43.5.6 Māori Land Court’s jurisdiction to hear fiduciary claims

43.6 Fiduciary law: intra-hapu and intra-īwi

43.1 Introduction

This chapter concerns the impact of trusts law and equitable principles and rules on a number of Māori related issues. In particular, the chapter focuses on the range of unique Māori land trusts that are growing in popularity as a management tool for Māori freehold land, and on the role of fiduciary law in Crown-Māori and intra īwi/hapu relationships.

43.2 Māori land trusts

43.2.1 Māori land

In New Zealand six categories of land have been created: Māori customary land; Māori freehold land; General land owned by Māori; General land; Crown land; and Crown land reserved for Māori. A special legislative regime in the form of Te Ture Whenua Māori Act 1993 (the Māori Land Act 1993) exists for land with the status of Māori customary and Māori freehold land. It is said that very little Māori customary land remains, whereas up to six per cent of Aotearoa New Zealand is classified as Māori freehold land. Māori freehold land is typically characterised as being multiply owned and, until recently, not actively managed. The Māori Land Court is responsible for administering Māori land. It is a court of record that has as its primary objective to promote and assist in the retention and effective use, management, and development of Māori land.

43.2.2 Māori Land Court’s jurisdiction

As introduced earlier in this book (1.8.3), the Māori Land Court has exclusive jurisdiction to constitute the five types of trusts capable of managing predominantly Māori freehold land (but not solely, for example, general land and general land owned by Māori can also be managed under some Māori land trusts). The five trusts are: pūtea trusts; whanau trusts; ahu whenua trusts; whenua topu trusts; and kai iaki trusts. These trusts are subject to the specific rules contained in Te Ture Whenua Māori Act 1993 and the general law of trusts, namely the Trustee Act 1956 and equitable principles. While Te Ture Whenua Māori Act 1993 usually only permits the Māori Land Court to exercise a limited statutory jurisdiction, an exception is made for trusts. The Act extends the Court’s jurisdiction to include all the same powers and authorities as the High Court in respect of trusts generally. Moreover, the Court of Appeal has stipulated that the Māori Land Court “is to have the most extensive supervisory powers”, or, as the Māori Land Court has accepted, it has “a guardianship role to play in respect of trusts”.

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1 The author gratefully acknowledges the research assistance provided by Maia Wikeira, Faculty of Law, University of Otago.
2 Section 129 Te Ture Whenua Māori Act 1993.
3 Ibid, see preamble and ss 2 and 17. For a good introduction to this Act, see R Boast et al, Māori Land Law, Butterworths, Wellington, 2004.
4 Ibid, s 211(1). However, note that the Act permits that an instrument such as a will can establish a trust of a similar kind to any one of these five specific Māori land trusts: s 211(2). For a more comprehensive description and assessment of Māori trusts see J Ruru, “Appendix B. Māori Land Law for Conveyancers”, in S Scott, A McBeth, J Ruru, Adams’ Land Transfer, Wellington, LexisNexis, looseleaf, at B.4.
5 Ibid, s 237(1).
It is worthwhile noting at the outset that the five statutory forms of Māori land trust are not the only means by which Māori land can be held in trust, nor the only way that Māori can hold land interests by means of a trust. Māori are free to use other forms of trust to hold land (and other property interests) drawing on general trust law. But this chapter focuses on discussing the five Māori land trusts provided for in Te Ture Whenua Māori Act 1993.

43.2.3 Establishing Māori land trusts

(1) Whanau trusts

The five Māori land trusts can be further divided into land management or share management type trusts. The most popular Māori land trust is the whanau trust – a share management type trust. The whanau trust was introduced by Te Ture Whenua Māori Act 1993 to provide a way for owners, or successors to owners of individual interests as tenants in common, to stem the advent of fragmentation of Māori land interests. Under the whanau trust, the land interests of a living or deceased owner are vested in the trustees, usually family members, and no further succession and fragmentation occurs. A whanau trust may be constituted in respect of any beneficial interest in Māori freehold or general land owned by Māori, and any shares in a Māori incorporated. All applications to create a whanau trust must be made: by or with the consent of the owner or all the owners of the interest or shares involved; or by the administrator of an estate to give effect to a will; or by the administrator of an estate with consent of the persons entitled to the interests or shares involved. More than 11,000 whanau trusts have since been established.

(2) Abu whenua trusts

The second most popular Māori land trust is the abu whenua trust. As a land management type trust, the abu whenua trust operates to promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land. These trusts existed prior to the enactment of Te Ture Whenua Māori Act 1993 as s 438 of the Māori Affairs Act 1953 trusts. In 1993, all s 438 trusts became abu whenua trusts. Today, more than 6,700 abu whenua trusts exist.

(3) Whenua topu trusts

While the whenua topu trust is similar to the abu whenua trust in that it is a land management trust, its difference is marked in its operation. The whenua topu trust operates to promote and facilitate the use and administration of the land in the interests of the iwi or hapu (not specifically the persons beneficially entitled to the land). No similar type of trust existed prior to 1993. The intention of the whenua topu trust is to provide a means for land to be

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6 The Proprietary of Mangakino Township v The Māori Land Court & Anor 16/6/99, CA65/99 (at p 10 per Blanchard J).
7 Re Tumuhere Māori Trust Trust 30/7/08, Judge Harvey, MLC Waiauaki A20070002293 (at para 64).
8 Section 214(2)(a) Te Ture Whenua Māori Act 1993.
10 Section 215(2) Te Ture Whenua Māori Act 1993.
11 Ibid, s 354.
held in a manner that more approximates pre-English law customary land structures. However, few iwi or hapu have created whenua topu trusts – as at 30 June 2004 only 51 blocks of land were being managed by whenua topu trusts.\(^\text{15}\)

