I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Land Court of New Zealand
Waiariki District

A20190011546

WĀHANGA *Under*	Sections 18(1)(h), 18(1)(i), 131 and 132 of Te Ture Whenua Maori Act 1993
MŌ TE TAKE *In the matter of*	Pouakani River Bed
I WAENGA I A *Between*	MERCURY NZ LIMITED Te Kaitono *Applicant*
ME *And*	TUAHUROA TAMATI CAIRNS, TOHU RANGIKAUWHATA HAA, TAUHOPA TE WANO HEPI, TORIWAI ROTARANGI AND ANTHONY RALPH MATARA ROTARANGI Ngā Kaitono Tuatahi *First Respondents*
ME *And*	THE POUAKANI CLAIMS TRUST NO.2 Te Kaiurupare Tuarua *Second Respondent*
ME *And*	THE ATTORNEY-GENERAL Te Tangata Whaitake *Interested Party*

Nohoanga: *Hearing*	14-15 December 2021 (Heard at Rotorua)
Kanohi kitea: *Appearances*	J Hodder QC and K Grant for Mercury NZ Ltd I Millard QC, M Smith, A Sykes for Respondents D Ward and M McMenamin for Attorney-General K Feint QC for Te Kotahitanga o Ngāti Tuwharetoa J Cole for Raukawa Settlement Trust
Whakataunga: *Judgment date*	1 July 2022

TE WHAKATAUNGA Ā KAIWHAKAWĀ C T COXHEAD
Judgment of Judge C T Coxhead

Proceedings continued overleaf

Proceedings continued

ME	TE KOTAHITANGA O NGĀTI TUWHARETOA
And	Te Tangata Whaitake
	Interested Party
ME	RAUKAWA SETTLEMENT TRUST
And	Te Tangata Whaitake
	Interested Party

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Hei tīmatanga kōrero
Introduction

[1] Mercury NZ Ltd (Mercury) applies to strike out an application of Tuahuroa Cairns and others, together with the Pouakani Claims Trust No.2 (collectively, Pouakani).[1] The Attorney-General supports Mercury's application for a strike out, which is opposed by Pouakani.

[2] The Pouakani application relates to riverbed land used by Mercury for hydropower generation in the Pouakani area. It seeks a determination by the Māori Land Court that the land under the three hydro dams and hydro lakes in the Pouakani area of the Waikato River is Māori Customary land. Declarations are also sought that the current titles held by the Crown or Mercury are held in a fiduciary capacity for Pouakani hapū, and that Pouakani have an interest in the water that flows over the riverbed at Pouakani.

[3] The Pouakani claim is opposed by the Attorney-General and Mercury, who operates the hydroelectricity production at the three dam sites (Whakamaru, Maraetai and Waipapa) in this claim area. The Crown initially began the hydro projects on the Waikato River and has since divested these to private or mixed ownership model enterprise.

[4] Mercury seeks to strike out the Pouakani application on the basis that the titles to the land under the dams are indefeasible and that this Court does not have jurisdiction to consider fiduciary claims over General land or Crown land, nor jurisdiction to determine interests in water.

He kōrero whānui me te hātepe ture o te tono nei
Background and procedural history

[5] It is not necessary to provide a lengthy background. However, to put the decision into some context, Pouakani's legal claims to the river commenced some 34 years ago on 27 March 1987, when John Hanita Paki lodged a claim with the Waitangi Tribunal on behalf of

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[1] The applicants are Tuahuroa Tamati Cairns, Tohu Rangikauwhata Haa, Tauhopa Te Wano Hepi, Toriwai Rotarangi and Anthony Ralph Matara Rotarangi, being kaumatua representing the hapū of the Pouākani area. These hapū are Ngāti Wairangi, Ngāti Moe, Ngāti Korotuohu, Ngāti Ha, Ngāti Hinekahu, Ngāti Rakau, Ngāti Whaita, Ngāti Parehinu, Ngāti Parehunuku, Ngāti Pakau, Ngāti Te Kohera and Ngāti Moekino. The hapū of Pouākani affiliate to Ngāti Raukawa, Ngāti Maniapoto, Tūwharetoa and Te Arawa. Also bringing an application is Pouākani Claims Trust No.2, which is a charitable trust representing the Pouākani people.

himself, the trustees, and beneficial owners of Titiraupenga and Pouakani B9B Trusts. In 2000, Mr Paki applied to the Māori Land Court for investigation of title to the bed of the Waikato River adjoining the Pouakani Blocks on the basis that it remained land held by the hapū of Pouakani under their customs and usages. Some 21 years later Pouakani find themselves back in the Māori Land Court after various proceedings in the High Court, Court of Appeal and the Supreme Court.

[6] The Supreme Court issued decisions in 2012 and 2014, being *Paki v Attorney-General (No.1),*[2] *and Paki v Attorney-General (No.2)*.[3] A summary of the issues before the Court in those proceedings is set out in paragraphs [5] to [11] of *Paki No.1.* The main issue considered by the Supreme Court in *Paki No.1* was whether the Waikato River at Pouakani was considered navigable (deep and wide enough to afford passage to watercraft). The Crown's assumption of ownership of the riverbed was based on the Waikato River as a whole being considered navigable, as this would vest the riverbed in the Crown under the Coal Mines Amendment Act 1903 and its successor statutes (Coal Mines Act). The majority of the Supreme Court held that the Waikato River at Pouakani was not navigable and therefore, the Coal Mines Act was not a basis for Crown ownership of the riverbed lands.

[7] In *Paki No.2*, the Supreme Court considered whether, since the Coal Mines Act did not apply, the Crown had instead gained title to the riverbed at Pouakani through the *ad medium filum aquae* (to the middle line of the river) presumption and, if so, whether this breached legally enforceable obligations to Pouakani hapū. Chief Justice Elias, in her decision, noted that the status of the riverbed is undetermined and may be investigated by the Māori Land Court to establish whether it continues as unextinguished customary land.

