhaps best considered, not as an exception at all, but as those common law and equitable principles remaining after the proper reach of Torrens indefeasibility is identified.⁸ On this basis, I question whether the requirement that a registered proprietor has acted unconscionably is useful in all in personam cases.

In *Regal Castings v Lightbody*, Mr Lightbody, the owner of a jewellery business, Capro, was personally responsible for its debt to a supplier, Regal Castings. Regal Castings had allowed Capro to enter into restructuring agreements and it continued to supply the business. In 1998, Mr Lightbody and his wife transferred their family home into the ownership of a trust of which they and their solicitor, Mr Horrocks, were trustees. The consideration for the transfer, a debt of \$230 000, was to be repaid in one sum in 2005. However, before that date, Mr and Mrs Lightbody progressively gifted sums to the trust and, in 2002, the debt was extinguished. Although Mr Lightbody's joint tenancy with his wife in the house property was his sole significant asset, Regal Castings was not told of the transfer to the trust.

⁵ See *Cashmere Capital Ltd v Carroll* [2009] NZSC 123, [2010] 1 NZLR 577 and *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, [2010] 1 NZLR 82. The Supreme Court declined leave to appeal in *Jackson Mews Management Ltd v Menere* [2010] NZSC 39, [2010] 2 NZLR 347 at 362. Rod Thomas had criticised the decision of the Court of Appeal *Jackson Mews Management Ltd v Menere* [2009] NZCA 563, [2010] 2 NZLR 347: Rod Thomas "Encumbrance instruments" [2010] NZLJ 10. The issues arising from *Jackson Mews*, including reform relating to covenants in gross and encumbrances under the draft Land Transfer Bill, are also reviewed in Katherine Sanders "Land Law" [2012] NZ Law Rev 545.

⁶ See Matthew Harding "Property, Contract and the Forged Registered Mortgage" (2010) 24 NZULR 21; Patrick J Lewis "Less Power to Them: a Note on the Mortgagee's Diminishing Expectations of Indefeasibility" (2009) 83 ALJ 658 and, for an overview of the discussion, Katherine Sanders "Land Law" [2012] NZ Law Rev 545.

⁷ On Tipping J's obiter comments, with Blanchard and Wilson JJ in agreement, in relation to unregistered interests see Janet November and Julia Rendell "The "Mirror" Principle and the Position of Unregistered Interests in the Torrens System" [2010] NZ Law Rev 567. On remedies available to creditors and others whose rights are defeated by trust structures see Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZ Law Rev 56.

⁸ Tipping J acknowledges this view in *Regal Castings* at [147].

Capro was placed in liquidation in 2003. Regal Castings was unable to recover \$160 000 owed on a term loan and for further supplies to Capro. It then brought a claim under s 60 of the Property Law Act 1952 (“the Act”) seeking an order setting aside the transfer of the house to the trust as having been made with intent to defraud.

The High Court concluded that Mr Lightbody did not have the intent to defraud required by s 60 of the Act.⁹ This conclusion was upheld by a majority in the Court of Appeal.¹⁰ In the Supreme Court, the Court held that Mr Lightbody “had an intent to hinder, delay or defeat Regal’s recourse to his interest in the house property, should it ever prove necessary for Regal to have such recourse”.¹¹ Section 60(1) did not require an applicant to show that the debtors wanted creditors to suffer a loss – it was sufficient that the debtor had knowledge that he or she was exposing the creditor to a significantly greater risk of being unable to recoup the amounts owing.

The further issue arising was whether the Court was able to grant the order sought by Regal Castings transferring a one-half interest in the property to the Official Assignee.¹² One of the trustees, Mr Horrocks, had no knowledge of the Regal debt at the time of the transfer but this was found to be no obstacle to the claim: the trustees took as joint tenants of the property and the Court found “they must be treated as one purchaser who has knowledge of the fraudulent intent”.¹³

A further objection was put by counsel for the Lightbodys, who argued that to uphold a claim under s 60 of the Property Law Act 1952 against the trust property would be inconsistent with the Torrens system. Section 60 did not itself address its relationship with the Land Transfer Act 1952¹⁴ and although, per s 3(2) of the Property Law Act, s 60 applied to land under the Land Transfer Act, s 3(1) also

⁹ *Regal Castings Ltd v Lightbody & Ors* HC Auckland CIV-2005-404-000352, September 29 2005 at [73]-[75].

¹⁰ *Regal Castings Ltd v Lightbody* [2007] NZCA 396, [2008] 2 NZLR 153.

¹¹ At [60]. This is the language now used in s 345(1)(a) Property Law Act 2007 and Justice Blanchard in his judgment at [52] argued that “intent to defraud” in the 1952 Act had been regarded as “shorthand” for this fuller expression. *Regal Castings* was cited with approval on this point in *Marcolongo v Chen* [2011] HCA 3, (2011) 242 CLR 546 at [32]; *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, (2012) 270 FLR 1 at [527]-[528]; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26 at [86] and *Ingram v Y Twelve Pty Ltd* [2013] NSWSC 1777 at [99].

¹² It was clear that, were the case remitted to the High Court, the Official Assignee might apply to intervene and seek an order for the transfer of the one half interest. This was because s 58 of the Insolvency Act 1967, which provides a procedure to enable the Official Assignee to invoke s 60 of the Act, contains, in sub (7), a provision specifically overriding the Land Transfer Act 1952.

¹³ At [70].

¹⁴ This is now remedied in s 350(4) of the Property Law Act 2007, which expressly provides that the section overrides the Land Transfer Act 1952.

provided that the Property Law Act was to be read and construed so as not to conflict with the provisions of the Land Transfer Act. The Court then turned to address the relationship of the principles of indefeasibility with s 60 of the Act.

As a preliminary question, Justice Tipping considered whether the trustees, as volunteers, had acquired indefeasible title. If they had not, there would be no impediment to the application of s 60. The Judge noted that the issue of whether volunteers acquire indefeasible title had divided a Full Court of the then Supreme Court in *In re Mangatainoka*¹⁵ and had more recently divided the Australian courts.¹⁶ The Judge surveyed this controversy and examined the arguments based on the Land Transfer Act 1952 itself. Justice Tipping concluded that a volunteer takes indefeasible title: “based on the fact that registration creates title; it does not simply record a pre-existing title”.¹⁷ And, whilst this discussion was not taken up directly by the other members of the bench in *Regal Castings*, it does provide a helpful indication of an approach to the issue; one which accords with that suggested in the proposed draft Land Transfer Bill.¹⁸

The Court found for Regal Castings on the central question of whether the principle of indefeasibility precludes an order under s 60 of the Property Law Act. The majority held that the title of the registered proprietor was amenable to the grant of remedies in respect of personal obligations.¹⁹ Justice McGrath found that s 60 operated as an exception to indefeasibility. This section examines these approaches.

The Chief Justice favoured permitting the statutory remedy under s 60 to operate on the property held by the trust on the basis that the remedy was granted against the registered proprietors personally and therefore presented no conflict with the indefeasibility principle. The analysis of the Chief Justice went little further than that; noting the famous statement of the Privy Council in *Frazer v Walker*²⁰ recognising in personam claims, and that s 60 of the Property Law Act 1952 provided a foundation in law for such an in personam claim.²¹

¹⁵ *In re Mangatainoka 1BC No. 2* (1914) 33 NZLR 23.

¹⁶ The courts in New South Wales and Western Australia favour indefeasibility for volunteers subject to statutory exceptions while courts in Victoria permit equities affecting the title of the donor to continue against the title of the donee see: *Bogdanovich v Koteff* (1988) 12 NSWLR 472 (NSWCA); *Conlan v Registrar of Titles* (2001) WAR 299 (WASC); *Rasmussen v Rasmussen* [1995] 1 VR 613 (VSC).

¹⁷ At [135].

¹⁸ See cl 47(4)(a) of the Land Transfer Exposure Draft Bill. Though the rest of the bench did not address directly Tipping J’s discussion of volunteers, their approval is arguably implicit in the outcome of the case, which, as Tipping J notes, relies upon the assumption that the title of the trustees as volunteers is indefeasible.

¹⁹ This conclusion has been cited with approval in *Marcolongo v Chen* [2011] HCA 3, (2011) 242 CLR 546 at [21] and *Federal Commissioner of Taxation v Oswal* [2012] FCA 1507 at [25].