(4) \textit{Kai tiaki trusts}

Kai tiaki trusts first came into existence in 1953 and have continued to operate under Te Ture Whenua Māori Act 1993.\(^\text{14}\) A kai tiaki trust can constitute any interests in Māori land or General land, or any shares in a Māori incorporation, or any personal property, to which any person under disability is beneficially entitled (including minors aged up to 20 years).\(^\text{13}\) Some restrictions apply. For example, the Māori Land Court can only establish a kai tiaki trust in respect of property that is not subject to a property order under the Protection of Personal and Property Rights Act 1988,\(^\text{16}\) and General land only where the beneficiary is Māori.\(^\text{17}\)

(5) \textit{Putea trusts}

Putea trusts are share management type trusts designed to manage impractical, or otherwise undesirable, minimally valued interests, or manage interests where the person beneficially entitled is unknown.\(^\text{18}\) Few putea trusts have been created.

43.2.4 Appointing trustees

Any individual, who would be “broadly acceptable to the beneficiaries”, can be appointed as responsible trustee of a Māori land trust.\(^\text{19}\) The Act also permits a Māori trust board, a Māori incorporation, the Māori Trustee, the Public Trust, or a trustee company to be appointed as a trustee.\(^\text{20}\) Unless there is a custodian trustee, the assets of the trust, usually Māori freehold land, are vested in the responsible trustee who, under s 233, is responsible for administering and managing the trust. In the case of an ahu whenua trust and a whenua topu trust the responsible trustee takes the total freehold of a particular block of land. In the case of a whanau, kai tiaki, or putea trust usually only an interest or interests in land as tenant in common vest in the trustee.

The concept of advisory trustee was extended to Māori land trusts in a 1974 amendment to the Māori Affairs Act 1953.\(^\text{21}\) Te Ture Whenua Māori Act 1993 sets out detailed directions to advisory trustees of Māori land trusts.\(^\text{22}\) The advisory trustee can provide an excellent avenue for those Māori owners wishing to have a greater involvement in the administration of their land, without the legal responsibilities flowing from holding the position of responsible trustee.

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Section 350 Te Ture Whenua Māori Act 1993.

Ibid, ss 217(1) and 217(7).

Ibid, s 217(3).

Ibid, s 217(4).

Ibid, s 212(2)(a).

Ibid, ss 222(1)(a) and (2)(b).

Ibid, s 222(1).

See s 438(2A) Māori Affairs Act 1953.

See s 224 Te Ture Whenua Māori Act 1993.
The liability of advisory trustees in Māori trusts has not been tested in the Courts. The effect of taking advice from advisory trustees on the liability of the responsible trustee has not been tested either. Although s 244(c) may seem to remove responsibility from responsible trustees if they follow the advice of the advisory trustees, s 224(d) provides for the situation where the responsible trustees consider that the advice or direction of the advisory trustees exposes them to liability.

Since the passing of Te Ture Whenua Māori Act 1993, the Māori Land Court has had the power to appoint one or more custodian trustees, and to vest Māori freehold land in a custodian trustee. The Act contains special provisions applying only to custodian trustees. These provisions are almost identical to s 50 Trustee Act 1956. The main difference is that under s 222 Te Ture Whenua Māori Act 1993 “any individual or body” can be appointed as custodian trustee, while under the Trustee Act 1956 only “a corporation” can be appointed as custodian trustee. The reference to “body” must be interpreted to mean only those bodies listed in s 222(1) Te Ture Whenua Māori Act 1993.

43.2.5 Trustees’ powers

The powers available to trustees of the various Māori land trusts will depend primarily on whatever “absolute or conditional” powers are given to the trustee by the Māori Land Court. Subject to any express limitations imposed by the court in the trust order, trustees have the powers and authorities that may be necessary “for the effective management of the trust and the achievement of its purposes”. The source of the powers of a trustee of a Māori trust must be found in the trust order made by the Māori Land Court creating the trust, in statute law (including Te Ture Whenua Māori Act 1993 and the Trustee Act 1956), or in the equitable principles recognised by the Courts.

43.2.6 Decision making

(1) Decisions of trustees and execution of documents

Subject to an express provision in the trust order and subject to some exceptions, if there are three or more trustees, decisions can be made by a majority of the trustees. Where a trustee dissents, in writing, from the majority of trustees before the decision is implemented, the trustee is absolved from personal liability for the decision. The Māori Land Court, supported by the Māori Appellate Court, has refused to vary the terms of an ahu whenua trust order to allow two of the six trustees to execute renewals of leases following a majority decision by the trustees. The Appellate Court clearly supported the principle that documents should be executed by all trustees.

(2) Consultation with beneficial owners

Trustees can organise consultation meetings with beneficial owners. These are not formal meetings called by the court but meetings held to obtain the views of the beneficial owners.

23 Ibid, ss 222(4) and 222(5).
24 Ibid, s 220(1).
25 Ibid, s 226(1).
26 Ibid, ss 226(2).
27 Ibid, s 227(6).
28 Malcolm Takimo Short & the Pukenui Oruawhata Trust, 7/8/97, Marumaru J (presiding), Spencer, Carter JJ, MAC 1 Wairiki Appellate MB 86.
on actions to be taken. At these meetings, if a vote is taken, the principle is one person one vote unless the trust order says otherwise.