[8] The Pouakani applicants filed their current application, together with a statement of claim, in the Māori Land Court on 19 December 2019.

[9] Mercury joined the proceedings on 20 February 2021, followed by the Attorney-General on 28 February 2021.

[10] An amended statement of claim was filed on 1 April 2021.

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2 *Paki v Attorney-General (No.1)* [2012] NZSC 50.
3 *Paki v Attorney-General (No.2)* [2014] NZSC 118.

[11] On 29 June 2021, Mercury applied to strike out the proceedings.

[12] I heard the interlocutory strike out matter on 14 and 15 December 2021 and, at the conclusion of those hearings, I reserved my decision.[4]

Te tono a Pouakani
Pouakani's application

[13] The Pouakani applicants seek an order from the Court declaring the bed of the Waikato River at Pouakani to be Māori customary land. Also sought is recognition that Pouakani hapū are the owners of the riverbed and the river, to the extent that it flows over the riverbed at Pouakani.

[14] Pouakani hapū submit that they have retained continuous ownership under tikanga Māori of the Waikato River at Pouakani.

[15] The Crown had previously asserted ownership of the riverbed based on the Coal Mines Act and the *ad medium filum aquae* presumption. However, such bases have now been shown to be wrong.[5] Therefore, the applicants contend that the customary title still exists.

[16] Pouakani therefore seek:

(a) A status order that the riverbed at Pouakani is Māori customary land; and

(b) An order vesting the riverbed at Pouakani in Pouakani hapū as owners; or

(c) In the alternative, a declaration that, but for the issue of the Land Transfer titles, the riverbed at Pouakani would be Māori customary land; and

(d) A declaration that the Crown and Mercury hold the titles to the riverbed in a fiduciary capacity for Pouakani hapū; and

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4 269 Waiariki MB 297-365 (269 WAR 297-365); 272 Waiariki MB 75-115 (272 WAR 75-115).
5 See *Paki v Attorney-General (No.1)*, above n 2.

(e) A declaration that Pouakani hapū are the owners of the river water to the extent that it flows across the riverbed at Pouakani.

Te tono whakakore a Mercury
The strike out application

[17] Mercury applies for an order that the application be struck out in so far as it relates to:

(a) Land under fee simple title owned by Mercury or in which Mercury has beneficial interest, as the titles are indefeasible;

(b) Mercury's easements, as these are also indefeasible;

(c) The fiduciary claim, as the Māori Land Court does not have jurisdiction to inquire into fiduciary claims for General or Crown land; and

(d) The ownership of water claim, as the Māori Land Court is again without jurisdiction.

Ngā kōrero a Mercury
Submissions for Mercury

[18] Mr Hodder, for Mercury, submits that the applications of Pouakani cannot succeed. He says the claim of customary land over the lands subject to titles and easements is untenable at law due to the titles being indefeasible. Further, the fiduciary claim cannot succeed, as the Māori Land Court has no jurisdiction to inquire into fiduciary claims over either General land or Crown land and the Māori Land Court has no jurisdiction to make declarations about the ownership of water.

[19] I set out the submissions for Mercury under each of these headings.

Indefeasibility of titles and easements extinguishing customary title

[20] Counsel submits that the primary issue is whether the Māori Land Court can declare land registered under the Land Transfer Act 2017 (LTA) to be Māori customary land. Mercury submits it cannot.

[21] Mercury holds the land under the Maraetai and Waipapa dams in fee simple title. The Crown has title of Whakamaru dam although this is, Mercury submits, beneficially owned by Mercury as there is an agreement in place for it to be transferred to Mercury. Mercury submits they have perpetual operating easements over the hydro lakes above these three dams.

[22] Mercury does not dispute the findings of the Supreme Court in *Paki* and takes no position as to whether the riverbed was vested in the Crown under a mistake of law.[6] However, they argue that the Crown gave Mercury's predecessor warranties that it had sole and exclusive ownership of the land and full right and authority to sell.

[23] Regardless, counsel submits that registration under the LTA has cured any underlying defect in the title. Therefore, any ongoing claim would be outside the jurisdiction of the Māori Land Court and would be a matter for the Waitangi Tribunal.

[24] Mercury submits that land can have only one status. The subject land is General land (Waipapa and Maraetai dams) and Crown land (Whakamaru dam). Registration attracts indefeasibility and customary title is extinguished by registration. Therefore, land which is General land or Crown land cannot still be Māori customary land per *Te Roroa*.[7] Mercury took no position on the customary title claim to the riverbed under the easements and noted that, even if that land were shown to be customary land, the easements would still stand.

[25] Furthermore, the Māori Land Court has no jurisdiction to change General land or Crown land to Māori customary land. Māori customary land is land held in accordance with tikanga Māori. Te Ture Whenua Māori Act 1993 (TTWMA) does not create it, retrospectively or otherwise, and once extinguished Māori customary title cannot be reclaimed.

[26] It was submitted that indefeasible title under the Torrens System is captured in s 51(1) of the LTA and on registration an owner obtains title that cannot be set aside. The system is for title by registration, as opposed to registration of existing title. This indefeasibility is unaffected by void instruments. Therefore, although the Crown may have granted title based

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6 *Paki v Attorney-General (No.1)*, above n 2.
7 *Te Roroa Whatu Ora Custodian Ltd v Kereopa* [2012] NZHC 1052.

on the Coal Mines Act in error, once the title was registered, it became indefeasible. As the easements are registered under the LTA, these are also indefeasible.

[27] Mercury accepts that there must be clear evidence that customary title has been extinguished, and that this can be done through sale to the Crown, investigation of title, legislation, or other lawful authority. Counsel argues that registration under the LTA is an example of a lawful authority, the act of registration thereby extinguishing customary title. He goes on to cite authorities that concur with this reasoning.[8]

[28] Mr Hodder submits that registration has the effect of extinguishing estates and interests less than full title and notes that the exceptions to indefeasibility do not apply in this case.