²⁰ [1967] NZLR 1069 (PC) at 1075.

²¹ At [22].

In a longer discussion, with which Justices Blanchard and Wilson concurred,²² Justice Tipping, citing *C N N A Davies Ltd v Laughton*²³ and *Duncan v McDonald*²⁴, found that:

An in personam claim against a registered proprietor looks to the state of the registered proprietor's conscience and denies him the right to rely on the fact that he has an indefeasible title if he has so conducted himself that it would be unconscionable for him to rely on the register.

He considered that Regal had made out that it would be unconscionable for the trustees to rely on their indefeasible title and, on that basis, regarded the imposition of a remedial constructive trust in favour of the Official Assignee as the appropriate course in this case.²⁵

Justice Blanchard, with whom Justice Wilson concurred, agreed with the analysis of Justice Tipping, and invoked "the necessary elements of the in personam jurisdiction" citing *C N N A Davies Ltd v Laughton*²⁶ and *Duncan v McDonald*.²⁷ These elements were satisfied in this case, in part because Mr Lightbody had "acted unconscionably towards Regal in transferring the property with the intention of putting it beyond Regal's reach".²⁸

The differences in approach to the in personam claim highlight some of the academic controversies in this field. The issue I examine here is whether it is necessary to find that the trustees had acted unconscionably in obtaining or retaining the property in order to permit the operation of s 60 of the Act. Those Judges who considered unconscionability a necessary element of an in personam claim relied upon analysis in *C N N A Davies Ltd v Laughton*²⁹ and *Duncan v McDonald*.³⁰ In *Laughton*, Justice Thomas, delivering the Court's judgment, discussed the in personam jurisdiction in some depth, without

²² Blanchard and Wilson JJ concurred with [147] – [164] of the judgment of Tipping J, that is, Tipping J's analysis of in the in personam claim.

²³ [1997] 3 NZLR 705 at 711 – 712.

²⁴ [1997] 3 NZLR 669 at 683 – 684.

²⁵ For the argument that it was unnecessary to resort to the use of a remedial constructive trust in this case see Jessica Palmer "Attempting Clarification of Constructive Trusts" (2010) 24 NZULR 113 at 127-128. Palmer argues at 128 that "trusts arising to correct voidable transactions ... are neither institutional nor remedial and are not based on notions of unconscionability".

²⁶ At 711 – 712.

²⁷ At 683 – 684.

²⁸ At [78].

²⁹ At 711 – 712.

³⁰ At 683 – 684. These two cases were decided within a month of each other; the bench of the Court of Appeal differing by one Judge only – Justice Blanchard, who delivered the judgment of the Court in *Duncan* did not sit in *Laughton*. The bench in *Laughton* was comprised of Richardson P, Gault, Henry, Thomas and Keith JJ. Justice Thomas delivered the judgment on behalf of the Court. The bench in *Duncan* was Richardson P, Gault, Thomas, Keith and Blanchard JJ. Justice Blanchard delivered the judgment on behalf of the Court.

prescribing a list of criteria. With regard to a requirement that the registered proprietor must have behaved unconscionably, the Court stated:³¹

The key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue. It is such involvement or knowledge which gives rise to the equity or legal right in the innocent party as against the registered proprietor in person.

As *Laughton* suggests the act or omission may be either unconscionable or illegal, it seems therefore that the unconscionability requirement entered New Zealand law in the *Duncan* judgment where the Court stated:³²

Before a registered proprietor is susceptible to an in personam claim it must be shown that he or she has acted or is acting unconscionably in obtaining or taking advantage of the registered interest, but the registered proprietor's conduct need not have involved actual dishonesty towards the in personam claimant. An attempt by the registered proprietor to enforce an interest knowingly obtained by his or her unlawful behaviour may be found to be unconscionable.

The Court in *Duncan* and the majority in *Regal Castings* are, of course, not alone in finding that the registered proprietor's conscience must be affected in order to give rise to a right in personam. Unconscionability is often required by the courts.³³ However, a body of case law and academic commentary supports an alternate view that unconscionability is only required where it is an element of the cause of action asserted.³⁴ Peter Butt prefers this view given an in personam claim requires a legal or equitable cause of action.³⁵ Others go further arguing that where unconscionability is not an element of the cause of action involved, its inclusion is superfluous at best, and potentially misleading.³⁶ The broader question is one of policy – if claims in personam can be said to operate within a

³¹ At 712.

³² At 683 – 684.

³³ See, for example, *Vassos v State Bank of South Australia* [1993] VicRp 74, [1993] 2 VR 316 at 333 where Hayne J said that in personam remedies are “a clear reference to the remedies being available in circumstances where equity would act, i.e., in cases which equity would classify as unconscionable or unconscientious.” This case is well put in the dissenting judgment of Davies JA in *White v Tomasel* [2004] QCA 89, [2004] 2 QdR 438, [2004] ANZ ConvR 248.

³⁴ Some equitable actions which operate in personam require unconscionability as an element of the cause of action e.g. unconscionable dealings *Commercial Bank of Australia v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

³⁵ Peter Butt *Land Law* (6th ed, Thomson Reuters, Sydney, 2010) at 822, 20 104.1. See e.g. Robert Chambers “Indefeasible Title as a Bar to a Claim for Restitution” (1998) 6 Restitution L Rev 126; *White v Tomasel* at [74] doubting the need for unconscionability; *Harris v Smith* [2008] NSWSC 545, (2008) 14 BPR 26,223, (2008) NSW ConvR 56-222 at [55].

³⁶ See Tang Hang Wu “Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility” (2008) 32 Melbourne U Law Rev 672. Tang argues “that the requirement of unconscientiousness is apt to mislead and should be abandoned in the context of the in personam exception” at 682.

space to which indefeasibility does not reach, is there any need to require unconscionability, unless it is an element of the cause of action in question?

Support for this view might arguably be drawn from an examination of the facts of the *Regal Castings*. The Supreme Court departed from the decision of the High Court and Court of Appeal on the basis of a difference in view about what was required by s 60, and how that test applied to the Lightbodys. Much of this discussion focused on the knowledge and understanding of the Lightbodys at the time the property was conveyed to the trust. As discussed above, the Supreme Court held that it was not necessary to show that the Lightbodys wished for Regal Castings to suffer a loss – the test was met if the debtor had knowledge of the risk to which his actions exposed the creditor. Following this fine-grained consideration of whether the cause of action was established, discussion of whether it was unconscionable to transfer the property to the trust or, whether it would be unconscionable for the trustees to continue to rely upon their registered title,³⁷ appeared to reiterate discussion of the elements of the cause of action.³⁸ In this case, the unconscionability requirement had no work to do. As Lyria Bennett Moses and Brendan Edgeworth have argued, unconscionability is generally used “in a way that means it operates effectively as a conclusion: the court or commentator simply decides that it would be unconscionable to retain an interest despite the existence of a legal or equitable rule under which it ought to be lost or diminished”.³⁹ I argue that in *Regal Castings*, the unconscionability requirement played little, if any, role in determining the appropriateness of recourse against the property of the trust. With respect, the analysis of the Chief Justice, which did not rely upon a requirement of unconscionability, was sufficient to meet any concern about the operation of s 60 against the property held by the trust.

One cannot, of course, argue against the inclusion of an unconscionability requirement in personam claims without touching upon much wider arguments about the proper scope of the in personam “exception”, including the issue of whether it is appropriately described as an “exception”. I agree with Moses and Edgeworth that the in personam category “is merely the class of claims that fall outside the provisions in Torrens legislation”.⁴⁰ This acknowledges that land law is “bijural”: its sources are the Torrens statutes and those traditional legal and equitable doctrines and principles that co-exist with the Torrens system.

³⁷ Blanchard J considers unconscionability in the context of the initial transfer at [78] whereas Tipping J considers whether it would be unconscionable for the trustees to rely on the register to defeat Regal’s claim to avoid the transaction at [158].

³⁸ See [158].

³⁹ Lyria Bennett Moses and Brendan Edgeworth “Taking it Personally: Ebb and Flow in the Torrens System’s In Personam Exception to Indefeasibility” (2013) 35 Sydney L Rev 107 at 113 citing Chambers above note 35.

⁴⁰ Moses and Edgeworth, above note 39, at 132.