43.2.7 Duties of trustees

Māori land trustees are under the same obligations as other trustees to, for example, act impartially and fairly between beneficiaries, prudently invest trust funds, and to act jointly. The Māori Land Court has recently described the trustees’ duties as:

“Their principal duty is to obey their terms of trust. They have equally crucial duties of protecting the assets of the trust and acting prudently when investing trust funds. When so investing they must avoid hazardous or speculative ventures. This is because the custodianship of the existing corpus lands remains paramount.”

In Horowhenua II (Lake) Māori Reservation, Judge Harvey was satisfied that there were grounds to remove the trustees for a variety of reasons including: the practice of holding meetings that effectively excluded a significant number of trustees; the notion that the trustees were permitted to continue operating without annual general meetings of beneficiaries as required by the Regulations; and the fact that they did not adopt any transparent or robust process when selecting themselves to undertake various paid tasks for the trust. This is an important case that emphasises the ramifications of how “the law imposes onerous and demanding duties on the office of trustee”. It reinforced the application of equitable principles to Māori land trustees such as the duty of loyalty and good faith, the duty to act personally, and the duty not to profit.

Māori land trustees, however, are under additional obligations to those provided under the Trustee Act. For example, s 230 Te Ture Whenua Māori Act 1993 directs the court to make provisions in trust orders as to the keeping, filing, inspection and auditing of the trust accounts. The court has considerable power to enforce the obligations of the trust. For instance, s 238 gives the court the power to require a trustee to file in the court a written report and to appear before the court for questioning on the report. The section also permits the court to question trustees “on any matter relating to the administration of the trust or the performance of his or her duties as a trustee”. If the court is satisfied that a trustee has failed to carry out the duties of a trustee satisfactorily, the court, at any time, can make an order for the removal of the trustee. Professor Nicola Peart has observed that: “These powers are more specific than the Trustee Act provides and indicate the supervisory powers of the Māori Land Court are very extensive and in a sense invite the Court to be proactive”.

43.2.8 Allocating trust profits

The land, money and other assets of a Māori land trust must be held and applied for persons or purposes that align with the rationale for creating the distinct trust. For example, the land, money and other assets of a whanau trust must be held and applied for the purposes

of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in life of the descendants of any tipuna (whether living or dead) named in the order constituting a whanau trust. In comparison, the land, money and other assets of an ahu whenua trust are simply to be held in trust for the persons beneficially entitled to the land in proportion to their several interests in the land. In stark contrast are the directions to the trustees of pukea and whenua topu trusts. The land, money and other assets of these trusts must be held for Māori community purposes. This makes sense because the aspiration of, for example, the whenua topu trust is to benefit the iwi and hapu rather than individuals.

Section 218 explains in detail what constitutes “Māori community purposes”. For example, money could be directed towards the promotion of health by installing water supplies in Māori settlements, or could be directed towards the promotion of social, cultural, and economic welfare by making grants to construct or repair Māori meeting houses. The section is comprehensive in its reach, and includes a catch-all provision that allows trustees to seek approval from the Māori Land Court to allocate money to any other or additional purposes not specifically listed.

43.2.9 Succeeding to land interests

Most Māori land trusts have been designed to halt the fragmentation of Māori land interests and thus do not permit any persons to be entitled to succeed to any interests or shares vested in the trustees. The whanau, pukea and whenua topu trusts all do not allow succession to occur. The ahu whenua trust is the exception. The constitution of an ahu whenua trust does not affect any persons entitled to succeed to any beneficial interest in any land vested in the trustees.

43.2.10 Alienate trust land

1. Trustees

When constituting a trust, the owners must pay particular attention to the powers they wish to confer on the trustees to alienate the land. Te Ture Whenua Māori Act 1993 only places threshold consent provisions on alienations of a permanent kind: sale, gift and long-term leases (leases of more than 52 years). The trust order can further restrict the trustees’ powers, for example, by not permitting any sales. However, if the trust order permits the trustees to, for instance, sell trust land, then the requirements contained within the trust order and in Te Ture Whenua Māori Act must be met. The minimum requirement in the Act for a sale or a gift is that the trustees can prove that three-quarters of the owners consent to it. The minimum requirement for a long-term lease is the consent of at least half the owners. If the alienation is by way of sale or gift, the trustees must offer a right of first

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34 Section 214(3) Te Ture Whenua Māori Act 1993.
36 Ibid, ss 212(6) and 216(5). Note that in regard to whanau trusts, the Māori Land Court may empower trustees to apply surplus trust income for Māori community purposes: s 214(4).
37 Ibid, s 218(2)(a)(i).
38 Ibid, s 218(2)(b)(iii).
39 Ibid, s 218(2)(d).
40 Ibid, ss 214(6), 212(8) and 216(6).
41 Ibid, s 215(8).
refusal to prospective purchasers or donees who belong to one or more of the preferred classes of aliencees. The Act defines the preferred classes of aliencee to include, for example, children of the alienating owner and other beneficial owners of the land who are members of the hapu associated with the land. If the right of first refusal is not actioned, the trustees must then seek confirmation of the alienation instrument. If the alienation is by way of lease, licence, or forestry right for a term of more than 21 years, or mortgage, then a copy of the instrument must be sent to the Māori Land Court Registrar for noting.

(2) **Beneficiaries**

The beneficiaries of an ahu whenua trust remain capable of alienating their undivided interests in the land. However, the Act only permits alienations (such as sale or gift) to any person who belongs to one or more of the preferred classes of aliencee.

