IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-341
[2021] NZHC 335

UNDER	the Judicial Review Procedure Act 2016; Part 30 of the High Court Rules; the Declaratory Judgments Act 1908; and the Common Law
IN THE MATTER	of an application for judicial review and/or declaratory judgments
BETWEEN	RORE PAT STAFFORD Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	ACCIDENT COMPENSATION CORPORATION Second Respondent
	FIRE AND EMERGENCY NEW ZEALAND Third Respondent (discontinued)
	KĀINGA ORA – HOMES AND COMMUNITIES Fourth Respondent
	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Fifth Respondent
	HOUSING NEW ZEALAND LIMITED Sixth Respondent
	RADIO NEW ZEALAND LIMITED Seventh Respondent (discontinued)
	NELSON MARLBOROUGH INSTITUTE OF TECHNOLOGY Eighth Respondent

TRANSPOWER NEW ZEALAND LIMITED
Ninth Respondent (discontinued)

Hearing: 10-13 August 2020; further submissions received 9 February 2021

Counsel: K S Feint QC, M Smith and H Irwin-Easthope for Applicant
J R Gough, S M Kinsler and W I Guake for First Respondent
D L Laurenson QC and R L Roff for Second Respondent
V E Casey QC, R E Brown and G F Dawson for Fourth and Sixth Respondents

Judgment: 2 March 2021

JUDGMENT OF ELLIS J

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[1] In *Proprietors of Wakatū v Attorney-General* the Supreme Court held that the Crown owed fiduciary duties to the customary owners of certain land at the top of the South Island (Te Tau Ihu), and their descendants, to abide by undertakings given to the owners some 175 years ago.[1] In essence those undertakings were that—in return for the owners' consent to the grant of 151,000 acres of land in that area to the New Zealand Company—one-tenth of that land (the tenths), together with the owners' pā, urupā and cultivations (the occupied lands), would be reserved for them.

[2] Questions as to breaches of these duties, and of defences and remedies, remain at large and have been remitted to this Court for determination at trial. Because of the considerable historical research that is necessary to consider and

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1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

determine those issues, that trial—let alone any final resolution of (what I will call) the *Wakatū* proceedings—is some time away.[2]

[3] Mr Stafford is the named plaintiff in the *Wakatū* proceedings. By dint of his rangātira status, he represents the other descendants of the customary owners. In the event of even his partial success at trial, he seeks the return of what little of the tenths land still remains in the possession or control of the Crown.

[4] Mr Stafford says that any of the tenths land presently owned by the Crown, Crown entities, or State-owned enterprises should be protected from alienation so that the remedies he seeks in the *Wakatū* proceedings are not prejudiced. He says there should be a moratorium on the disposal of all such land until the resolution of his substantive claim. So in this proceeding he seeks judicial review of the refusal by the Attorney-General and/or relevant Ministers:

(a) to impose such a moratorium in relation to land owned by the "core" Crown; and

(b) to direct the other respondents—as entities owned by the Crown—not to dispose of land within the relevant area that is owned by those entities.

BACKGROUND

[5] In order to grapple with the difficult and novel issues raised in these proceedings, it is necessary to set out a considerable amount of background and contextual matters in some detail. So far as possible, I do this chronologically because, as is often the case, the chronology is revealing.[3]

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2 The extent of the further factual issues requiring resolution is significant, as the scope of the remedial relief the applicant seeks in the main claim is very broad and requires examination of the distinct histories of, and dealings with, more than 3000 parcels of land (as at 1848).

3 The principal reason it has taken so long to complete this judgment is that I have been required to extrapolate this background information for myself, from the raft of material filed by the parties.

The tenths

[6] In 1839, William Wakefield agreed to purchase for the New Zealand Company (the Company) a vast area of land in the lower North Island and upper South Island together comprising some 20 million acres (the 1839 purchases). As noted earlier, the purchases were agreed to by the customary owners on the basis that the tenths would be reserved for them.

[7] The Company subsequently offered allotments to settlers, each comprising a one-acre town lot, a 50-acre suburban lot and a 150-acre rural lot.

[8] Following the signing of the Treaty of Waitangi in 1840 and the promulgation of the Land Claims Ordinance 1841, all pre-Treaty sales were declared null and void unless allowed by the Crown. The sales would only be authorised if commissioners confirmed that the purchases had been agreed on equitable terms. Only upon receiving such confirmation would native title be cleared, enabling the land to pass to the Crown—and thence to the Company.