Fiduciary claim

[29] Counsel submits that the Māori Land Court does not have jurisdiction to make orders regarding constructive trusts over General or Crown land. He cites *Attorney-General v Maori Land Court*, where the Court of Appeal held that "[t]he Maori Land Court has never had a general power to make orders, other than declarations of status, in relation to [General or Crown] land."[9]

[30] Mr Hodder also submits that the fact Mercury's predecessor was a bona fide purchaser for value of the land would defeat any fiduciary claims over it. Mercury had no knowledge of a prior interest in the land, in terms of the knowledge required for LTA fraud under s 6. Mercury was entitled to rely on the Crown warranty as to the Crown's right to sell the land. Mr Hodder submits that Mercury's position must be assessed separately to that of the Crown and that Crown actions cannot be imputed to Mercury.

Water claim

[31] Mercury notes that the water claim was added to the amended statement of claim after the initial application was filed. Mr Hodder contends that the Māori Land Court has

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8 *Te Roroa*, above n 7; *Warin v Registrar-General of Land* HC Whangarei CIV-2006-488-0245, 31 October 2008; *Frazer v Walker* (1967) 1 AC 569 (PC).

9 *Attorney-General v Maori Land Court* [1998] NZCA 247.

no jurisdiction to make declarations of ownership over water and cannot grant title to water. He also notes that the Court has not made a ruling that customary title could include water.

[32] Mr Hodder submits that TTWMA does not contemplate determining ownership or interests in water and the definition of land in the Act does not stretch to inclusion of water. In addition, no one owns the water flowing past or over their land.

[33] Mr Hodder notes that the claim of customary land over the riverbed and the claim over the water are inextricable; if the riverbed claim fails, then the water claim must also fail.

Ngā kōrero a te Rōia Matua o te Karauna
Submissions for the Attorney-General

[34] Mr Ward, for the Attorney-General, submitted that the proceedings should be struck out based on the indefeasibility of the fee simple titles and easements. He said that the relief by way of a declaration of status or ownership of the riverbed but for the LTA registration of title was not a remedy available to the Court. He also agreed with Mercury that the fiduciary claim and the water claim should be struck out for want of jurisdiction. Counsel contended that the only part of the claim that could survive strike out was the claim over land other than that in fee simple, including under the easements.

[35] Mr Ward submitted that registration creates indefeasible title, which extinguishes customary interests. Therefore, the fee simple titles cannot be Māori customary land but became Crown land (in the case of all three dams) and then General land (in the case of Waipapa and Maraetai) on registration and subsequent transfer. Counsel also submits that the land under the hydro lake easements is Crown land.

[36] At the time the titles were issued (2002-2003), the Crown believed it had the right to the riverbed by way of the Coal Mines Act or by *ad medium filum aquae* in owning the adjoining land. It was not until the first *Paki* decision in 2012 that the Crown was told that the Coal Mines Act did not apply to that stretch of the Waikato River.[10] In 2019, the Crown was given notice that the applicants claimed the riverbed as Māori customary land; prior to

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10 *Paki v Attorney-General (No.1)*, above n 2.

that, the applicants had claimed the land under *ad medium filum aquae*. The Crown and Mercury already had titles by this stage.

[37] Counsel submits that the Māori Land Court cannot go behind the LTA register, and even if it could, there has been no fraud such that indefeasibility does not apply. Knowing of a claim to the Waitangi Tribunal does not equate to knowledge for establishing fraud and is thus not an exception to indefeasibility. Counsel says the objectives of TTWMA cannot be a reason to override the effect of registration under the LTA. The LTA must necessarily trump TTWMA due to the need for rights to property and security of title to be paramount.

[38] Counsel agrees with Mercury that any claim cannot affect the easement interests over the three hydro lakes.

[39] Mr Ward contends that the Māori Land Court has no jurisdiction over hypothetical circumstances, being the idea that, but for registration of the title, the land would be Māori customary land. Likewise, he submits that there is no jurisdiction in this Court for a fiduciary claim over General land or Crown land, nor for a claim regarding ownership of water. The Court can consider any right, title, estate, or interest only in relation to Māori freehold land under s 18(1)(a). It does not have equivalent powers over General land or Crown land.

[40] Therefore, the Attorney-General endorses Mercury's application for strike out.

Ngā kōrero a Pouakani
Submissions for Pouakani

[41] Mr Millard, for Pouakani, accepts that this Court has the power to strike out the claim. He also notes that Pouakani do not allege that fraud, as defined in the LTA, has occurred in relation to the Crown obtaining titles over the riverbed lands at Pouakani. However, counsel submits that the application should not be struck out as, even if the titles are indefeasible, a hearing is still needed for these matters. The ownership of the riverbed land under the easements needs to be ascertained, even if the easements themselves cannot be disturbed.

[42] Counsel submits that indefeasibility of titles, issued (on an erroneous basis) under the LTA, alone does not defeat Māori customary title, at least under the provision of TTWMA. In other words, Māori customary title has not been extinguished by the issuing

of title under the LTA solely. Pouakani submit that the cases relied on by Mercury and the Crown are distinguishable and, unlike its predecessor, the LTA is subject to, in effect, the relevant provisions of TTWMA.

[43] In the alternative, Pouakani submits that the Court has ongoing jurisdiction to decide if the land was Māori customary land until the issue of the LTA titles and who the customary owners were. They say such a finding is necessary for any resumption claim in the Waitangi Tribunal or a compensation claim under the LTA.