43.2.11 **Acquiring land**

Certain rules apply for when trustees acquire any land out of revenues derived from the operations of the trust. Upon acquisition, the trustees must decide whether they will retain the land as an investment, or apply to the court to have the land form part of the corpus of the trust. If land acquired was general land and it is to become part of the corpus of the trust, then the land will become Māori freehold land and be held in trust for the beneficiaries. However, if the land is to be held for investment purposes, it remains general land and therefore outside the ambit of Te Ture Whenua Māori Act 1993 and so can be alienated without regard to the Act.

43.2.12 **Reviewing trusts**

While Te Ture Whenua Māori Act 1993 as enacted required trustees of Māori land trusts (other than kai tahi trusts) to apply to the court within 20-year time periods for a review, since 2002 there has been no such requirement. Instead the present law gives the trustees, or a beneficiary of a trust, the discretion to apply to the court to review the terms, operation or any other aspect of the trust. Following a review, the court may confirm the trust order, vary or replace the trust order, or, if there is a sufficient degree of support for termination among the beneficiaries, it may terminate the trust. The High Court has made it clear that in the review process the Māori Land Court can take “into account the management and performance of the Trust up to that date, and prospectively”.

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42. Ibid, s 150A(1)(a). Note sub-para 150A(1)(a)(i) states that if **no owner** has a defined share in the land, then the trustees will need **proof of consent** from those persons who together own at least 75% of the beneficial freehold land.

43. Ibid, s 150A(1)(b)(i). Note sub-para 150A(1)(b)(ii) which states that if no owner has a defined share in the land, then the trustees will need **proof of consent** from those persons who together own at least 50% of the beneficial freehold land.

44. Ibid, s 147A.

45. Ibid, s 4 definition of “preferred classes of aliencees”.

46. Ibid, s 150A(3)(a).

47. Ibid, s 150A(3)(b).

48. Ibid, ss 149 and 148(1).

49. Ibid, s 243(1).

50. Ibid, ss 243(4) and 243(5).

51. Ibid, s 243(7).

52. Ibid, s 231(3).
43.2.13 Terminating trusts

Māori land trusts are terminated by the Māori Land Court making an order vesting the land or shares in the persons entitled to the land or shares in their respective shares or in other persons whom the beneficial owners may nominate.54 Since successions cease on the constitution of whanau, pūtea and most whenua topu trusts, the court is required to include successors in the vesting order.55

43.3 Perpetuities and Māori trust interests

As noted at 3.1.4 this book does not deal with the law of perpetuities. It should be noted, however, that with one exception the law of perpetuities does not apply to: (a) any trust constituted under Part 12 of Te Ture Whenua Māori Act 1993;56 (b) any other trust constituted in respect of any Māori land; or (c) any other trust constituted in respect of any general land owned by Māori.57 The one exception are Māori incorporations which are required to hold their land and assets for the incorporated owners.58

43.4 Constructive trusts and Māori land

Te Ture Whenua Māori Act 1993 does not explicitly exclude constructive trust claims to Māori land. While the Māori Land Court and the High Court have yet to do so, it is possible for these courts to determine a constructive trust claim in regard to Māori freehold land.59

43.4.1 High Court jurisdiction

In Grace v Grace the Court of Appeal held that the Māori Land Court does not have exclusive jurisdiction to hear claims in respect of trusts affecting Māori land (it simply has exclusive jurisdiction to constitute the five Māori land trusts).60 The court indicated that if faced with a convincing constructive trust claim, it would be possible to issue a vesting order in favour of the claimant. The case itself concerned a divorcing wife who sought a constructive trust over the family home that had been built on her husband’s Māori freehold land. However, she withdrew her constructive trust claim and instead pursued monetary compensation—a solution that the Court of Appeal approved: “That accords with the general principle that compensation in money is an appropriate remedy”.61

This issue is yet to be conclusively dealt with by the courts. It could be possible to distinguish the Court of Appeal’s obiter remarks as speculation and as contrary to the paramount retention principle advocated in Te Ture Whenua Māori Act 1993. Moreover, while it may be possible to issue a vesting order, that order may require Māori Land Court confirmation depending on whether it is classified as an alienation. This is because “no instrument of
alienation that is required to be confirmed ... shall have any force or effect until it is confirmed by the Court".62 Section 4 explicitly defines alienation to include the making or grant of any trust over or in respect of Māori land. Although such a disposition “effected by an order of the Court”63 is excluded, the Act defines “Court” to mean “the Māori Land Court or the Māori Appellate Court or both”.64 On this literal reading the High Court vesting order could be categorised as an alienation.

43.4.2 Māori Land Court jurisdiction

Te Ture Whenua Māori Act 1993 arguably gives the Māori Land Court jurisdiction to hear constructive trust claims concerning Māori freehold land. Section 18(1)(6) states that the court shall have the jurisdiction:

“To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.”

43.5 Fiduciary law: Crown and Māori

43.5.1 Introduction

In the landmark decision that first interpreted the principles of the Treaty of Waitangi, New Zealand Māori Council v Attorney-General (or better known as the Lands case), Cooke P referred to the relationship between the Treaty partners as creating “responsibilities analogous to fiduciary duties”.65 However, more than 20 years on, the extent and application of this duty still remains unclear. As the Waitangi Tribunal stated in a report released 22 June 2007: “Nothing has yet been determined by the superior courts in New Zealand to suggest that the duties analogous to fiduciary duties are inferior to the fiduciary duties known to the common law”.66 Ten days later, on 2 July 2007, the Court of Appeal released a judgment which refused to accept that the Crown had a fiduciary duty in a private law sense that is enforceable against the Crown in equity.67 This part considers the position of Parliament, the Courts, the Waitangi Tribunal, and academics on this issue.