[9] William Spain was appointed as the commissioner charged with investigating the 1839 purchases. He concluded that the promise of the tenths reserves and additional payments made to the owners meant that the purchase of land in the Nelson districts had been on equitable terms. So he recommended that the Company be granted 151,000 acres of land in the districts of Wakatū (Nelson), Waimea, Moutere, Motueka and Massacre (now Golden) Bay. As well as the tenths reserves, all occupied lands were also to be excluded from the grant. This recommendation became known as the "Spain award" and was formalised under the Land Claims Ordinance on 31 March 1845.

[10] In 1892, some 50 years after the Spain award, the Māori Land Court determined the identity of the customary owners of the tenths lands. While that determination has not itself been without controversy, there is no dispute that Mr Stafford and those he represents are descendants of those on that list.

[11] There is also now no dispute that much of the tenths and occupied lands was never reserved. There are also historical grievances about how some of the lands that were reserved were subsequently dealt with.

Wai 56

[12] In 1977 an entity known as the Proprietors of Wakatū Incorporated (Wakatū) was established to represent the descendants of the customary owners of the lands that were, or should have been, reserved.

[13] In 1986, the Wai 56 claim was filed by Mr Stafford and another claimant for themselves and on behalf of Wakatū, Ngāti Tama, Te Ātiawa, Ngāti Koata, Ngāti Rārua, and "all Māori people affected by [the] claim". The claim sought redress both for the failure to reserve the full tenths land and for the way in which the reserves had been managed by the Crown.

[14] The Waitangi Tribunal heard the Wai 56 claim as part of its wider inquiry into many different historical claims relating to alleged Treaty breaches in Te Tau Ihu. The Crown accepted before the Tribunal that Treaty principles had been breached in a number of ways, including in relation to the tenths reserves.

[15] The Tribunal reported on the claims in 2008 but did not consider questions of relief, in order to permit settlement negotiations to occur.

[16] As is well known, the Crown's preference in resolving claims under the Treaty of Waitangi Act 1975 is to deal with large iwi groupings and with all grievances in a district collectively. Its practice is to negotiate with a representative body that has secured the mandate of the other claimants. The relevant body here was Tainui Taranaki ki te Tonga.

[17] When Mr Stafford signed the mandate that allowed Tainui Taranaki ki te Tonga to negotiate a settlement in respect of all Treaty claims in the district, including Wai 56, it was on the basis that Wakatū would remain kaitiaki of the Wai 56 claim in the negotiations.

The *Wakatū* proceedings

[18] Consistent with Mr Stafford's reservation, in the course of the settlement negotiations, counsel for Tainui Taranaki ki te Tonga and Mr Stafford sought a discrete settlement of the Wai 56 Nelson tenths claims. The Crown did not agree. It took the view that—in the usual way—the claims about the tenths should form part of the wider settlement of all grievances with all iwi groupings represented by Tainui Taranaki ki te Tonga. As a result, Mr Stafford filed the *Wakatū* proceedings in the High Court, in 2010.

[19] Initially, the plaintiffs were Wakatū, Mr Stafford, and Te Kāhui Ngahuru Trust.[4] But as noted earlier, now the only plaintiff is Mr Stafford, albeit in a representative capacity.

[20] The most recent amended statement of claim in those proceedings contains six causes of action. The core allegation is that the Crown is liable to the plaintiff for failing to ensure, during the 1845 to 1850 period, that the tenths reserves comprised the full 15,100 acres set out in the Spain award. More specifically, Mr Stafford says that the Crown had a duty as a trustee or fiduciary to ensure that 15,100 acres (together with occupation reserves) were reserved from the Crown grant—but fewer than 4,000 acres were set aside. It is pleaded that:

> … the Crown either still holds the shortfall on trust for the tenths' owners, or, in breach of trust, has converted the shortfall to its own use or sold or gifted the land to others.

[21] As well, Mr Stafford says that:

(a) Governor Grey unlawfully approved the reduction in number of town reserve sections from 100 to 53, in 1847;

(b) Governor Grey unlawfully granted 918 acres of suburban tenths reserve land at Whakarewa to the Bishop of New Zealand for a school in 1853; and

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[4] The trust was established in 2010 by Mr Stafford as settlor for the purposes of representing the beneficiaries of the claimed trusts of the Nelson tenths and resolving their claims against the Crown for issues associated with the Nelson tenths.