On this view it is not necessary to consider, as Justice McGrath did writing separately, whether s 60 of the Act was an exception overriding the protection of indefeasibility. The Torrens system aims to cure defects in the vendor's title and to protect the purchaser from pre-existing unregistered interests in the property; it does not preclude the creation of new unregistered interests by the purchaser.⁴¹ Whilst this argument may well favour the retention of the requirement that the enforcement of an in personam claim must not be inconsistent with the objective of the Torrens system,⁴² it does not entail an unconscionability requirement which indeed may bar some claims.⁴³

II *Paki v Attorney-General*

Perhaps the most significant of the Supreme Court land law decisions in its first ten years have been those in the Paki litigation.

This case was brought by representatives of the Pouakani hapū, descendants of the owners of land adjoining the Waikato River near Mangakino. This land was part of the larger Pouakani block, created by the Native Land Court in 1886. From 1887 – 1899, the Crown acquired the land by various means: as payment for survey and other costs, through purchase from its Māori owners, and by compulsory acquisition for the Main Trunk Railway.

The plaintiffs rested their claim on the assumption that the Crown had obtained title to the bed of the river in accordance with the *ad medium filum aquae* or mid-point presumption when it acquired the riparian land. The plaintiffs argued that the Crown owed a duty to deal fairly with Māori and, in particular, to explain the mid-point presumption to the owners and to ensure their informed consent to the transfer of rights to the riverbed. The Pouakani group sought a declaration that Crown ownership of the riverbed was subject to a constructive trust in favour of the descendants of the Māori owners on the basis that the Crown had wrongfully acquired the riverbed in breach of fiduciary duties.

Having been unsuccessful in the High Court and Court of Appeal,⁴⁴ the plaintiffs sought leave to appeal to the Supreme Court. The Supreme Court approved six

⁴¹ Chambers, above note 35, at 128.

⁴² See, e.g., *Duncan v McDonald* [1997] 3 NZLR 669 at 683.

⁴³ Chambers, above note 35, argues at 131 that a narrow view of the “in personam exception” ignores those rights (such as those generated by unjust enrichment) which can arise through no action or fault of the legal-title holder and even without his or her knowledge. See also, *Harris v Smith* [2008] NSWSC 545, (2008) 14 BPR 26,223, (2008) NSW ConvR 56-222 at [55]. In this case a vendor sought rectification for common mistake and the reconveyance of a portion of land that the parties had not intended to be sold and transferred. The Court rejected a “superadded element of unconscionability”.

⁴⁴ *Paki v Attorney-General* [2009] 1 NZLR 72 (HC); *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125.

grounds of appeal, of which the first two were heard separately and judgment delivered in June 2012.⁴⁵ The plaintiffs succeeded on the first two grounds, and the Court then proceeded to hear the remaining issues. Judgment was delivered on those issues in August 2014.⁴⁶

First, this paper considers the Court's decision on the first two grounds *Paki v Attorney-General* ("*Paki No. 1*"), which concluded that the segment of the Waikato river adjoining land at Pouakani was not navigable under s 14 of the Coal-mines Act Amendment Act 1903 ("the Act"). The bed of this portion of the river did not therefore vest in the Crown upon the passage of the Act in 1903. Whilst I agree with the Court's conclusion that vesting under the Act attached only to those stretches of river which were navigable in fact, I argue against the suggestion in the reasons of some of the bench that the Act was merely declaratory of existing private and public rights in the beds of navigable rivers. I regard the Act as confiscatory and caution against overreliance on parliamentary statements of an Act's effect when an independent judicial assessment of the impact of legislation on private property rights is appropriate.

Second, I discuss the most recent decision of the Court *Paki v Attorney-General* ("*Paki No. 2*") in which the Court concluded that the decision in *Re the Bed of the Wanganui River*⁴⁷ is not authority for the proposition that the mid-point presumption reflects universal Māori custom. *Paki No. 2* thus acknowledges the possibility that there may be unextinguished Māori customary title in the beds of non-navigable rivers; a possibility that some had assumed was precluded by the *Re the Bed of the Wanganui River* precedent. This part considers the implications of the judgment.

A "*Precarious*" property and takings – *Paki No. 1*

The first of the *Paki* decisions addressed whether the Waikato River adjoining the Pouakani lands was a navigable river under the Coal-mines Act Amendment Act 1903. The plaintiffs had accepted from the outset that their claim would fail if the riverbed had vested in the Crown as the bed of a "navigable river" under s 14 of the Act. This is because the provision declared that the beds of navigable rivers "remain" and are "deemed to have always been vested in the Crown":

Bed of river deemed vested in Crown — (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river 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

⁴⁵ *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277. The leave decision is *Paki v Attorney-General* [2010] NZSC 88.

⁴⁶ *Paki v Attorney-General* [2014] NZSC 118.

⁴⁷ [1962] NZLR 600 (CA).

minerals, including coal, within such bed shall be the absolute property of the Crown.

The plaintiffs did not base a claim on customary title though the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* doubted the application of s 14 of the Act to customary land.⁴⁸

The plaintiffs were unsuccessful in the High Court and Court of Appeal, the courts adopting a “whole of river” approach to conclude that the Waikato river was navigable under the Act in 1903 and thus vested in the Crown. In the High Court, Justice Harrison found that the words of the statute, and its purpose and policy, led to the conclusion that the navigability of a river should be determined on the basis of its characteristics as a whole. An approach which examined the navigability of the river segment by segment would create a patchwork of private and public rights in the river bed; an outcome at odds with the purpose of the Act, which, the Judge concluded was “designed to have a radical effect on property rights in the national interest”.⁴⁹ The Court acknowledged the argument that “s 14, to the extent that it might exclude the *ad medium filum* presumption, is confiscatory and should be given a narrow or restrictive interpretation”,⁵⁰ but considered the terms of s 14 unequivocal. Adopting a whole of river approach, the Waikato River was found to be navigable. At the time the Act was passed, the river was navigable continuously for two-fifths of its length (from its mouth at Port Waikato to Cambridge) and most parts of well-defined sections above Cambridge were used before 1903.⁵¹

The Court of Appeal affirmed the approach of the High Court to the assessment of navigability. Whilst it said the conclusion might be reached on the basis of the text of the statute alone, the Court held that the Act formed part of a legislative package of measures intended to assert the colonial government’s right to manage and control waterways.⁵² Particular emphasis was given to the Water-power Act 1903, which came into force contemporaneously with the Coal-mines Act Amendment Act 1903, under which the Crown claimed the sole right to use water in lakes and rivers to generate electricity.⁵³ The Court held that this wider

⁴⁸ [1994] 2 NZLR 20 at 26 per Cooke P. Lead counsel for the appellants in that case was Sian Elias QC while JJ McGrath QC appeared for the Attorney-General. By contrast, Keith and Anderson JJ in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 concluded at [61] that s 14 did extinguish customary title relying upon the use of the phrase “absolute property of the Crown” in the Act. Richard Boast argues that the phrase “absolute property” in s 14 serves only to extinguish customary title in minerals in the riverbed and that the section is “insufficiently “clear and plain” to extinguish a customary title to the beds as such and that the Crown’s title remains burdened by Maori title”: *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 21.

⁴⁹ At [85].

⁵⁰ At [84].

⁵¹ At [105].

⁵² At [62].

⁵³ Whilst the Water-power Act 1903 did not play such a prominent role in the High Court’s reasoning, Harrison J did infer that “s 14 of the CMAAA and the Water-Power Act were introduced

legislative context suggested that Parliament intended to secure the bed of the river to the Crown to support social and economic development in the colony. A segment-by-segment approach to navigability would be “quite inimical” to the purpose of the Act.⁵⁴ The Court acknowledged that the broader interpretation of s 14 adopted might seem at odds with the general rule that legislation taking property rights should be read down. However, it held that the legislative purpose was paramount. Further, the confiscation effected by the Act was not discriminatory: “It applied to Maori and Pakeha equally and, where applicable, it overrode the common law rights of all New Zealanders”.⁵⁵

By contrast, the Supreme Court held unanimously that the question of navigability under s 14 of the Act was to be assessed in respect of particular stretches of a river. The Chief Justice, writing for the majority, rested this conclusion on the text of the legislation, the common law context, the legislative history, and convenience.