43.5.2 Parliament

Two statutes explicitly refer to fiduciary obligations in a Māori context. As stated above at 43.3, s 18(1)(6) Te Ture Whenua Māori Act 1993 confers on the Māori Land Court the jurisdiction to determine whether any specified land is held by any person in a fiduciary capacity. The judicial interpretation of this section is discussed below at 43.5.6.

The other statute to reference fiduciary obligations is the Foreshore and Seabed Act 2004. Section 13(4) states:

“The Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the foreshore and seabed.”

62 Section 156(1) Te Ture Whenua Māori Act 1993.
63 Ibid, s 4 “alienation” (6)(6).
64 Ibid, s 4 “Court”.
This is the only statutory example of where Parliament has expressly stated that the Crown does not owe fiduciary duties to Māori. Alex Frame has argued that this is evidence that Parliament must be taken to have assumed that the fiduciary duties would otherwise apply. Frame has stated: “The conclusion is invited that the doctrine applies in full Canadian vigour – why else exclude it so methodically from application to claims concerning the seabed and foreshore?”\textsuperscript{68} That Canadian vigour and the judicial discussion of these duties in Aotearoa New Zealand are now discussed.

43.5.3 High Court and Court of Appeal cases

In 1987, in the \textit{Landi} case, Cooke P defined the relationship between the Crown and Māori as creating “responsibilities analogous to fiduciary duties.”\textsuperscript{69} He did so without reference to the like precedents developing in Canada. In the subsequent development of the Treaty of Waitangi jurisprudence, Cooke P made several observations as to fiduciary duties, in these cases reflecting on the Canadian development of fiduciary obligations owing to Aboriginal peoples in Canada.

In 1984, the Supreme Court of Canada, in \textit{Guerin v R}, stated:\textsuperscript{70}

“The Crown’s obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this \textit{sui generis} relationship, it is not improper to regard the Crown as a fiduciary.”

In 1990, Cooke P reflected on the \textit{Guerin} case in \textit{Te Runanga o Muriwhenua Inc v Attorney-General}.

He stated:\textsuperscript{71}

“More recently in Canada Indian rights have been identified as pre-existing legal rights not created by Royal proclamation, statute or executive order. It has been recognised that, in some circumstances at least, the Crown is under a fiduciary duty to holders of such rights in dealings relating to their extinction. The judgments in \textit{Guerin} … seem likely to be found of major guidance when such matters come finally to be decided in New Zealand. The approach of this Court in the \textit{Māori Council} case to the principles of the Treaty of Waitangi and the partnership and fiduciary analogies


\textsuperscript{69} \textit{New Zealand Māori Council v Attorney-General} [1987] 1 NZLR 641 (at p 664) (per Cooke P).


\textsuperscript{71} \textit{Te Runanga o Muriwhenua Inc v Attorney-General} [1990] 2 NZLR 641 (CA).

\textsuperscript{72} \textit{Te Runanga o Muriwhenua Inc v Attorney-General} [1990] 2 NZLR 641 (CA) (at p 655).
there drawn are consistent with them. ... There are constitutional differences between Canada and New Zealand, but the Guerin judgments do not appear to turn on these. Moreover, in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Māori people are less respected than the rights of aboriginal peoples are in North America."

Two years later, in *Te Runanga o Wharekauri Rekahu Inc v Attorney-General*, Cooke P reflected on a subsequent Supreme Court of Canada decision, *R v Sparrow,* and the Australian High Court decision, *Mabo v Queensland (No 2).* He cited these cases as evidence that "continuance after British sovereignty and treaties of unextinguished aboriginal title gives rise to a fiduciary duty and a constructive trust on the part of the Crown". Cooke P specifically cited the passage from *Sparrow* that reads: "The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation". Cooke P observed: "clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty". He added:

"In New Zealand the Treaty of Waitangi is major support for such a duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement. The only real difference is that, whereas the Canadian Supreme Court required more than 18 months before delivery of its decision in *Sparrow* and the High Court of Australia slightly more than a year before delivery of their decision in *Mabo*, in New Zealand circumstances this Court has had to move more quickly – possibly at the cost of some public and other understanding of the complexity of the task."

A year later, in 1993, in *Te Runanga o Te Ika Whenua Inc v Attorney-General*, Cooke P indicated that while the Court could not vest ownership of the river in Māori, a remedy could possibly be found in a breach of fiduciary duty: "[T]he Māori remedy lies in the Waitangi Tribunal claim, or conceivably in Court action based for instance on Māori customary title or fiduciary duty". In 1995, Cooke P favourably cited the *Wharekauri* observation that the Crown owes fiduciary duties to Māori.

The observations have not been limited to Cooke P. In 2000, Anderson and Paterson JJ, in the High Court, strongly articulated that in a case of public significance such as the Māori fisheries litigation a Court might have recourse to a full armoury of jurisprudential principles to do justice. The full paragraph reads:

"Although paragraph (c) refers to equitable relief, the application is brought in the context of proceedings under the Judicature Amendment Act 1972, the principles..."
attending which are not derived from the High Court’s equitable jurisdiction. Nevertheless in a case of such public significance as the Māori Fisheries litigation, the historical origins of which involve issues of equity in the broadest sense of that word, and concepts of trusts on a public scale, a Court might have recourse to a full armoury of jurisprudential principle to do justice.”