(c) suburban tenths reserves were wrongfully reduced as a result of exchanges made before 1882.

[22] The High Court's first judgment on the claim was issued in 2012.[5] Clifford J held that only Mr Stafford personally had standing to bring the claim and that no fiduciary duties were owed.

[23] The plaintiffs appealed to the Court of Appeal.[6]

The Settlement Act

[24] Treaty settlement negotiations in relation to the Te Tau Ihu claims had been put on hold pending the High Court's decision in the *Wakatū* proceedings. Following the release of Clifford J's judgment, negotiations resumed. They culminated in the entry into separate Deeds of Settlement with the members of two groupings of iwi of Te Tau Ihu o Te Waka-a-Maui, including the grouping represented by Tainui Taranaki ki te Tonga—Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu and Te Ātiawa o Te Waka-a-Māui.

[25] The passage on 22 April 2014 of the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 (the Settlement Act) authorised and, to a certain extent, effected the agreements recorded in the relevant Deeds of Settlement.

[26] The Settlement Act took effect from 1 August 2014. It included acknowledgements of Treaty breaches and apologies made on an iwi by iwi basis. Included in a number of these were acknowledgements of, and apologies for, breaches involving both the failure to reserve, and the subsequent maladministration of, the tenths land.

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5 *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461.
6 Discussed further at [39] and following, below.

The RFR process

[27] The Settlement Act also established a right of first refusal (RFR) process in relation to future disposals of land in Te Tau Ihu (including land within the Spain award area) owned either by the Crown or by a "Crown body". The definition of "Crown body" includes Crown entities and SOEs and, so, the second to ninth respondents in this present proceeding.

[28] Under the RFR process, if a decision is made by the Crown or a Crown body to dispose of any land within the area, it must first be offered to the Trustees of recipient trusts under the Act (effectively the eight iwi of Te Tau Ihu).[7] While Mr Stafford and those he represents may also be beneficiaries of some of those iwi trusts, the RFR process does not require any offer to be made specifically to the Wai 56 claimants.

[29] There are, however, a number of exceptions to the RFR obligations. These are contained in ss 189–200 of the Settlement Act. They relevantly include:

(a) Section 192, which permits an RFR landowner to dispose of RFR land in accordance with an obligation under any enactment or rule of law.

(b) Section 193, which permits an RFR landowner to dispose of RFR land in accordance with:

> (a) a legal or an equitable obligation that—
>
> (i) was unconditional before the settlement date; or
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> (ii) was conditional before the settlement date but became unconditional on or after the settlement date; or
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> (iii) arose after the exercise (whether before, on, or after the settlement date) of an option existing before the settlement date; or

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7 Ngāti Kuia, Rangitāne, and Ngāti Apa; Ngāti Kōata, Ngāti Rārua, and Ngāti Toa; and Ngāti Tama and Te Āti Awa.

(b) the requirements, existing before the settlement date, of a gift, an endowment, or a trust relating to the land.

(c) Section 199, which permits other disposals by Housing New Zealand Corporation (now Kāinga Ora – Homes and Communities) or any of its subsidiaries:

> … if the Corporation has given notice to the trustees of the 1 or more offer trusts that, in the Corporation's opinion, the disposal is to give effect to, or assist in giving effect to, the Crown's social objectives in relation to housing or services related to housing.

(d) Section 200, which permits an RFR landowner otherwise to dispose of RFR land if the landowner's obligations in relation to RFR land are subject to—

> (a) any other enactment or rule of law but, for a Crown body, the obligations apply despite the purpose, functions, or objectives of the Crown body; and
>
> (b) any interest, or legal or equitable obligation,—
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> (i) that prevents or limits an RFR landowner's disposal of RFR land to the trustees of an offer trust; and
>
> (ii) that the RFR landowner cannot satisfy by taking reasonable steps;[8] and
>
> …

Preservation of Wakatū proceedings

[30] Section 25(1) and (2) of the Settlement Act provide that the Act finally settles all historical claims and releases and discharges the Crown from all obligations and liabilities in respect of those claims. And subs (4) provides that:

> (4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—
>
> (a) the historical claims; or

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[8] Subsection (2) provides that, for the purposes of subs (1)(b)(ii), reasonable steps do not include steps to promote the passing of an enactment.