The Supreme Court regarded the Coal-mines Act Amendment Act 1903 as a legislative response to the decision of the Court of Appeal in *Mueller v Taupiri Coal-Mines (Ltd)*.⁵⁶ The High Court and Court of Appeal had each addressed *Mueller*, the Court of Appeal noting “widespread agreement amongst historians and commentators that the passage of the CMAA 1903 was driven by the decision in *Mueller*”,⁵⁷ but it was brought to the forefront in the Supreme Court.

In *Mueller*, the Commissioner for Crown Lands for the Auckland District sought a declaration against the defendants who were mining for coal under the bed of the Waikato River. Whilst the defendants claimed the bed *ad medium filum aquae*, the Crown claimed that it had not parted with title to the riverbed when granting lands described as being bounded by the river. The riparian lands in this case had been granted to militia in 1866 and 1867 under the terms of the New Zealand Settlements Act 1863. The case turned on whether the application of the *ad medium filum aquae* doctrine had been rebutted in the circumstances of the grant. A majority held that the Crown had not intended to part with the bed of the river but the basis for this finding is not clear; no judgment attracted majority support,

as the twin components of a legislative package designed to secure ownership for the Crown of resources critical to the colony’s economic development” at [69]. The Supreme Court regarded the Court of Appeal’s reliance upon a relationship between the Water-power Act and its aims and those of the Coal-mines Act Amendment Act as unsupported by the legislative history at [52] - [53], fn 165 and [161].

⁵⁴ At [82].

⁵⁵ At [83].

⁵⁶ (1900) 20 NZLR 89.

⁵⁷ At [38].

and indeed two of the judges were later to disagree over what the *Mueller* case had decided.⁵⁸

That the *ad medium filum aquae* presumption should apply in New Zealand was, the Court found in *Mueller*, determined by the decision of the Privy Council in *Lord v The Commissioners for the City of Sydney*.⁵⁹ The Court of Appeal in *Mueller* considered itself bound by this decision, in which the Privy Council held that the *ad medium filum aquae* presumption applied to a Crown grant of land described as bounded by a creek. Their Lordships held that the application of the presumption “is always a question of intention, to be collected from the language used with reference to the surrounding circumstances”.⁶⁰ In this case, their Lordships noted that the grant did not exclude the presumption and that the Crown would have no reason to reserve that which would be useful to the grantee but of no probable use to the Crown. Further the Court held that the grant should be interpreted in the context of the Crown policy to encourage settlement and the cultivation of land.⁶¹ No party appears to have contended that the presumption was not part of the law of New South Wales.

Thus the New Zealand Court of Appeal in *Mueller* regarded itself bound by application of the presumption in New Zealand but a majority, Chief Justice Stout dissenting,⁶² held that the circumstances of the grant in this case rebutted the presumption. A number of factors were found to have excluded the application of the presumption to the grant. Each set of reasons identified a different mixture of relevant circumstances extrinsic to the grant;⁶³ no judge found a single factor

⁵⁸ See *The King v Joyce* (1906) 25 NZLR 78 (CA) in which there was disagreement between Edwards and Williams JJ about what had been decided in *Mueller*. At 90 – 91 Williams stated that the principle of the case was that the Crown must retain ownership of the soil of the road or the riverbed in order to facilitate public rights of navigation. Edwards dissented stating at 95: “I do not think that the case of [*Mueller*] can be regarded as having decided that the common-law presumption is rebutted in this colony in the case of every navigable river”. Edwards placed emphasis on the fact that the river was the “only practicable highway to the land upon its banks”, noting that other special facts in connection with the Waikato River were relied upon by the majority.

⁵⁹ (1859) 12 Moo PC 473, 14 ER 991 (PC). See *Mueller* at 95 and 103 per Stout CJ; at 105 per Williams J (Connolly J concurring); at 113- 114 per Edwards J and at 125 per Martin J.

⁶⁰ At 497.

⁶¹ At 498.

⁶² Stout CJ’s strong dissent turned on the assertion that a river’s navigability was insufficient to displace the *ad medium filum aquae* presumption. He found at 97 that in the law of England, Scotland and Ireland a river may be used as a highway notwithstanding that the bed belongs to private individuals. For a similar dispute about possible coexistence of private title (in this case native title) and public rights in the High Court of Australia see *Commonwealth v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1. The conclusion of the majority in *Yarmirr* that public rights of navigation and fishing precluded a finding of native title to the seabed has been criticised: see, e.g. Boast, *Foreshore and Seabed*, above note 48, at 48.

⁶³ See Williams J (Connolly J concurring) on the New Zealand Settlements Act at 107-109; on the river as a public highway and the need for the Crown to retain ownership of the bed in order to

determinative. Some of these factors were specific to the Waikato River and its settlement; others made it more likely that the courts would find the presumption rebutted in other cases in which the river was used as a public highway. The judges of the majority in *Mueller* each considered the river's use as a public highway significant, but none ruled clearly that the *ad medium filum aquae* presumption would be rebutted in all cases in which the river was in use as a public highway.⁶⁴

The Supreme Court in *Paki* regarded *Mueller* as the prompt for the enactment of the Coal-mines Act Amendment Act 1903. Practically, as the Chief Justice noted in the *Paki* judgment: "Such private ownership of the beds of rivers could only be excluded, following *Mueller*, by a case-by-case determination of whether the presumption of Crown grant *ad medium filum aquae* was sufficiently rebutted by the surrounding circumstances".⁶⁵ The Chief Justice found that Parliament then moved to secure public rights of navigation and the Crown's ownership of minerals in the bed.⁶⁶ Anxiety expressed in the House about the expropriation of existing rights of property was, she argued, met by the use of the common law concept of navigability to balance private property and public property. The Chief Justice stated that "it seems likely that sufficient justification was seen in the North American approach".⁶⁷

(1) Principles of statutory interpretation and property

It is a principle of statutory interpretation the Courts will not adopt a construction of a statute that takes away existing property rights more than an Act and its proper purpose require.⁶⁸ Commentators differ in their characterisation of the nature of this principle and its source. *Bennion on Statutory Interpretation* regards the principle as an aspect of the principle against doubtful penalisation, which requires strict or narrow construction of statutes that impose a detriment.

retain the power to improve navigability at 109-110, and suggesting (without deciding) that the river should be characterised as a highway of necessity and that the Crown must be taken to have dedicated the river as a highway at 113. See also Edwards J on the Highways and Watercourses Act 1858 at 114-115; on the Crown Grants Act 1866 at 115-117, and arguing that, even if private ownership of the riverbed were consistent with rights of public highway (Edwards J doubting this cf. Stout CJ), that, in this case, the Crown needed to retain rights to the land in order to preserve navigation and the ability to carry out works to improve navigation at 119-121, and on the New Zealand Settlements Act 1863 and the river as the sole means of access to the Waikato at the time of grant at 120. Martin J held at 126-127 that the presumption was rebutted by an "accumulation of facts" relevant to the Crown's intention, including legislation at the time of grant.

⁶⁴ See above note 58 re *The King v Joyce* (1906) 25 NZLR 78 (CA).

⁶⁵ At [54].

⁶⁶ At [29].

⁶⁷ At [30].

⁶⁸ JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 322. This statement (taken from the 3rd edition of the text) was cited with approval by the Court of Appeal in *Hood v Attorney-General* CA 16/04, 2 March 2005 at [59].

Bennion argues that the Court should assume the legislator intended to follow this principle and should therefore strive to avoid a construction which would “penalise a person where the legislator’s intention to do so is doubtful, or penalises him or her in a way which was not made clear”.⁶⁹ Others have characterised the rule as an aspect of the principle of legality and the norm that the courts will be slow to impute to Parliament an intention to override established rights, save where that intention is clearly stated.⁷⁰ As such, whether the principle is framed as one concerned with the imposition of a detriment, or with the restriction or removal of established rights, in each case it shapes the court’s interpretation of words in legislation that are considered general or ambiguous.⁷¹

The application of the principle therefore relies upon the court characterising the statute as capable of more than one construction. If the court regards the statutory language as unambiguous, the legislator’s intention or parliamentary purpose is said to be clear, and the principle supporting a strict construction of statutes interfering with property rights is not engaged. As Sean Brennan argues in the context of Australian cases concerning common law rights of native title, there is therefore great power in the exercise of the “threshold judgment” regarding the existence or absence of ambiguity as it will determine whether the rights protective interpretive principles are engaged. Brennan further argues that the courts through their reasons for decision also influence “the extent to which *the need for such interpretive principles to be applied* is readily perceived by others”.⁷² In the context of indigenous property rights, the court’s reasoning may impact upon the degree to which indigenous peoples are perceived to benefit from general rights protective interpretive principles.