In contrast, McGechan J, in 2003, did not accept the basis of an argument that the Crown had obligations including those of a fiduciary character under the Treaty of Waitangi. This was a High Court case where Te Runanga o Ngai Tahu sought judicial review against the Attorney-General, the Minister of Fisheries and the Treaty of Waitangi Fisheries Commission. McGechan J stated:

“Ngai Tahu alleged obligations including those of a fiduciary character under the Treaty, the Deed of Settlement, the Māori Fisheries Act 1989 and the Settlement Act 1992 and breach by the Crown of those obligations. To avoid misunderstanding I say at the outset that I do not accept either of the Treaty or the Deed of Settlement gives rise in its own right to obligations directly enforceable through the Courts. Both do, however, have a background role in relation to interpretation of the two statutes concerned, the role made explicit in relation to the deed by s 3 of the Settlement Act. I accept, however, that the Commission and Crown of course had enforceable statutory obligations under the two Acts. The Ngai Tahu claim, if it is to succeed in Court, must be based on those statutory obligations properly interpreted.”

In 2007, the High Court and Court of Appeal explicitly disagreed on the extent of fiduciary obligations. In New Zealand Māori Council v Attorney-General, Gendall J in the High Court commenced his discussion with this statement:

“The starting point has to be the Treaty of Waitangi obligations and duties cast upon both the Crown and Māori. The Lands case makes it clear beyond any doubt that duties of a fiduciary nature rest upon the Crown pursuant to the Treaty, and the nature of its relationship with Māori. It holds a position of great strength with Sovereign power to legislate. So, too, Māori have duties of good faith.”

He then added:

“I think the plaintiffs’ true cause of action goes back to fiduciary duties or obligations contained in the July Agreement, the Deed Poll, the Trust Deed and legislative provisions, being a layering process to reflect the essential fiduciary obligation. For the reasons that I will now outline, the fiduciary duties exist because of the partnership relationship, a well as the vulnerability of Māori in the sense that they are subject to the Crown’s ultimate power to legislate.”

And:

“But, as here, apart from fiduciary obligations arising between partners, a feature that exists pursuant to the Treaty is that there can be fiduciary obligations arising because of vulnerability (unequal bargaining power in the relationship where a beneficiary is vulnerable to, or at the mercy of the fiduciary holding the discretion or power) and because of corresponding duties of loyalty and good faith vested in Treaty partners.”

Gendall J then traversed some of the Supreme Court of Canada’s case law including Guerin and stated:87

“The Canadian cases involved the Constitution Act 1982. The Courts said this Act casts upon the Canadian Government the duty to act in a fiduciary capacity which, whilst not guaranteeing immunity from Government regulation, required the Government to justify legislation having a negative effect on any Aboriginal right protected under that Act. In New Zealand there is no similar constitution act, but there is the Treaty of Waitangi.

“The New Zealand Court of Appeal has followed the lead of the Canadian Courts and imposed upon the New Zealand Government duties of a fiduciary nature in respect of the Māori people. The Lands case recognises that the Treaty created a continuing relationship of a fiduciary nature, akin to a partnership, and that there is a positive duty to each party to act in good faith, fairly, reasonably and honourably towards the other.”

To reiterate, Gendall J stated:88

“The Lands case has made it clear beyond any possible doubt that the instrument, the Treaty, created fiduciary duties on the Crown in favour of a specific class of people, Māori, and they, as partners with the Crown, have corresponding duties of good faith. ... The short point is that obligations under a Treaty such as the Treaty of Waitangi must be heeded and given recognition by the Courts irrespective of a specific statutory provision such as s 9 of the State-Owned Enterprises Act. Fiduciary obligations arise because of the overriding treaty obligations – if such are not obligated by legislation.”

And, later he stated:89

“I do not think the Court should shy away from expressing a view on questions of equitable and ethical duties, especially those which clearly arise out of the Treaty partnership and relationship. However, it is a delicate area and the Court cannot impose any restriction on Parliament passing such legislation as it thinks fit. If in the process the result is that the Crown takes to itself a benefit (in this case a very substantial benefit), to the detriment of possible potential claimants to whom fiduciary duties are owed and who might otherwise be entitled to share in those benefits, then Māori will be affronted, as is apparent from this case. That may have political, or policy, implications but they are beyond the Court.”

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And. 90

"I am prepared to express a view which those who may participate in the legislative process may consider, and ignore entirely if they choose. The Crown has a fiduciary duty of good faith to all Māori, and if it were to take for itself accumulated Crown rental funds in relation to Deferred Licensed Land by any process other than by a Waitangi Tribunal declaration or with the consent of Māori claimants to share in such funds, then such would be inconsistent with the Crown's fiduciary duty. Beyond that, the Court cannot go."

On appeal, William Young P, O'Regan and Robertson JJ took a different stance to Gendall J. 91 In a joint judgment delivered by O'Regan J, the Court of Appeal focused on one of the cases cited by Gendall J and declared Gendall's J reliance on it incorrect. According to the Court of Appeal, Gendall J had incorrectly relied on A-G v New Zealand Māori Council 92 (the Radio Frequencies case) because it is a case that does not stand "for the proposition that fiduciary duties, sourced from the Treaty itself, can form the basis of an action in New Zealand". O'Regan J stated. 93

"We do not intend to traverse the arguments made to us on the basis of the recent Canadian authorities as to the nature of the duty owed by the Crown to aboriginal peoples in that country. Those decisions reflect the different statutory and constitutional context in Canada. The decisions of this Court contain clear statements to the effect that the Crown's duty to Māori is analogous with a fiduciary duty and we see no proper basis for us to revisit them. The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Māori and the Crown under the Treaty: good faith, reasonableness, trust, openness and consultation. But it does so by analogy, not by direct application. In particular, we see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Māori under the Treaty, has a duty to the population as a whole. The present case illustrates another aspect of this problem: the Crown may find itself in a position where its duty to one Māori claimant group conflicts with its duty to another. If Gendall J was saying that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity, we respectfully disagree."