[44] It was submitted that the land under the Whakamaru Dam is still Crown-held and therefore this Court should determine whether the Crown is free to transfer the ownership to Mercury, where it knows the title was issued on an erroneous basis and has knowledge of the claim by Pouakani. Further, *ad medium filum aquae* works against the Crown at Whakamaru as there are islands in the river clearly owned by Māori and marked as such on the survey office plan. Those deprived of an interest in land can make a claim for compensation under the LTA, however, this is an inadequate remedy for Pouakani.

[45] Mr Millard further submits that the act of the Crown issuing titles over the riverbed under the dams, despite knowing there were claims to that part of the riverbed, created a fiduciary duty to the customary owners. Counsel says the Court has jurisdiction to determine the fiduciary claim and whether, notwithstanding the change in status effected, the land is retained in equity in the hands of the Māori owners. Pouakani dispute that Mercury was a bona fide purchaser for value.

[46] Counsel submits that the Māori Land Court has previously made determinations over rights to water and the Court's ability to inquire into customary water rights is not ousted by either the definition of land in TTWMA, or the concurrent High Court jurisdiction. It was also contended, per Cooke J's reasoning in *Te Ika Whenua*, that customary rights apply equally to land and water.[11] Customary land is held in accordance with tikanga Māori. The tikanga for Pouakani is that the river is and was treated as a whole entity in their rohe, and not separated into beds, banks and waters. Therefore, Māori customary land could be understood to include waters on or flowing over that land. Mr Millard asserts that the Court's

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[11] *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 (CA).

jurisdiction over Māori customary land is unlikely to be less than that for Māori freehold land, for which orders granting rights over water have been made.

[47] Counsel noted that Mercury and the Crown do not dispute the titles were issued under an erroneous legal basis, being the Coal Mines Act, per the Supreme Court findings in *Paki (No.1)*.[12]

[48] Pouakani submit that the strike out application should be rejected as the Māori Land Court is the best Court to determine these issues. There are aspects which, if heard in the High Court, would need to be referred back to the Māori Land Court for determination, which is not a sensible course of action per Elias CJ's comments in *Ngāti Apa*.[13] Counsel noted that the novel arguments and constitutional elements of this claim make it important that the matter not be struck out. This is a developing area of law which has tikanga elements at its core, meaning the claim should be considered by the Court.

Ngā kōrero a Te Kotahitanga o Ngāti Tūwharetoa
Submissions for Te Kotahitanga o Ngāti Tūwharetoa

[49] Ms Feint, for Te Kotahitanga o Ngāti Tūwharetoa (Te Kotahitanga), represents the post-settlement governance entity of Ngāti Tūwharetoa, to which four of the Pouakani hapū affiliate. Te Kotahitanga appears as an interested party in these proceedings and opposes the strike out application, supporting Pouakani to pursue their claim. Ms Feint notes her instructions that Te Kotahitanga acknowledges the tikanga of mana ā-hapū and therefore supports the hapū to lead the claim.

[50] Ms Feint submits that the Crown has treated other parts of the Waikato River as needing to have customary title lawfully extinguished, which was done explicitly by statute. An example of this is the portion of the river above Huka Falls, for which native customary title was extinguished by the Native Land Amendment and the Native Land Claims Adjustment Act 1926. Ms Feint noted in the hearing that:[14]

> …the Crown found legislation necessary to declare this lake in the Upper Waikato River to be the property of the Crown and also to extinguish the customary title which one would have thought would not have been necessary if the Crown considered that

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12 *Paki v Attorney-General (No.1)*, above n 2.
13 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).
14 272 Waiariki MB 96 (272 WAR 96).

> it was Crown property already and notably this legislation post-dates the Coal Mines Amendment Act of 1903. And it also appears that at this point the Crown wasn't confident in relying on an *ad medium filum aquae* principle at least in relation to the Upper Waikato River.
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> …the fact that customary title was expressly extinguished above the Huka Falls leaves open the question of what customary title remained below the Huka Falls, which includes of course the Pouakani section of the river…

[51] Therefore, it seems that the Crown omitted to take this step in respect of the riverbed under the Whakamaru, Maraetai and Waipapa dams.

[52] Ms Feint submits that the indefeasibility argument "papers over the cracks" of colonisation. The Crown is in a unique position to grant itself titles and concurrently has a responsibility to protect the property rights of Māori. She submitted that customary rights can survive the conversion of title at least so long as the lake continues to be owned by the hapū.

[53] She submitted that this Court should be "very cautious about applying the authorities on indefeasibility to both the Crown and Mercury as a creature of the Crown."[15] Mercury should not be treated as being in a separate position from the Crown as it is part of the Crown as a state-owned enterprise or mixed ownership model entity.

[54] Ms Feint submitted that *Attorney-General v Maori Land Court* is distinguishable as not applicable to Crown land. She asserts that once land has become General land, indefeasibility of title will apply, but while it remains Crown land, this Court has jurisdiction.[16]

[55] All of the riverbed was Māori customary land as, Ms Feint contends, "the Crown did not acquire property on acquisition of sovereignty at all until it had first extinguished Māori customary title either by purchase or by operation of law."[17] She goes on to note that the Crown could only grant land that it had lawfully acquired from Māori and that brings into operation the *nemo dat* principle; that the Crown cannot grant property unless it first has that property to give.[18]

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15 272 Waiariki MB 101 (272 WAR 101).
16 272 Waiariki MB 102 (272 WAR 102).
17 272 Waiariki MB 100 (272 WAR 100).
18 272 Waiariki MB 100 (272 WAR 100).

[56] Ms Feint submitted, in relation to the riverbed land at Pouakani, that: [19]

> If the Crown doesn't own it and can't prove that they own it and have acquired it by operation of law, it would seem to follow that it would be Māori customary title provided that the evidence in time can persuade the Court that in tikanga, there were rights recognised in the Waikato River.