An initial judgment might be considered to perform a gatekeeping function before the interpretive principle is engaged. That is, as the principle is concerned with legislative interference in vested or existing property rights, the Court must regard the legislation as removing or restricting existing rights before seeking to minimise the extent of this interference by statutory interpretation. This observation may seem trite but, as I will argue the *Paki* case demonstrates,

⁶⁹ Oliver Jones *Bennion on Statutory Interpretation. A Code* (6th ed, LexisNexis, London, 2013) at 749.

⁷⁰ Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131. See, e.g. French CJ in *Fazzolari v Parramatta City Council* [2009] HCA 12, (2009) 273 CLR 603 at 619.

⁷¹ Of the limits of the operation of this principle, *Bennion* simply notes “a penal enactment will not be given a strict construction if other interpretative factors weigh more heavily in the scales”: above note 69 at 750. Where criteria tell in favour of interference with property rights, the result is a balancing exercise at 764.

⁷² Sean Brennan “Statutory interpretation and indigenous property rights” (2010) 21 PLR 239 at 240 (*italics in original*). See also a comment on this piece: The Hon Justice John Basten “Commentary on “Statutory interpretation and indigenous property rights” (2010) 21 PLR 263.

identification of the property rights extant at the time of the legislation is a vital step; one which is not always straightforward.

(2) Statutory interpretation in *Paki No. 1*

In the *Paki* case, the initial or gatekeeping issue - identification of the property rights extant at the time of the legislation - was significant. In the High Court, Justice Harrison did not make a formal finding as to whether the Coal-mines Act Amendment Act 1903 restricted common law rights; simply acknowledging the argument on behalf of the plaintiffs that s 14 “to the extent that it might exclude the ad medium filum presumption, is confiscatory and should be given a narrow or restrictive interpretation”.⁷³ Being satisfied however that s 14 was unambiguous, there was no need to consider what had been lost by the passage of the Act, and how that might affect its interpretation. In Court of Appeal, it seemed to go without saying that the Act interfered with common law rights, in particular rights to the bed of a river arising from the ad medium filum aquae presumption. Indeed the Court of Appeal regarded the principle that statutes restricting common law rights should be strictly construed as the “only real argument” against the conclusion reached on the basis of the text and purpose of the Act.⁷⁴

The only real argument to be made against this proposition [that the divisibility argument ... is quite inimical to the purpose of the CMAA 1903] is that the effect of the CMAA 1903 was confiscatory, in that it took away existing common law rights. Boast has trenchantly described s 14 as “one of the most expropriatory enactments in New Zealand legal history and a startling example of statutory overkill”: at 266. Normally, if there was ambiguity, one would read such legislation down. That said, the legislative purpose is paramount.

To analyse the method of the Supreme Court it is essential first to identify what the Court concluded about the extent of private property rights in the beds of navigable rivers before the legislation was passed. It is then necessary to consider what the Court believed the effect of the legislation to be – did it take private property rights? Then, if necessary, a further step would be to consider whether the Court regarded the Act as ambiguous or capable of more than one interpretation such that a strict or narrow construction of its confiscatory effect would be possible. I will consider each issue in turn.

⁷³ Harrison J at [84] cited *Attorney-General ex rel Hutt River Board v Leighton* [1955] NZLR 750 (SC) at 768 – 771 per Fair J. See, e.g., Fair J at 769: “The section is, as I have said, confiscatory; and it is trite law, as well as good sense, that the operation of such laws is not to be extended beyond their plain and unambiguous meaning.”

⁷⁴ At [83]. The work of Richard Boast cited by the Court is Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith (eds) *Maori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at 266.

The Chief Justice, writing for the majority, took as a starting point the assertion that private property in the beds of navigable rivers “could only be regarded as precarious following *Mueller*”.⁷⁵ She then argued that the Act “adjusted private property and the public interest according to whether the river was navigable or not”.⁷⁶ The majority did not explicitly address whether it regarded vesting the beds of all navigable rivers in the Crown as confiscatory concluding only that: “There was sufficient justification in North American case law concerning the beds of navigable rivers to counter charges of expropriation of private property”.⁷⁷

The majority then did not apply the interpretive presumption that statutes that take property rights should be narrowly construed. Instead it regarded the Act as adopting one thread of common law jurisprudence regarding title to the beds of rivers (that most favourable to the interests of the Crown).⁷⁸ Arguing then that the concept of navigability itself became the mechanism for the balancing of public and private rights under the Act, the majority may be seen as adopting a rights protective construction of the concept of navigability,⁷⁹ one which led in this case to the conclusion that the portion of the Waikato River adjoining the Pouakani lands was indeed non-navigable.

Whilst this method might be criticised for failing to front up to the loss of riparian owners’ opportunity to prove private title to the bed of navigable river following *Mueller*, it adopts an approach which in practice protects the rights of private property owners just as the principle against doubtful penalisation and the principle of legality might have. The role of the judge in the protection of private property rights is however less explicit, occluded in this case by the interpretive process focusing on the concept of navigability at common law, rather than on s 14 of the Act as a whole.

However in my view the approach taken in the reasons of Justice McGrath is, with respect, problematic. Justice McGrath notes the use of a deeming provision

⁷⁵ At [55].

⁷⁶ At [30].

⁷⁷ At [55].

⁷⁸ See also [50] where the majority states that s 14 established an ownership regime “which purported to have been in place at least from initial Crown grant”. I regard the majority as concluding merely that the interpretation of the common law reflected in the Act was open on the basis of the North American case law. It was, of course, not the only common law thread to be considered see, e.g. Stout CJ’s dissent in *Mueller* and above note 62 re *Yarmirr* and English common law. Cf. Tom Bennion “Rivers as navigable public highways – *Paki v Attorney*” *Māori Law Review* July 2012, 1 at 8: “All of the judges agreed that the 1903 Act was simply declaratory of certain public rights and not a taking of right.”

⁷⁹ A “whole of river” approach was found to be both under and over-inclusive: it would lead to property owners being deprived of rights in circumstances where no one could benefit from navigation, and a river which was of great importance for navigation in its lower reaches might not be classified as navigable on a proportionate basis at [68] - [69].

in s 14 of the Act - “the bed of [a navigable] river shall remain and shall be deemed to have always been vested in the Crown” - and continues.⁸⁰

This expression and affirmation of the view that beds of navigable rivers always vested in the Crown indicated that Parliament did not regard the legislation as confiscatory. Only explicit grants of title to the riverbed created “existing rights”. It follows that the legislation is not to be read as affecting property rights.

The question however is whether the use of the declaratory language and the creation of a legal fiction that the beds of navigable rivers had always vested in the Crown should lead to the conclusion that the legislation is not to be read as affecting property rights. *Mueller* did not find that the mid-point presumption would be rebutted in the case of all navigable rivers but – for some judges – that navigability might be a factor in the assessment of whether, on the facts, the grant included the bed to the mid-point. As Justice William Young states, “prior to the enactment of s 14, the owners of land adjoining navigable rivers had potential claims to ownership of the river bed”. Moreover, “there could be no certainty as to which of the approaches proposed in *Mueller* would prevail”.⁸¹ Prima facie, the statute took property rights.⁸²

If, prima facie, the statute takes property rights, the interpretive presumption is engaged. That the legislature did not wish the statute to be perceived as confiscatory⁸³ (a politically unpalatable prospect) should not displace the interpretive presumption. Neither, in my view, does the creation of a legal fiction that the Crown had always owned the beds of navigable rivers preclude recognition of the legislation as confiscatory for the purposes of interpreting the breadth of the taking. The court must guard against removal of common law rights on the basis of uncertain legislative authority.

⁸⁰ At [103](b).

⁸¹ At [162].