(b) the deeds of settlement; or

(c) this Act; or

(d) the redress provided under the deeds of settlement or this Act.

[31] Importantly, however:

(a) Subsection (5) makes it clear that subs (4) does not exclude the jurisdiction of a court in relation to the interpretation or implementation of the Settlement Act.

(b) Subsection (6) expressly preserves the position of the *Wakatū* plaintiffs. It states:

> Subsections (1) to (5) do not affect—
>
> (a) the ability of a plaintiff[9] to pursue the appeal filed in the Court of Appeal as CA 436/2012; or
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> (b) the ability of any person to pursue an appeal from a decision of the Court of Appeal; or
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> (c) the ability of a plaintiff to obtain any relief claimed in the Wakatū proceedings to which the plaintiff is entitled.

[32] It may usefully be interpolated here that at the time the Settlement Act was passed, only Mr Stafford personally was a "plaintiff", and the High Court had found against him in terms of his claim that fiduciary duties were owed. But now, Mr Stafford and all those he represents fall within the relevant definition and the Supreme Court has found that fiduciary duties *were* owed to them.[10]

[33] It is, perhaps, because of this quite fundamental change in the litigation landscape that the relationship between the *Wakatū* claim and the Settlement Act

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9 Subsection (8) defines "plaintiff" as meaning a plaintiff named in the Wakatū proceedings, and "Wakatū proceedings" are defined as meaning the proceedings filed in the High Court as CIV–2010–442–181.

10 For completeness, I also record that while these judicial review proceedings are—in formal terms—separate from the *Wakatū* proceedings, no party to them has suggested that this Court lacked jurisdiction in the review proceedings by virtue of s 25. And that must, I think, be right—the application for review is directly concerned with the relief claimed by the plaintiff in the *Wakatū* proceedings and so must be preserved by s 25(6)(c).

has become vexed and, in some ways, is one of the central issues in the present dispute. As will shortly be seen, one of the principal reasons given by the Attorney-General for declining to make directions preserving Mr Stafford's position in the *Wakatū* proceedings was the potential for conflict with the RFR process and with the Crown's wider settlement obligations to the eight Te Tau Ihu iwi.

Caveats over Settlement Act land

[34] In November and December 2012 (after Clifford J's judgment and before the Settlement Act), Wakatū had lodged caveats against various titles comprising certain land owned by the Crown and occupied by three Nelson primary schools. In the case of two of the schools, the land was part of the original tenths allotment. In the case of the third, the caveated land was part of the Matangi Āwhio pā as it existed in 1842. Thus, while the land of the third school was not reserved as a tenths allotment, it was land that should not have been transferred to the Company. Wakatū said that the land therefore was land:

(a) in respect of which the Crown has breached obligations owed to iwi, hapū and whānau of Te Tau Ihu o Te Waka-a-Māui; and

(b) that was still available to be restored to those iwi, hapū and whānau by way of remedy in the *Wakatū* proceedings.

[35] In July 2014, just after the Settlement Act had been passed (but before the Court of Appeal's decision on the appeal in the *Wakatū* proceedings), Wakatū applied to this Court under s 145A(1) of the Land Transfer Act 1952 for orders that the caveats not lapse. That application countered the applications for lapse made by the Crown to the Registrar-General of Land to enable those properties to be transferred to local iwi pursuant to the Settlement Act, which was about to come into force.

[36] Clifford J refused the Crown's application to lapse the caveats.[11] After noting that it was an issue that was then before the Court of Appeal,[12] he tentatively rejected the Crown argument that s 25 of the Settlement Act was not intended to allow Wakatū to advance interests on behalf of members of the iwi who had signed full and final settlement deeds with the Crown, and who were to receive the benefit of full and final settlements provided by the Settlement Act.

[37] And although Clifford J had found against the plaintiffs in the substantive *Wakatū* proceeding, he was satisfied that it remained reasonably arguable that the caveated land was land:

(a) owned by the Crown pursuant to constructive or institutional constructive trusts for the benefit of the Wakatū claimants; and

(b) that should, as a remedy for the breach, be returned to iwi.

[38] In short, the Judge accepted that if the caveats were lifted then Wakatū's appeal rights in relation to the substantive proceeding would be rendered nugatory.