[57] The Crown has acknowledged customary interests in the river and the legislature has provided for mechanisms for kaitiakitanga. Ms Feint further submits the Crown has recognised that there are hapū rights and interests in water that need to be recognised and provided for. This is at odds with the Attorney-General's position on this claim. She comments: [20]

> So there [in the Tuwharetoa Waikato River Settlement Act 2010] you have a direct acknowledgement by the Crown that Tuwharetoa has asserted its customary title and Treaty rights to the lakes and rivers within its rohe and that the Crown acknowledges that it needs to engage with Tuwharetoa in good faith as a Treaty partner before introducing any new policies that might affect those rights and interests.

[58] Ms Feint supported the argument that the Crown may hold the land in a fiduciary capacity for Pouakani: [21]

> But to the extent that the Crown has taken upon itself to create titles in the bed of that river and convey them to Mercury as an SOE, then it ought to have been protecting any Māori property right in doing that and to the extent that it has not, then its arguable in my submission that its either holding the land in the case of the Whakamaru land as a fiduciary or that it has conveyed that land to Mercury in breach of its fiduciary duties.

[59] Ms Feint submitted that the Māori Land Court is the correct Court to assess whether portions of the riverbed remain in customary ownership, as having exclusive jurisdiction under s 132 of TTWMA to investigate customary land. She notes that parliament nominated the Māori Land Court to have this role due to the expertise of the Court in tikanga Māori as a body of customary law.[22]

[60] Ms Feint submitted that, as there is a core tikanga aspect to this matter and tikanga is a developing area of the law, the claim should not be struck out.

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19 272 Waiariki MB 100 (272 WAR 100).
20 272 Waiariki MB 98 (272 WAR 98).
21 272 Waiariki MB 100 (272 WAR 100).
22 272 Waiariki MB 101 (272 WAR 101).

Ngā kōrero a Raukawa Settlement Trust
Submissions for Raukawa Settlement Trust

[61] Ms Cole, for the Raukawa Settlement Trust as an interested party in these proceedings, submits that several of the hapū of Pouakani affiliate to Ngāti Raukawa and therefore Raukawa are an interested party in these proceedings as the outcome will affect Raukawa iwi. Raukawa opposes the application to strike out.

[62] Counsel submits that the Māori Land Court has exclusive jurisdiction to investigate title to Māori customary land and determine the owners. It is necessary for customary ownership to be determined to resolve this dispute, even if the resolution is ultimately achieved in another forum and not the Māori Land Court.

[63] Where titles have been issued erroneously, Ms Cole submits that it cannot have been intended that indefeasibility of title would prevent this Court from investigating the titles and granting remedies. If so, it would amount to the Crown exercising unfettered discretion and allowing the Crown to give away somebody else's land.

[64] Ms Cole submits that customary ownership should not be looked at as something deriving from English law. She posits that customary law is something that cannot be taken away from the mana whenua of the whenua or of the awa. Customary ownership is about connection to a place, Ms Cole submits, and lasts forever; that is why a pepeha refers to land, waters and maunga.

Ko te ture e pā ana ki te whakakore tono
The law relating to strike out

[65] The Māori Land Court has inherent powers to strike out proceedings. As observed by Judge Ambler in *The Proprietors of Maraeroa C v NZ Forest Products Ltd*:[23]

> …although a Court of limited jurisdiction does not have inherent jurisdiction, it does have inherent powers subject to the rules of Court and to statute to regulate its procedure, to ensure fairness in its procedures and to prevent an abuse of its process. That inherent power extends to striking out or staying proceedings where an abuse of process would otherwise arise.

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[23] *The Proprietors of Maraeroa C v NZ Forest Products Ltd* (2007) 121 Waikato MB 258 (121 W 258) at [12] referencing Te Ture Whenua Māori Act 1993, s 6(2). See also *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) regarding inherent jurisdiction.

[66] Judge Ambler in this case noted that the leading New Zealand decision on strike outs is *Attorney-General v Prince* and cited the Court of Appeal's findings:[24]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed … ; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material … ; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction …

[67] The reasoning in *Attorney-General v Prince* was endorsed by the Supreme Court in *Couch v Attorney-General*:[25]

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

[68] This approach has also been recently affirmed in the Māori Appellate Court case *Nicholas v Official Assignee*: [26]

> … Following the case of *Ngāti Apa v Attorney-General* as it was applied by Judge Ambler in *The Proprietors of Maraeroa C v NZ Forest Products Ltd,* we consider that a claim must continue unless it can be established that the applicants cannot succeed.

[69] Therefore, there is clear authority for a strike out to be considered in the Māori Land Court, on the following basis:

(a) Pleaded facts in the statement of claim are assumed to be true, whether or not these are admitted;

(b) The causes of action must be so clearly untenable they cannot possibly succeed;

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24 *The Proprietors of Maraeroa C*, above n 233 at [10] citing *Attorney General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

25 *Couch v Attorney-General* [2008] NZSC 45 at [33], per Elias CJ and Anderson J. Footnotes omitted.

26 *Nicholas v Official Assignee* 2021 Māori Appellate Court MB 228 at [8] citing *Ngāti Apa*, above n 133 at [108], applied in *The Proprietors of Maraeroa C*, above n 233.

(c) The jurisdiction to strike out must be exercised sparingly and only where the Court is satisfied it has the requisite material;

(d) Where applications to strike out raise difficult questions of law and require extensive argument, jurisdiction is not excluded; and

(e) Particular care is required in areas where the law is confused or developing.

[70] As Judge Ambler noted in *Maraeroa C*, "the Court must guard against straying into an assessment of the substantive evidence and the merits of the case under the guise of a challenge to jurisdiction."[27]

Te kerēme e pā ana ki te whenua papatupu
Customary land claim

[71] The Pouakani application seeks a determination by the Māori Land Court that the land under the three hydro dams and hydro lakes in the Pouakani area of the Waikato River is Māori Customary land. Therefore the claim is for the entire Pouakani claim area of the Waikato River.