⁸² The alternative is to interpret the first part of the section “Save where the bed of a navigable river is or has been granted by the Crown” as including grants to the mid-point of the river under the presumption, unless the *ad medium filum aquae* presumption had been rebutted. None of the courts in the *Paki* litigation adopted this approach: see Elias CJ at [51] and William Young J at [166]. Some case law had suggested that “granted by the Crown” should be understood in this way: *Tait-Jamieson v GC Smith Metal Contractors* [1984] 2 NZLR 512: Savage J in *Tait-Jamieson* agreeing with obiter dicta of FB Adams J in *Attorney-General ex rel Hutt River Board v Leighton* [1955] NZLR 750 at 790. The alternate view accepted by the Supreme Court is that the beds of navigable rivers that were not expressly or by necessary implication granted to the adjacent land owners were vested in the Crown by s 14 of the Act: Hay J in *The King v Morison* [1950] 1 NZLR 247 at 267 and Fair J in *Leighton* at 770-773. See also *Small v Johanson* [2004] DCR 367.

⁸³ Justice William Young, noting the declaratory language of s 14, stated: “it is obvious that the legislature did not intend s 14 to be construed as confiscatory and thus read down” at [167].

In this case, these issues of method did not impact upon the outcome of proceedings. Nonetheless, I consider them important, particularly given Brennan's argument, discussed above, that the courts through their reasons for decision influence "the extent to which *the need for such interpretive principles to be applied* is readily perceived by others".⁸⁴ In my view, it is necessary for the court to reach an independent assessment of the extent of private property rights prior to the passage of the legislation and of the Act's effect on those rights. Only then can it be clear whether the presumption that an Act taking property rights should be narrowly construed is engaged. Whilst one may take Justice McGrath's view to be that where title to land did not explicitly include a grant to the bed, any rights were at best inchoate, this seems at odds with the decision in *Mueller* and the principle that citizens should be allowed access to the courts to prove and protect rights.

B *Paki No. 2*

The second of the Supreme Court's decisions in the *Paki* litigation was delivered in August 2014.⁸⁵ The Court had determined in *Paki No. 1* that the relevant segment of the Waikato River was non-navigable. In *Paki No. 2*, the Court considered whether the Crown had acquired title to the mid-point of the riverbed through its acquisition of riparian lands. Only then would the question of whether the Crown had breached legally enforceable obligations to the owners of the riparian land arise.

The case of both the Crown and the plaintiffs relied on two premises: first, that when the Native Land Court investigated title to the riparian land, the subsequent Crown grant to the riparian owners included the riverbed to the mid-point; second, that when the Crown acquired the riparian land the conveyance from the Māori owners included the riverbed. Neither of these premises was a focus for the parties, but the first was perhaps most obscure. It was however fundamental. As the Chief Justice noted:⁸⁶

The prior question is whether it is shown that the riparian owners whose titles were investigated by the Native Land Court had themselves the property in the riverbed upon which the presumption depends.

The parties' assumption that the original Māori owners of the riparian blocks took title to the mid-point of the river following the Native Land Court process rested upon the decision in *Re the Bed of the Wanganui River*.⁸⁷ That case had long been interpreted to determine that it was consistent with Māori custom that those who owned the riparian land were entitled also to the riverbed. In *Paki No 2*, the

⁸⁴ Brennan, above note 72, at 240 (italics in original).

⁸⁵ *Paki v Attorney-General* [2014] NZSC 118.

⁸⁶ At [24].

⁸⁷ [1962] NZLR 600 (CA).

Chief Justice carefully examined the long history of inquiries and litigation relating to the Whanganui River and concluded that *Re the Bed of the Wanganui River* is not authority for the proposition that the mid-point presumption reflects universal Māori custom. Said the Chief Justice:⁸⁸

I do not think that conclusion can properly be taken from the judgments of the Court of Appeal or the opinions of the Maori Appellate Court, which are specific to the Whanganui River and the investigations of title through the Court in relation to the riparian lands on that River.

Justices McGrath, William Young and Glazebrook, completing the bench of four delivering the judgment,⁸⁹ acknowledged that the general application of the mid-point presumption to the titles created by the Native Land Court was at least uncertain⁹⁰ or deserving of further argument;⁹¹ Justice Glazebrook stating that she would be “inclined to agree with the Chief Justice that *Re the Bed of the Wanganui River* is not authority for the proposition that the mid-point presumption reflects universal Maori custom”.⁹² *Paki No. 2* thus recognises the possibility that there may be unextinguished Māori customary title in the beds of non-navigable rivers; a possibility that some had assumed was precluded by the *Re the Bed of the Wanganui River* precedent.⁹³

This part considers the implications of this judgment, focusing upon title to the beds of non-navigable rivers rather than the judges’ obiter discussion of the obligations of the Crown to the Māori riparian owners. I then consider the Court’s engagement with history in this decision. I conclude by reflecting upon the Supreme Court as a forum for the resolution of New Zealand land law disputes.

(1) The implications of *Paki No. 2*

Whilst it was no part of the parties’ case in *Paki* that past understandings of *Re the Bed of the Wanganui River* should be revisited, it comes as no surprise that the Supreme Court has taken that step. The framing of the approved grounds of leave, together with some comments in the first *Paki* judgment,⁹⁴ signalled the

⁸⁸ At [18]. See also [136].

⁸⁹ Justice Chambers died before the judgment was delivered. The remaining judges decided under s 30(1) of the Supreme Court Act 2003 to continue the proceeding to judgment.

⁹⁰ William Young J at [212] found it was “at least uncertain whether the mid-point presumption generally applied to the titles created by the Native Land Court and, if so, whether it applied in relation to the Pouakani block and was not displaced”.

⁹¹ At [175]-[176], McGrath J acknowledged both views of the *Re the Bed of the Wanganui River* precedent and concluded that the court should not proceed further to determine the issues, given the absence of argument.

⁹² She did not however come to a concluded view at [317] - [319].

⁹³ See, e.g., *Paki No. 2* at [48].

⁹⁴ See, for example, *Paki No. 1* at [24]. See also William Young J’s impression in *Paki No. 1* at [133] that the judges in the majority in *Mueller* “were uncomfortable with the application of the [ad medium filum aquae] rule in New Zealand”, which William Young J concluded at [164] “had never

Court's preparedness to revisit this decision, despite the parties' pleadings. In my view, this is appropriate; to proceed on the basis of the assumptions suggested by the parties would have been truly to build a house upon the sand.⁹⁵ In an area of the law that can fairly be described as complex and uncertain, this would have been unhelpful.

Arguably also, following the decision of the Court of Appeal in *Attorney-General v Ngati Apa*⁹⁶ it was clear that general application of the mid-point presumption was undermined, just as the decision in *Re the Ninety Mile Beach* had been.⁹⁷ As the Chief Justice stated, "[t]reating application of the mid-point presumption as a rule of law is also inconsistent with the approach taken by the Court of Appeal in *Ngati Apa*".⁹⁸ Richard Boast describes the Wanganui River decisions, *Ninety Mile Beach* and *Kepea v Inspector Of Fisheries*⁹⁹ as resting upon the notion that "once a title was issued by the [Native Land] Court, the whole of Maori property rights with respect to that area were comprised wholly in the title leaving no scope for anything cognisable at common law".¹⁰⁰ This was undermined first in the case of customary fishing rights in *Te Weehi v Regional Fisheries Officer*,¹⁰¹ and then by *Ngati Apa* in respect of the foreshore – like reasoning on the basis of *Re the Bed of the Wanganui River* could not stand. Instead, both *Ngati Apa* and *Paki* stress that whether customary property subsists is a question for the Māori Land Court for determination on the facts.¹⁰²

Speaking of the Coal-mines Act Amendment Act 1903, Richard Boast noted that there had been no move to clarify the law, "presumably because the vagueness

been a good fit for the circumstances of New Zealand" given, among other things, the history of Māori customary ownership.

⁹⁵ On this point, see Elias CJ in *Paki No. 2* at [29].

⁹⁶ [2003] 3 NZLR 643.