Wakatū in the Court of Appeal

[39] The Court of Appeal's decision was issued in December 2014.[13] The Court found—contrary to the High Court's finding—that Mr Stafford had standing to bring the *Wakatū* proceeding on behalf of other customary owners without obtaining a representative order. This was because of the customary authority associated with his rangātira status. Clifford J's other findings on standing (that neither Wakatū nor Te Kāhui Ngahuru Trust possessed it) were upheld.

[40] On the issue of the relationship between the Settlement Act and Mr Stafford's claims, the Court agreed with Clifford J's caveat decision. The

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11 *Proprietors of Wakatū v Attorney-General* [2014] NZHC 1785.

12 The Court gave leave after the hearing of the *Wakatū* appeal had been completed for submissions on the Settlement Act issue to be filed.

13 *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298.

Court held that the Act did not bar any claim against the Crown in this case for breach of trust, nor any claim on behalf of the customary owners based on breach of fiduciary duties owed to them. Parliament's intention was that Mr Stafford's appeal, and any appeal to the Supreme Court, was to be allowed to proceed, while those who wanted to settle their claims could do so unaffected by it. Ellen France J said:

> [39] I consider it follows from the first objective that the Crown cannot be right that the Settlement Act bars any claim in this case against the Crown for breach of trust in respect of express trusts. Nor can it be right that the Settlement Act bars the appellants' claims based on breach of fiduciary duties owed to the customary owners. The distinction the Crown seeks to draw is between the claims to which the appellants are themselves entitled and those advanced on behalf of persons who are not named plaintiffs. Because the claims being pursued by the named plaintiffs were in large part for customary groups that had agreed to settle their historical claims, it was said, the claims could not proceed.
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> [40] However, the appellants must be entitled in terms of s 25(6)(c) to obtain the relief they seek in the Wakatū proceedings, if it is found to be available to them. The fact there is a reference to the specific "CA" file number of the appeal suggests the legislature was aware of the particular nature of the claim. In specifically preserving the ability to obtain the relief sought, the legislature cannot at the same time have cut down the appellants' claims in the way the Crown submits. For example, the relief sought includes a declaration that the Crown was obliged to reserve and hold on trust 15,100 acres in addition to occupation reserves and one tenth of any further land acquired by the New Zealand Company for the Nelson settlement and that it failed to do so. In any event, Mr Stafford would be entitled to this relief on his own account.
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> [41] I do not consider my approach is inconsistent with the legislative history. Clifford J … set out the relevant extract from the report of the select committee considering the Bill which recorded advice from the Office of Treaty Settlements, in consultation with the Crown Law Office, as follows:
>
> > The current orthodox position is that the Treaty of Waitangi does not give rise to directly enforceable legal obligations without specific statutory authority. In the Wakatū proceedings the claims are based around the same factual grievances that are the subject of the settlement, but primarily raise private law claims based in trust and fiduciary duty, not based on the Treaty breach. The ability to prosecute certain private law claims raised in Wakatū may be impacted by extinguishment provisions of the Tainui Taranaki Treaty settlements and their extinguishment clause, unless expressly preserved. Crown Law advice was sought on this matter and ultimately, it was considered … improper to obstruct final determination in the appellate courts. Legislative drafting was developed to specifically apply a preservation

> clause only to the current litigation and specific parties to that litigation.

[41] Ultimately, however, Mr Stafford's appeal against the High Court's substantive findings—that no fiduciary duties were owed by the Crown and that there was no trust over the tenths land—did not succeed. In light of the subsequent result in the Supreme Court, however, it is unnecessary to detail the reasons for that here.

The Supreme Court decisions

[42] Mr Stafford was granted leave to appeal to the Supreme Court in May 2015, and the decision was released in February 2017. As noted earlier, the Court allowed Mr Stafford's appeal on the substantive matter. A four Judge majority held that the Crown owed fiduciary duties to reserve the tenths (15,100 acres) for the benefit of the customary owners and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award.

[43] The Chief Justice and Glazebrook J went further and found that the tenths were (or should have been) held by the Crown on trust for the customary owners.[14] They also found that, on its face, the failure to reserve the rural tenths (at least) constituted a breach of that trust.[15] As regards the rural tenths, those two Judges thought that only questions of available defences (that the claim had been extinguished due to the effluxion of time) and remedies remained undetermined. They agreed that those issues, together with issues about breaches relating to other tenths land needed to be remitted to the High Court for determination, after hearing further evidence.