The most recent case on point (at the date of writing) is Paki & Ors v Attorney-General. 94 The representatives of the Pouakani people pled that the Crown owed the original owners of land adjoining the Waikato River a fiduciary duty based on four arguments which were collapsed into two streams of authority by Harrison J: the Treaty of Waitangi jurisprudence and related authority on the Crown's duty on extinguishment of customary rights. 95 Harrison J held against the Pouakani people on an earlier point of law but still progressed

95 Paki & Ors v Attorney-General 30/7/08, Harrison J, HC Hamilton CIV-2004-419-17.
96 Paki & Ors v Attorney-General 30/7/08, Harrison J, HC Hamilton CIV-2004-419-17 (at paras 25 and 108).
to consider the claim of alleged breach of fiduciary duty. He prefaced his discussion as “strictly obiter”.97 Harrison J rejected all arguments. At one point he stated:

“The Canadian authorities are settled. The Crown does not owe a fiduciary duty at large to its indigenous people or a group of them. An express undertaking assumed or implied from a particular instrument to represent or protect a specific interest is required. Mr Millard’s argument must fail for its generality and inability to identify a principled foundation within the statutes or another instrument. This conclusion is, I think, decisive against the representatives’ claim of a fiduciary obligation by the Crown when acquiring the Pouakani people’s lands between 1887 and 1892.”

The Pouakani people are currently seeking to appeal this decision to the Court of Appeal.98

43.5.4 Waitangi Tribunal Reports

The Waitangi Tribunal has in several instances discussed the fiduciary obligation of the Crown to Māori. Even though the courts are free to dismiss Tribunal statements, the courts have stated that the Tribunal’s opinions “are of great value to the Court”,99 and “are entitled to considerable weight”.100 In many of its reports, the Tribunal has discussed the Crown owing and at times breaching fiduciary duties to Māori.101 It is worthwhile repeating some of the most recent discussion that took place in 2007. In the He Maunga Rongo: the Report on the Central North Island Claims report102 – a report that was published 10 days before the Court of Appeal’s decision in A-G v New Zealand Māori Council – the Tribunal stated:103

“This principle of active protection is said to create duties akin to fiduciary duties. We reject at this time the Crown’s argument that this duty is in some way less than the fiduciary duty known to the common law or equity. That is a matter still to be determined by the Courts in New Zealand.”

It later stated:104

“Nothing has yet been determined by the superior courts in New Zealand to suggest that the duties analogous to fiduciary duties are inferior to the fiduciary duties known to the common law. What is clear is that there are Treaty duties analogous to fiduciary duties imposed on the Crown actively to protect Māori interests. It is also clear that

97 Poki & Ors v Attorney-General 30/7/08, Harrison J, HC Hamilton CIV-2004-419-17 (at para 107).
98 Note that the Supreme Court recorded a statement in its minute to the court in relation to New Zealand Māori Council v Attorney-General [2007] NZSC 87 (at para 2(b)) stating: “The parties acknowledge that the comments of the High Court and Court of Appeal in their judgments, of 4 May 2007 and 2 July 2007 respectively, concerning the Crown’s fiduciary obligations to Māori under the Treaty of Waitangi are obiter dicta (paragraphs 61-82 in the Court of Appeal judgment, and paragraphs 52-53, 57-70, and 94 of the High Court judgment)”.
100 Maunga Te Ariki Te Uri Karaka Te Wairo v The Minister of Conservation and Auckland City Council 19/2/02, Harrison J, HC Auckland, noted 25 TCL 12/3; [2002] BCL 290 (at para 59).
103 Ibid, Part V, page 21 (this reference pertains to a pre-publication copy of the report).
these are not absolute duties. The Crown can take or regulate resources or taonga in breach of the terms of Article 2 of the Treaty in certain circumstances as outlined above. If it does so, it must act fairly and reasonably, and only after proper consultation and payment of compensation."

43.5.5 Commentary

The most pivotal writing on the fiduciary duties of the Crown to Māori has been done by Alex Frame and Paul McHugh. Paul McHugh has written supportively of why the doctrine has “failed to take root in New Zealand” 105. In a 2005 article, Frame debunked McHugh’s reluctance to support the applicability of fiduciary law and argued that: 106

“the equitable remedy of breach of fiduciary duty is likely to be available against the Crown in New Zealand, except, probably, in relation to the foreshore and seabed, and that the circumstances for its application by New Zealand courts are likely to be those outlined by the Supreme Court of Canada in the line of cases beginning with Guerin in 1984”

In this article, Frame set out a helpful profile of the remedy. 107

- Where either a true Trust … or a “Trust-like” (Guerin et) relationship exists between the Crown and Māori, equity will detect and enforce a fiduciary relationship.
- For a trust-like relationship to be found the court must be shown specific circumstances, albeit coloured by the context of the general Crown/Māori relationship including the Treaty of Waitangi and a specific Māori legal interest which pre-dated the Crown’s intervention, over which the Crown has assumed a discretionary control.
- The remedy is unlikely to be available to constrain the Crown in its general administration of social services or the political system.
- Breach of the fiduciary duty will occur where the Crown has failed fully to disclose relevant matters, or has acted in breach of the rules against profiting or self-dealing, or has failed to act with ordinary diligence in protecting the plaintiff’s interests, or has permitted an exploitative bargain.
- The plaintiff must come to the Court “with clean hands” and have commenced the proceedings within a reasonable time of either the acts or omissions complained about, or of the time when the Crown, having been made aware by the plaintiff of the complaint, has failed to provide redress.