⁹⁷ See *Paki No. 2* at [48]-[49], [137] and [142] - the decision in *Ngati Apa* in 2003 appears not to have impacted upon the litigation strategy which seems to have been decided in 2002, though proceedings were not filed until 2004. On the other hand, given the plaintiffs are descendants of the original riparian owners, an application to the Māori Land Court for investigation of title to the riverbed carries some risk, bearing in mind the possibility that a different or larger grouping may be found to hold the bed in accordance with Māori custom (see fn 86 in *Paki No. 2* re competing claims to that portion of the riverbed). If indeed the Māori Land Court finds that it is consistent with the custom of this particular area that rights to the bed would go with the riparian land, the plaintiffs may well find themselves arguing afresh that the Crown breached a fiduciary duty to Māori in acquisition of the riparian land. The plaintiffs may also argue that the mid-point presumption was rebutted in the circumstances of the transfers from Māori to the Crown (see e.g. *Paki No. 2* at [23]).

⁹⁸ At [142].

⁹⁹ [1965] NZLR 322.

¹⁰⁰ Richard Boast, *Foreshore and Seabed*, above note 48 at 21.

¹⁰¹ [1986] 1 NZLR 680 (HC).

¹⁰² See *Paki No. 2* at [142]; *Ngati Apa* at [8]-[12]. But note also that the jurisdiction of the High Court to determine any question relating to the particular status of land is not affected by the Te Ture Whenua Māori Act 1993, see s 131(3) Te Ture Whenua Māori Act 1993.

and imprecision of the law is useful to governments”.¹⁰³ In the *Paki* cases, as in *Ngati Apa*, the Court has examined the assumptions underlining the Crown’s claims, and carefully dismantled them. *Paki No. 2* saw close attention to the *Re the Bed of the Wanganui River* decisions to ascertain their reach and significance, and a reframing of the *ad medium filum aquae* “rule” as a conveyancing presumption which application turns upon the circumstances of the grant.¹⁰⁴

The practical consequence of the Court’s decision in *Paki No. 2* is that it is now possible for the plaintiffs and others to apply to the Māori Land Court for investigation of title to the non-navigable segments of the bed of the Waikato River. Whilst both the Māori Land Court and the High Court have jurisdiction to determine the status of any parcel of land,¹⁰⁵ the Māori Land Court has exclusive jurisdiction to investigate the title to Māori customary land.¹⁰⁶ As discussed in *Ngati Apa*,¹⁰⁷ should the Māori Land Court determine any land is Māori customary land, it would have two options: the Court may make a status declaration under s 131 of the Te Ture Whenua Māori Act or a vesting order under s 132 of the Act. A vesting order changes the status of customary land to Māori freehold land and the order is then registered under the Land Transfer Act 1952.¹⁰⁸ A status declaration would not necessarily have those consequences however; indeed it was suggested by Justice Gault in *Ngati Apa* that few customary interests in the foreshore and seabed would be capable of supporting a vesting order and an estate in fee simple, though Boast suggests this “may well have been overstating the position”.¹⁰⁹ The Chief Justice in *Paki No. 2* suggests a status declaration may be appropriate where conversion of customary interests into fee simple title “may cut across the complexities of overlapping customary interests”.¹¹⁰

In this regard, in *Paki No. 2* the Chief Justice returned to a possibility mooted in *Ngati Apa*. In *Ngati Apa* she suggested that, where the foreshore and seabed contained valuable tribal resources,¹¹¹ the property may have been a tribal one whereas contiguous land, on which were located habitations and cultivations, might have been more susceptible to ownership by an individual or smaller family

¹⁰³ Richard Boast, *Foreshore and Seabed*, above note 48 at 20.

¹⁰⁴ At [60].

¹⁰⁵ Te Ture Whenua Māori Act 1993, s 131(1) and 131(3).

¹⁰⁶ Te Ture Whenua Māori Act 1993, s 132(1).

¹⁰⁷ At 658-659 per Elias CJ and at 696 per Tipping J.

¹⁰⁸ Te Ture Whenua Māori Act 1993, s 139.

¹⁰⁹ At 673 per Gault J. Richard Boast, *Foreshore and Seabed*, above note 48 at 97.

¹¹⁰ At [143].

¹¹¹ For example, fisheries, see *Paki No. 2* at [102] per Elias CJ citing Sir Harold Johnston of the 1950 Royal Commission on Claims Made in Respect of the Wanganui River, who argued against the riverbed vesting in riparian owners considering the circumstances, particularly the fisheries not contiguous to land interests. See also *Paki No. 2* at [113]-[114].

group.¹¹² This suggestion is supported by a number of considerations. First, the Chief Justice notes that the Native Land Court's adoption of occupation as the foundation for the award of title to individual Māori owners may well have given rise to the "neglect of wider tribal interests or more limited individual use rights" in rivers and lakes.¹¹³ Second, in the Whanganui proceedings in particular, though the Māori Appellate Court found that nothing in the evidence suggested a separate take to the river and the land on its banks, this conclusion has been strongly criticised by the Waitangi Tribunal.¹¹⁴ Finally, the Chief Justice referred to the decision of Judge Acheson in relation to Lake Omapere as an example of the recognition of customary interests supporting tribal title independent of ownership of the riparian lands.¹¹⁵

Many issues remain unclear. For example, Justice William Young asserts:¹¹⁶

...it would be difficult and perhaps impossible now to identify customary owners in relation to the river other than the owners of the riparian land recognised by the Native Land Court.

In my view, this issue and others are best left to be determined on the facts in the Māori Land Court. Though it is not yet known how the Māori Land Court will exercise its jurisdiction, as discussed above, the Court has a number of options under the statute and, barring legislative intervention, will have the opportunity to develop its jurisprudence case by case.

(2) The Court's engagement with the past

This note has focused on the land law aspects of the case, rather than the obiter discussion of the potential for the descendants of the original riparian owners to claim breach of fiduciary duty against the Crown.¹¹⁷ However, in examining briefly the Court's engagement with the past, I consider how the judges grapple with the construction and application of an historic legal duty and, in particular, how historical research may be used to inform the context within which the legal issue is determined.

¹¹² See *Ngati Apa* at [88] - [89] citing Norman Smith *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 89-94, though Smith's discussion of "cultivations and kainga" and "waste or uncultivated lands" at 92 - 94 is perhaps most relevant. Discussed in *Paki No. 2* at [143]; see also [65].

¹¹³ At [71]. Further, as discussed by William Young J at [237] - [239], the Waitangi Tribunal in *The Whanganui River Report* (Wai 167, 1999) at 277 argued that the "operations of [the Native Land] court made it impracticable and impossible for Maori to claim for the whole tribal estate".

¹¹⁴ In *The Whanganui River Report* (Wai 167, 1999), the Tribunal argued that the Court misconstrued the naming of more remote ancestors for the river than those specified for the riparian lands. The Tribunal stated at 276 that in Māori terms this signified the indivisibility of the river: "that the river should be held for all".

¹¹⁵ At [129] citing *Lake Omapere* (1929) 11 Bay of Islands MB 253

¹¹⁶ At [208].

¹¹⁷ For discussion of this issue see Karen Feint "Sole Arbiter of its Own Justice? The Courts' Role in Supervising the Crown-Māori relationship" in *Scrutinising the Actions of Government* (New Zealand Law Society Continuing Legal Education, Wellington, 2014) 39 at 49-60.

Juridical histories are often criticised by academic historians as ‘presentist’ – concerned not with understanding the past, but with passing judgment on it. Judicial concern with the demands of the present is however readily explicable; judges engage with historical materials in order to resolve a dispute between parties. The past is pressed into the service of the present to inform the resolution of current problems. Indeed, as Paul McHugh has argued, the common law “places a premium on the past” whether it “be custom and usage or the precedent value of case law” but it engages with a world McHugh describes as “the common law’s past”.¹¹⁸

Speaking of Aotearoa New Zealand’s “muted history wars”, which focused on reliance on ‘juridical histories’ in Waitangi Tribunal reports,¹¹⁹ David Williams has argued that both juridical and contextualist histories have validity. He continued:¹²⁰

What is important is that historians (and judges) should identify carefully and clearly exactly how they have undertaken their work and what methodology they have employed.