[72] The strike out application is specific in terms of being with regard to the area of land under fee simple title owned by Mercury or in which Mercury has beneficial interest.

[73] Mr Ward, for the Attorney General, submitted that the only part of the claim that could survive strike out, is the claim over land other than that in fee simple, including under the easements. Therefore, even if the application should be struck out in terms of the areas under title, a hearing is still needed for the riverbed under the hydro lakes.

Indefeasibility of titles and easements extinguishing customary title

[74] As noted, the primary issue is whether the Māori Land Court can declare land registered under the LTA to be Māori customary land. Mercury submits it cannot. Registration, it is submitted, attracts indefeasibility and customary title is extinguished by

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27 *The Proprietors of Maraeroa C*, above n 233 at [11].

registration. Therefore, Mercury submits that land which is General land or Crown land cannot still be Māori customary land per *Te Roroa*.[28]

[75] The cases relied on by Mercury and the Attorney-General clearly hold that registration of title in the land transfer system does extinguish customary title.[29] Justice Whata in *Gregory v Thames Coromandel District Council* was also clear in accepting "the basic proposition that customary title to land brought under the transfer system cannot survive the indefeasibility provisions of the LTA (where the title covers the ground)."[30]

[76] While that general proposition seems clear, there are factors which raise questions in the present case.

[77] Firstly, it appears that none of the cases referred to concerned situations where the basis of the Crown's assertion of ownership had been found to be wrong and therefore the original ownership was yet to be determined.

[78] Secondly, as noted by the learned author in *Māori Land Law*, in Aotearoa/New Zealand, all titles, including Māori freehold land, can be traced back to an actual grant or the equivalent, an initial certificate of title under the Land Transfer Act.[31] The question therefore arises as to what effect the mistake as to assumption of ownership has. It is accepted that there must be clear evidence that customary title has been extinguished and that this can be achieved through sale to the Crown, investigation of title, legislation, or other lawful authority. However, it is not clear whether the indefeasibility of titles issued (on an erroneous basis) under the LTA alone can defeat Māori customary title. As noted in *Te Roroa,* the acquisition of title by the Crown marks the end of customary title.[32] However, in the present situation the Crown's acquisition of title has been found to have been on an erroneous basis.

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28 *Te Roroa Whatu Ora Custodian Ltd v Kereopa* [2012] NZHC 1052.

29 *Kereopa v Te Roroa Whatu Ora Custodian Ltd* [2003] NZCA 327; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC); *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA); *Te Roroa Whatu Ora Custodian Ltd v Kereopa* [2012] NZHC 1052; *ANZ National Bank Ltd v Uruamo* [2012] NZHC 1895, (2012) 13 NZCPR 643; *Johnson v Johnson and ors* [2021] NZHC 624; and *Re Reeder (on behalf of Ngā Pōtiki)* [2021] NZHC 2726.

30 *Gregory v Thames Coromandel District Council* [2017] NZHC 2323 at [40].

31 Richard Boast, Andrew Erueti, Doug McPhail, Norman F Smith *Maori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at 70.

32 *Te Roroa Whatu Ora Custodian Ltd v Kereopa* above n 28 at [23].

[79] Thirdly, as submitted by Ms Feint QC, in this situation there are questions as to the Crown grant of land. The Crown could only grant land that it had lawfully acquired from Māori and that brings into operation the *nemo dat* principle; that the Crown cannot grant property unless it first has that property to give.

[80] It is also claimed that the easements over the three hydro dams are indefeasible. The question of whether indefeasibility of titles issued (on an erroneous basis) under LTA alone defeats Māori customary title is therefore also relevant. It is noted that the title for the portion of the Waikato Riverbed containing Whakamaru Dam, has the registered proprietor as Her Majesty the Queen. However, I note there are no titles for the land under the hydro lakes. The situation appears to therefore be that there is an easement over an area where there may not be an LTA title issued and the current proprietor's assumption of title has been found to be upon an erroneous basis. There are clearly issues that need to be considered with regard to the Pouakani clam. To complicate matters further, it is noted that as the land underneath the easement is still recorded as Crown land. Section 131A of Te Ture Whenua Māori Act 1993 provides jurisdiction for the Court to make an order changing the status of Crown land to Māori customary land under certain conditions.

The Supreme Court decisions

[81] While the Supreme Court in *Paki No.1* and *Paki No.2* did not specifically consider whether registration under the LTA extinguished customary title, they did make a number of comments with regard to the Māori Land Court's jurisdiction to determine the status of any parcel of land and that an application for investigation of title should be heard in the Māori Land Court.[33] The Supreme Court was also well aware of the certificates of title for the Pouakani lands in the present case and Elias CJ specifically referred to those certificates of title at paragraphs [45] and [46] of her judgment. Mr Ward on behalf of the Attorney-General submitted that the titles Mercury now holds were transferred prior to the *Paki No.2* decision.

Paki No.1

[82] As noted above, the main issue considered by the Supreme Court in *Paki No.1* was whether the Waikato River at Pouakani was considered navigable (deep and wide enough to

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33 *Paki v Attorney-General (No.2)*, above n 3.

afford passage to watercraft). The Crown's assumption of ownership of the riverbed was based on the Waikato River as a whole being considered navigable, as this would vest the riverbed in the Crown under the Coal Mines Act and its successor statutes.

[83] Although, as a matter of fact, it was not possible to navigate the whole of the Waikato River from Lake Taupō to Port Waikato due to waterfalls and rapids, the Supreme Court had to consider whether the specific stretch of the Waikato River at Pouakani was navigable. If answered in the affirmative, then the Coal Mines Act, as a basis for the Crown's claim to ownership of the riverbed, was correct in law. However, if the river was not found to be navigable at Pouakani as at 1903, the Coal Mines Act was not a basis for Crown ownership of the riverbed lands.