F.M. (Jock) Brookfield has provided interesting commentary on the 2007 Court of Appeal New Zealand Māori Council v Attorney-General decision. Brookfield suggested that the different constitutional contexts of Canada and New Zealand are relevant to this question of whether

the Crown owes indigenous peoples a fiduciary duty. He then asked: “could that fiduciary duty or equitable obligation, recognised in Canada, survive in New Zealand in a context outside that of the Māori Land legislation and independently of the Treaty?”

As Brookfield noted, that question was not before the Court of Appeal, which dealt with the matter solely in relation to the Treaty. Brookfield’s position is:

“Certainly, so far as the Treaty is relied on, the Crown’s obligations under it or its principles can indeed be by way of analogy only with private law concepts. But I suggest there can be no good reason for channelling the fiduciary duty exclusively through the Treaty, for it to be rendered relatively ineffective under Te Heuheu Tukino v Aotearoa District Māori Land Board. Indeed the Treaty cannot have the effect of replacing any part of the fiduciary duty, dependent on the honour of the Crown in law ‘depriv[ing] from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation’.”

More recently, in July 2008, David Williams presented a paper at the 7th Annual Māori Legal Forum and posed these questions to the audience:

“Is ‘fiduciary duty’ a useful pragmatic concept, or an undesirable blind alley?

What is the relevance of the (paternalistic) fiduciary trust concept to Crown/Māori relationships?

What is the relevance of Canadian common law on aboriginal rights in New Zealand common law?

Is it better to pull back from ‘fiduciary duty’ and rely on more recent Canadian conceptions of the ‘honour of the Crown’ and a ‘duty of the Crown’ to consult and to accommodate Indigenous interests?

Is it better to pull back from ‘aboriginal title’ doctrines altogether as fatally flawed and pursue modern international norms of indigenous rights?

Might a constitutional status for Indigenous rights/Tiriti o Waitangi rights better assist Māori?

Despite the Court of Appeal ruling in the 2007 New Zealand Māori Council v Attorney-General case, the issue remains contentious. We await a comprehensive Supreme Court decision on this issue.

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109 Ibid, at 93-94. Brookfield is citing a passage from a Supreme Court of Canada case: Tsilhqot’in Nation v British Columbia (Project Assessment Director) [2004] 3 SCR 550, 564, per McLachlin CJ C. Note that in the "In Good Faith", book, the then Minister of Treaty Negotiations listed fiduciary duty as the first in a list of four principles inherent in understanding partnership: see M Burton, “Impact on Government – A Political Perspective”, ibid, 51, at 53.


43.5.6 Māori Land Court’s jurisdiction to hear fiduciary claims

As stated above at 43.5.2, s 18(1)(i) Te Ture Whenua Māori Act 1993 gives the Māori Land Court the power to determine whether “any specified land” is held in a fiduciary capacity. Māori land owners in Wairoa tested the extent of this power in the late 1990s. They argued that adjacent land which the Crown had taken from them in the 1930s for road purposes was still held subject to fiduciary obligations owing to them. The case went through to the Court of Appeal where it held that the land, now with general land status and vested in the Wairoa District Council, was not being held in a fiduciary capacity. The court stated that the Act cannot be taken “to be a vehicle whereby General land beneficially claimed by Māori can be the subject of a vesting order in favour of Māori”.113 The decision was strongly critiqued by some Māori.113

43.6 Fiduciary law: intra-hapu and intra-iwi

The Māori Fisheries Act 2004 sets forth a regime for Māori to benefit from commercial fishing. Te Ohu Kai Moana will transfer the assets to “mandated iwi organisations”. These organisations must act for the benefit of all the members of the iwi. Section 17(2)(b) states that the organisation’s constitutional documents must be ratified to have effect under the Act:

“In the case of a mandated iwi organization, by not less than 75% of the adult members of the iwi who vote –

“(1) in person at a general meeting called for the purpose of adopting a constitution; or

“(2) by postal ballot.”

In 2008, this section was tested in the Māori Land Court.114 At issue was the ratification hui and postal vote conducted by the Hauraki Trust Board. The court held that the Trust Board was estopped from applying to Te Ohu for failing to adequately notify voters of what was required for an effective and valid vote. These words from the court should be a warning to all iwi going through this process:115

“It is only in the Māori context, such as through Te Ture Whenua Māori Act 1993 and also the MFA that Trusts can be imposed on the owners of assets, without full consent from all owners. Where legislation provides a process which results in the imposition of a Trust, then the process must be followed correctly. This is an electoral process, and as a matter of policy the process must be correct whether the error in process affects a small number or a large number of people. … Where an electoral process is faulty, resulting in confusion as to how to validly and effectively take part, then it is unconscionable to rely on it. The Board’s good intentions are not sufficient to diminish that unconscionability.”

114 Taipari v Hauraki Māori Trust Board 30/4/08, Judge Milroy, MLC Waikato-Maniapoto 114 Hauraki MB 34.
115 Taipari v Hauraki Māori Trust Board 30/4/08, Judge Milroy, MLC Waikato-Maniapoto 114 Hauraki MB 34 (at para 137).