To this end, Williams was critical of the statement in the reasons of Chief Justice Elias in *Ngati Apa* that the decision reached was “not a modern revision, based on developing insights since 1963” but a reassertion of the correct legal position following a misstep in *Re the Ninety Mile Beach*.¹²¹ Whilst Williams welcomed the decision in *Ngati Apa*, he characterised it as “new law” and asserted that, “from a legal history point of view it is not convincing to say that it [the “old law”] was ‘wrong’ at the time it was first pronounced”.¹²²

The historical issues raised in the *Paki No. 2* judgment are less vexed than those presented by *Ngati Apa* (in which perhaps the Court could not have avoided historiographical debates surrounding the native title doctrine) but are fascinating nonetheless. Justice William Young, in reasons concerned perhaps above all with questions of time, addresses candidly the problems presented by the plaintiffs’ claim. The Judge considers the issue of the Crown’s duty in equity to the original owners of the riparian land in some depth, framing it as a question of “whether a requirement of retrospective justification applies in respect of

¹¹⁸ Paul McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand” (2002) 52 UTLJ 69 at 74.

¹¹⁹ See e.g. W H Oliver “The Future Behind Us. The Waitangi Tribunal’s Retrospective Utopia” in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss. Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001).

¹²⁰ David V Williams “Historians’ context and lawyers’ presentism: Debating historiography or agreeing to differ” (2014) NZ Journal of History (forthcoming).

¹²¹ At [13].

¹²² David V. Williams *A Simple Nullity? The Wi Parata case in New Zealand law & history* (Auckland University Press, Auckland, 2011) at 208.

purchases by the Crown of the Pouakani blocks”.¹²³ He concludes that existing authorities and legal principles do not assist the plaintiffs’ claim, and that an extension of the current jurisprudence would be inappropriate. His reasons for this conclusion begin, in effect, by acknowledging the past is a foreign country;¹²⁴ the case “grounded in circumstances incommensurably different from current conditions”.¹²⁵ He continues:¹²⁶

Secondly, I think there would be a distinct element of overreaching if the Court were to extend existing legal principles and to apply the results – and, in particular, a requirement of retrospective justification – to the social and economic conditions of the 1890s for which I certainly have no real feel.

Yet elements of Justice William Young’s reasoning appear at odds with his admission of a lack of familiarity with the period. Earlier in the section, speaking of the transactions between the Crown and the riparian land owners the Judge stated: “They did not have to sell if the price offered was not acceptable, albeit that this would likely result in partition if other owners did wish to sell.”¹²⁷

Justice William Young’s statement is interesting because it speaks so directly to the reasons of Chief Justice Elias.¹²⁸ The Chief Justice referred extensively to historical materials, relying upon these materials to inform the context both to the existence of any equitable duty on the Crown and to the question of whether lapse of time would be a bar to the claims.¹²⁹

In summary, the relevant context here is likely to include the recognition of Maori property according to their own custom both at common law and under the Treaty guarantee. It includes the fact that the Crown at the relevant times had a monopsony on purchases of land from the Pouakani vendors and the fact that these were early transactions put through the Native Land Court, in circumstances of some controversy and dispute. ...

In this section, the Chief Justice goes on to discuss the political trust theory and the Native Land Act 1909 each preventing Māori recourse to the courts for the recognition and vindication of customary property interests.

¹²³ At [258].

¹²⁴ This is part of the well-known opening line of LP Hartley’s novel *The Go-Between* (H. Hamilton, London, 1953).

¹²⁵ At [285].

¹²⁶ At [286].

¹²⁷ At [282]. William Young J does accept the Chief Justice’s view that the Crown was, at the time, effectively a monopsony purchaser: Elias CJ at [2]; William Young J at [261].

¹²⁸ For a further interesting exchange see William Young J at [249] – [253] where in a section entitled “What were they thinking?” the Judge concludes at [253], as had the High Court and Court of Appeal, that “there can be no certainty as to contemporary understandings as to the effect on the title to the riverbed of processes which occurred between 1887 and 1899”. The Chief Justice however notes at [66] that the application and rebuttal of the presumption does not turn in all cases on close inquiry as to the thinking of the individuals involved at the time but may be rebutted on objective assessment (as indeed it was in *Mueller*).

¹²⁹ At [160].

The reasons of the Chief Justice thus contextualise Justice William Young's assertion that riparian owners were free not to sell. Citing leading academic treatments of the Native Land Court process and the work of the Waitangi Tribunal, the Chief Justice notes that the operation of the Court itself set up pressures to sell, and that aspects of these general patterns may be identified in the Pouakani case.¹³⁰ She then argues that equity has displayed heightened concern in cases showing like features, for example those of bargains with expectant heirs.¹³¹ So the suggestion for the yardstick against which the conduct of the Crown may be measured is that developed in cases of expectant heirs of the 18th and 19th century who, finding themselves in straitened circumstances, borrowed against their expected inheritance.¹³²

I would argue then that it may not be a simple matter for judges engaging with the past to identify clearly how they have undertaken their work and what methodology they have employed, at least not by reference to a historical contextualist and legal 'presentist' binary. In part I think this is because, as the past is at the heart of the common law, judges' relationship with historical materials is entangled with the fundamentals of their approach to judicial method. Indeed this seems at the heart of Williams' critique of the *Ngati Apa* "not a modern revision" aside – it may be read as a caution against misrepresenting history to obscure aspects of legal method that are better addressed directly; a call to the bench to own up to "new law" and defend openly its justice.

The correspondence of the past, present and future in law is, however, complex. Speaking of law's relationship with prevailing political thought, Janet McLean has written.¹³³

Because the common law always looks backward and forward at the same time and legal concepts speak of the present, future, and the past, it often takes a very long time for the law to respond to major political change. The ideological timeframe in which law operates sometimes tracks prevailing political thought but often has its own distinct pace and rhythms; something that I have called "law time"

Aspects of the method of the Chief Justice speak well, I think, to McLean's insight that "legal concepts speak of the present, future, and the past". The Judge's contextualisation of the transfers between Māori and the Crown drew upon academic legal histories. When it came to suggesting the standard upon which

¹³⁰ At [42]. See also at [40] discussion of the practice of sales being agreed before the Native Land Court investigation was complete; a practice evident in the Pouakani example.

¹³¹ At [42].

¹³² See, for example, *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 28 ER 82 cited in GE Dal Pont *Equity and Trusts in Australia* (5th ed, Thomson Reuters, NSW, 2011), which the Chief Justice cites at fn 80 of *Paki No. 2*.

¹³³ Janet McLean "Ideologies in Law Time: the Oxford History of the Laws of England" (2013) 38 *Law and Social Inquiry* 746 at 747.

the Crown's conduct might be assessed however, the Chief Justice referred to the law of unconscionable bargains, particularly the expectant heir cases. By locating the relationship between the present legal problem and the common law past at the level of principle, the method can be viewed as continuing the use of the common law as a "timeless" resource, albeit one which relies upon a careful understanding of context to identify appropriate legal principle.¹³⁴

III Conclusion

Whilst this note agrees with some aspects of the Supreme Court's approach to these land law cases, and takes issue with others, there is, I think, a larger point to be made. One can well imagine that, after the details of these first judgments are forgotten, the legacy of the Supreme Court's first ten years will be to have cemented its role as the final court of appeal for Aotearoa New Zealand. The decision to cut ties with the Privy Council was not popular with some at the time of the passage of the Supreme Court Act 2003 yet discussion of this small cluster of land law cases - *Regal Castings v Lightbody* and the *Paki* judgments – highlights why this change was, in my view, so desirable. First, given the sum at stake in *Regal Castings*, the appeal may never have made its way to London. I would argue that the establishment of the Supreme Court of New Zealand has promoted access to justice. Second, with respect, these cases and others highlight the depth of experience and expertise that the bench brings to the resolution of New Zealand land law disputes. In cases engaging the principles of the Torrens system, questions of New Zealand legal history and the relationship between the Crown and Māori, the knowledge judges have gained on the bench, in their earlier professional careers, and as a part of the New Zealand community, in my respectful view, contributes to good decision-making. The relationship between land and peoples is at the heart of our community; it seems right that those who exercise judgement on these issues should come from amongst us.

¹³⁴ The Chief Justice's approach to the common law as a capacious resource, sufficiently generous to respond to disparate legal challenges is, I think, also reflected in her reasons in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. In that case, the Judge disagreed with the conclusion of the Court of Appeal that Tūhoe burial custom could not be recognised by the common law as it permitted a party simply to take the body of the deceased, which "authorises the use of force and allows the stronger party to win": *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [163]. The Chief Justice instead identified the "underlying values in burial (of connection with whenua and whakapapa)" as those to be taken into account in New Zealand law: at [96].