[84] Following a two-day hearing, the decision of the Supreme Court was reserved. The majority of the Supreme Court held that the Waikato River at Pouakani was not navigable and therefore went on to consider the remaining claims of the applicant parties.

Paki No.2

[85] In *Paki No.2*, the Supreme Court considered whether, since the Coal Mines Act did not apply, the Crown had instead gained title to the riverbed at Pouakani through the *ad medium filum aquae* (to the middle line of the river) presumption and, if so, whether this breached legally enforceable obligations to Pouakani hapū.

[86] Elias CJ, in her discussion, considered whether the *ad medium* presumption applied to the Pouakani lands adjacent to the Waikato River, and concluded that it did not:[34]

> The presumption does not arise as a necessary incident of the title obtained in the Maori Land Court unless the circumstances of the investigation indicate that the riparian owner has the riverbed. In the case of major tribal resources and natural features of value to the tribe whether the riparian owner takes title to the riverbed or lakebed requires investigation of the status of the land beyond the boundaries of the title.
>
> For these reasons, I consider the High Court was wrong to conclude without evidence of Pouakani custom and without investigation of the status of the riverbed land by the Maori Land Court that riparian ownership to the middle of the river is established as a matter of general custom or as a matter of law.

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34 *Paki v Attorney-General (No.2)*, above n 3 at [144]-[145].

[87] The Chief Justice further elaborated on the appropriateness of importing English common law concepts into the New Zealand context that were of dubious utility:[35]

> As is described in *Ngati Apa* and need not be enlarged upon here, the English common law applied in New Zealand from 1840 only "so far as applicable to the circumstances of the … Colony of New Zealand". English common law rules affecting property (such as the presumption of Crown ownership of tidal lands considered by the Court of Appeal in *Ngati Apa*) could not apply to lands held by Maori according to custom unless consistent with those customs. The Court held unanimously in *Ngati Apa* that native property continues until lawfully extinguished and that the onus of proof of extinguishment lay on the Crown in contending that it owned all land below high tide in New Zealand.

[88] Elias CJ rejected applying the precedent of *Re the Bed of the Wanganui River*, which had been the authority since the 1960s for the *ad medium* rule in New Zealand:[36]

> For the reasons explained below, I do not consider that the 1962 decision in *Re the Bed of the Wanganui River* is authority for the proposition that a legal presumption of ownership to the middle of the flow attached to all Maori freehold riparian land for which title was issued on investigation in the Native Land Court, ousting any separate customary interest in the bed if the riparian land has been investigated. If ownership to the middle of the flow does not accord with the custom and usage of the Pouakani riparian owners, I consider that no presumption that the riverbed was conveyed with the riparian lands applies as a matter of New Zealand law. On that basis, the status of the riverbed is undetermined and may be investigated by the Maori Land Court to establish whether it continues as unextinguished customary land.

[89] The Chief Justice also considered than an application to the Māori Land Court should be brought to consider the Pouakani riverbed land's status. Her Honour expressly stated this in a further three places in her decision:[37]

> The Maori Land Court has jurisdiction to determine the status of any parcel of land, and has had exclusive jurisdiction since 1909 to investigate the title to Maori customary land. On that basis, it is consistent with the statute and with authorities such as *Tamihana Korokai v Solicitor*-General… that the question of the status of the land be considered on application for investigation of title in the Maori Land Court.

[90] In making this finding, Elias CJ considered Tipping J's reasoning in *Ngāti Apa*:[38]

> In *Ngati Apa v Attorney-General*, Tipping J considered that "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". *Ngati Apa* concerned seabed, but the correctness of the Court of Appeal's determination in

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35 *Paki v Attorney-General (No.2)*, above n 3 at [67], citing *Ngāti Apa v Attorney-General*, above n 13.

36 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA); *Paki v Attorney-General (No.2)*, above n **Error! Bookmark not defined.** at [25].

37 *Paki v Attorney-General (No.2)*, above n 3 at [19]. Footnotes omitted.

38 At [20], citing *Ngāti Apa v Attorney-General*, above n 13. Footnotes omitted.

> *Re the Ninety Mile Beach* that the investigation of title in the riparian lands extinguished any customary interest in land on the foreshore was a live issue and raised comparable issues to those in the present case. Tipping J thought that inquiry into custom in relation to the foreshore lands was "both general and specific to the site in question" and, as a matter of tikanga, was within the "exclusive jurisdiction" of the Maori Land Court under s 132(1) of Te Ture Whenua Maori Act. I consider it is the appropriate course in the present case also.

[91] Her Honour concluded by reiterating that the next step for the Pouakani was to seek a determination by the Māori Land Court:[39]

> In conclusion, I do not consider the plaintiffs have established an essential plank in their case – that the Crown became the owner of the riparian lands by the 19th century acquisitions on which they rely. I would decline to accept the assertion of ownership by the Crown and its adoption for reasons of convenience by the appellants. I would dismiss the appeal on that basis, without prejudice to any application that the appellants or others who qualify may bring to the Maori Land Court for investigation of any customary title to the riverbed and without prejudice to any application the Crown may make in properly constituted proceedings in the High Court to establish its title.

[92] William Young J also noted the jurisdiction of the Māori Land Court to investigate whether the title to the riverbed is Māori Customary land, and the need for this to occur:[40]

> I note in passing that, under Te Ture Whenua Maori Act 199[3], the appellants may seek a determination from either the Maori Land Court or the High Court that the riverbed is Maori customary land and, if it is held to be Maori customary land, an investigation by the Maori Land Court as to title. A determination that the riverbed is Maori customary land would involve a reassessment by the Maori Land Court or High Court of the questions whether mid-point presumption applied and, if so, whether it was rebutted in respect of the transactions in issue in the present case.

[93] Clearly the Supreme Court was of the view that the determination of the status of the riverbed could be heard in the Māori Land Court. The matters noted by the Supreme Court do persuade me to take a cautious approach to the strike out application.

Summary

[94] I consider therefore that the situation is not as clear and straight forward as Mercury and the Attorney-General submit. Although there are titles registered under the LTA, the Supreme Court *Paki* decisions make it clear that the Crown assumption of ownership under the Coal Mines Act was wrong and the *ad medium filum aquae* presumption did not apply

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39 *Paki v Attorney-General (No. 2)*, above n 3 at [32].
40 At [209] per William Young J.

to the Pouakani lands without proof. On that basis, the Supreme Court considered the status of the riverbed was undetermined and could be investigated by this Court to establish if it continues as customary land. Those facts raise issues as to the Crown's title and whether Māori customary title has in fact been extinguished, which require further argument and consideration.

[95] In my view, the Pouakani application is tenable and should not be stuck out, in so far as it relates to land under the fee simple title owned by the Crown and Mercury, or in which Mercury has beneficial interest, and Mercury's easements.

Te kerēme e pā ana ki te kaitiakitanga
Fiduciary claim

[96] Pouakani's position is that the Crown proceeded to bring the titles under the LTA even though the Crown was aware there were Māori claims to the bed of the river and despite the survey office plans showing two islands marked as "Māori". They say this deliberate act created a fiduciary duty on the Crown to return the land to its rightful owners and the Māori Land Court has jurisdiction to determine whether, notwithstanding the change of status effected at law (albeit in error), in equity the land remained with the Māori owners.

[97] Conversely, Mercury's position is that the Māori Land Court does not have jurisdiction to make orders regarding constructive trusts over General or Crown land. Counsel cites *Attorney-General v Maori Land Court*, where the Court of Appeal held that "[t]he Maori Land Court has never had a general power to make orders, other than declarations of status, in relation to [General or Crown] land."[41] Counsel also submits that Mercury's predecessor, being a bona fide purchaser for value of the land, would defeat any fiduciary claims over it. Mercury had no knowledge of a prior interest in the land, in terms of the knowledge required for LTA fraud under s 6. Mercury was entitled to rely on the Crown warranty as to the Crown's right to sell the land. Mr Hodder submits that Mercury's position must be assessed separately to that of the Crown and that Crown actions cannot be imputed to Mercury.

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41 *Attorney-General v Maori Land Court* [1998] NZCA 247.

[98] The fiduciary claim, as I read it, relies on a finding that the status of the riverbed in question is or was Māori customary land. If the land in question is Māori customary land then the Court could consider the fiduciary claim. If the claim that the riverbed is Māori customary land is clearly untenable and is struck out, then this part of the claim would also be struck out.

[99] I have found that the claim of Māori customary title is not clearly untenable and should not be struck out. Further consideration of that part of the application is needed. Therefore, it follows that the fiduciary claim aspect of the application should also procced for full consideration.

Te kerēme e pā ana ki te wai
Water claim

[100] Mercury contends that the Māori Land Court has no jurisdiction to make declarations of ownership over water and cannot grant title to water. They submit that TTWMA does not contemplate determining ownership or interests in water and the definition of "land" in the Act does not stretch to inclusion of water. In addition, no one owns the water flowing past or over their land. Counsel argued that Pouakani's claim of customary land over the riverbed and the claim over the water are inextricable.

[101] Pouakani submit that customary land is held in accordance with tikanga Māori and tikanga for Pouakani is that the river is and was treated as a whole entity in their rohe, and not separated into beds, banks and waters. Therefore, Māori customary land may be understood to include waters on or flowing over that land.

[102] As I have noted above, I do not agree with Mercury and the Attorney General's argument that the Pouakani claims should be struck out with regard to the land under fee simple title owned by Mercury or in which Mercury has beneficial interest, on the basis that the titles are indefeasible and Mercury's easements are also indefeasible. It follows that if the riverbed claims can be seen to be linked and dependent upon the issue of customary title, then Pouakani's water claim requires further consideration and is not clearly untenable.

[103] Further, it is unclear as to whether the Māori Land Court's ability to inquire into customary water rights has been ousted by the TTWMA definition of land. This is an issue the Court will need to consider full arguments on.

[104] Lastly, I agree with counsel for Pouakani that water ownership is a contentious topic in Aotearoa/New Zealand. The arguments of ownership are novel. This is a developing area of law which has tikanga elements at its core. The claim should be considered by the Court in full and not be struck out.

Kupu whakatau
Decision

[105] The Pouakani application clearly raises difficult questions of law. That is not surprising given the history of litigation concerning the lands in this area, which demonstrates that this is not a straightforward situation. While difficult questions of law that might require extensive argument are no barrier to a strike out claim, the causes of action in the substantive application must be so clearly untenable that they cannot possibly succeed. I do not consider that is the situation in the present case.

[106] Although there are LTA titles in relation to the hydro dams, the situation is not simple and clear. The finding that the Crown assumption of ownership based on the Coal Mines Act was wrong has, in my view, made matters more complex and raises questions as to the Crown's original title and the effect on the status of the land as Māori customary land. There is also the fact that no titles exist for the land under the hydro lakes. Those matters need to be considered fully. Any findings in relation to those issues will naturally have implications for the remaining issues concerning the fiduciary duty and water claims of Pouakani, such that they also need to be considered in full.

[107] The jurisdiction to strike out an application must be exercised sparingly and particular care is required in areas where the law is developing. I am not satisfied that a strike out should be granted in this case. The application of Pouakani is not clearly untenable and the claims involve matters of tikanga and water ownership that are developing areas of law.

[108] Application for strike out is dismissed

I whakapuaki i te 10.00am i Rotorua te 1st o ngā rā o Hurae te tau 2022.

C T Coxhead
JUDGE