[44] The majority agreed with the High Court and the Court of Appeal that the claims were not barred by the 2014 Settlement Act, but noted that questions of prejudice to the Crown or to others caused by the settlement were matters that

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14 Elias CJ at [401] and Glazebrook J at [573]. Arnold and O'Regan JJ did not determine that question, finding it sufficient for the purposes of the appeal to hold that fiduciary duties were owed.

15 Elias CJ at [436] and Glazebrook J at [719].

remained to be considered and would be relevant—for example—to any application of the doctrine of laches.

[45] The Court unanimously dismissed the Attorney-General's cross-appeal against the Court of Appeal's determination that Mr Stafford had standing to pursue the claim not only on his own behalf, but also on behalf of the customary owners.

The request for a moratorium

[46] On 21 April 2017, shortly after the release of the Supreme Court's decision, Ms Feint wrote on behalf of Mr Stafford to Crown Law. She said:

> Mr Rore Stafford has been considering the Supreme Court's decision to remit the 'tenths' case back to the High Court for determination of remaining questions as to liability, loss and remedy.
>
> In seeking remedies, it is Mr Stafford's clear objective to obtain, to the extent possible, the return of the whenua tuku iho of the hapū and whānau. As the remedy process is likely to take some time, the first priority is to ensure that any 'tenths' land remaining in Crown possession is protected from disposal. We include in the definition of 'tenths' land not only the properties that were formerly selected as 'tenths' sections, but also land that could comprise the 'shortfall' of over 10,000 acres – that is, land in the possession of the Crown (either land whose registered owner is the Crown or public body, or land without title) within the boundaries of the 151,000 acres the subject of the Spain award.
>
> In addition, Mr Stafford wishes to protect the pā, urupā and cultivations within the boundaries of the Spain award. We appreciate that the Crown will require information on exactly where the occupied lands are in order to protect them. We are working on compiling that information as a matter of urgency.
>
> In the meantime, we would like to know whether there are any proposals to dispose of any Crown land within the boundaries of the Spain award, whether that be by sale, or by transfer to local authorities or other parties. We would appreciate it if you can make inquiries to ascertain whether there are any proposals to dispose of any properties within the boundaries of the Spain award?

[47] On 6 June 2017 Mr Stafford himself wrote—rangātira ki te rangātira—to the then Prime Minister about the issue. He said:

> The most pressing issue for me is to protect Crown properties whose return will be sought by way of remedy. We have given some thought to a land protection mechanism that would avoid the need for a costly and

> potentially disruptive caveats process. As a conversation starter, we have developed some principles to guide the development of a mechanism in conjunction with Crown officials, and we attach those principles as an appendix. Essentially, we propose an early warning system that would notify me if any Crown-owned lands are to be disposed of.

[48] The letter also proposed a protection mechanism whereby:

(a) A nominated lead Crown agency—Crown Law or Land Information New Zealand (LINZ) were suggested—would establish an "early warning" system to ensure that it was notified by other government departments or relevant agencies of any proposed disposal of Crown property[16] within the boundaries of the Spain award.

(b) Upon receiving such notification, the lead agency would immediately notify Crown Law, with the object of ensuring that Mr Stafford was, in turn, notified of the pending disposal at least one month before any transfer date.

(c) Mr Stafford would then have time to consider whether to caveat the property on the basis of a "potential prior equitable interest".

(d) Mr Stafford was to give the Registrar-General of Land notice of any potential prior equitable interest in the relevant property, so that the Registrar could notify both Crown Law and any intending purchaser or transferee of that potential interest, if any transfer documents of a relevant Crown property were lodged for registration.

[49] On 28 June Ms Feint wrote to the then Attorney-General, raising with him the need for a protection mechanism and asking for a meeting. A further letter was sent to Crown Law on 21 August seeking undertakings that the Crown would

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[16] Crown property was defined for the purposes of the proposal as "land in Crown title (the Sovereign in right of New Zealand), including any government department, any local authority land, and any untitled land".

not dispose of or otherwise prejudicially deal with any Crown land until a system of safeguards has been established. The letter relevantly said:

> 7. I understand from informal discussions we have had that work is being done by Crown officials to develop a land protection mechanism, and that that work is drawing on the principles that have been identified in the correspondence I have referred to above.
>
> 8. Nonetheless, Mr Stafford is becoming increasingly concerned at the length of time that it is taking to carry out that work, and in particular, the absence in the interim of any protective mechanism while work by officials in relation to a land protection mechanism is being carried out. That situation gives rise to a risk that land may be dealt with in a manner prejudicial to litigation claims to the land - for instance, through proposals to sell such land to bona fide third parties for value without notice of any equitable interest in the land.
>
> 9. There are two potential ways in which the risk just noted might be addressed. First, the Attorney-General could provide a written undertaking recognising that:
>
> 9.1. The Crown has a legal obligation to establish a system of safeguards to identify and protect Crown land (i.e. land whose registered owner is the Crown or a public body, or land without title[17]) located within the boundaries of the Spain award until the High Court proceedings have been resolved; and
>
> 9.2. The Crown will not dispose of or otherwise prejudicially deal with any such land until that system of safeguards has been established and agreed with Mr Stafford.

[50] The letter advised that if no such undertaking was forthcoming, Mr Stafford would then file an urgent interlocutory application seeking declarations and directions analogous to those made in *New Zealand Māori Council v Attorney-General* (the *Lands* decision), namely:[18]

> 10.1 A declaration to the effect that the Crown has a legal obligation to establish a system of safeguards to identify and protect land that will or may be claimed through the ongoing litigation, and that the Crown should not take any further action that will or may prejudice such land until that system of safeguards has been established; and

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17 It may be observed that this definition of "Crown land" is arguably more expansive than the earlier definition proposed by Mr Stafford.

18 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

> 10.2 Directions similar to those made by the Court of Appeal in the *Lands* case, namely a relatively short deadline for the Crown to develop a system of safeguards, to consult with Mr Stafford on that proposed system, and if he did not agree, then for the Crown to file its proposals with the Court for an urgent hearing to be arranged, in which the Court will determine whether the Crown's proposals are adequate to comply with the Crown's relevant fiduciary duties and, if they are not, to identify a system of safeguards that are adequate to comply with those fiduciary duties.

[51] On 13 September, Mr Stafford sent a further letter to the Attorney-General, attaching a draft application to the High Court seeking directions on the lines foreshadowed in the August letter. The Attorney-General replied a few days later. He recorded that Crown Law and officials from LINZ, the Office of Treaty Settlements, and the Post Settlement Commitments Unit had been working to develop a means to address Mr Stafford's concerns and that there had been communications between counsel about this. He said:

> Subject to my comments below, the Crown accepts it is reasonable and efficient that there be an arrangement among the parties concerning Crown land in the relevant area pending resolution of the litigation.
>
> You must appreciate, however, that this is not straightforward. There are a number of practical issues requiring investigation and resolution. I understand counsel for the Crown has explained those issues to your counsel, and I have asked him to set them out in full in a letter to Ms Feint.[19]

[52] After saying that he, too, wished to avoid further litigation, the Attorney noted that:

(a) it was incumbent on Mr Stafford as plaintiff either to progress the substantive proceeding or to come to the Crown with some means of resolving the claim, and that any while any proposal for resolution (which had been flagged by counsel) would be welcome, it needed to be put in writing;

(b) the Supreme Court had made no findings of breach and had not considered defences or remedies, so it could only be said that any

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[19] The follow-up letter from Crown counsel was written on a "without prejudice" basis, and so was not before the Court.

Crown land within the Spain award area *might* be subject to the equitable interests claimed by Mr Stafford; and

(c) given that officials were already urgently working to achieve what Mr Stafford sought—namely identifying and protecting Crown land within the Spain award area—there could be no benefit to Mr Stafford in filing proceedings.

[53] By October 2017 the Crown had agreed to implement an "early warning system" of any pending disposals of properties, known as the "Land Protection Mechanism" (LPM). Although no formal document recording the detail of the LPM was put before the Court, my understanding is that it requires LINZ to report to Mr Stafford on a monthly basis as to whether there is any pending proposal to dispose of Crown-owned land within the Spain award area. It is then over to Mr Stafford to take whatever steps he wishes to, or can, to intervene in the disposal process.

[54] Mr Stafford says that despite repeated requests from his lawyers, LINZ has not provided any such reports. While this may be because there have been no pending disposals, it has understandably left him with concerns about the LPM's effectiveness.

The ACC property

[55] In 2008 the Accident Compensation Corporation (ACC) had acquired a commercial property in Morrison Square, Nelson, for investment purposes. The Morrison Square property is within the Spain award area.

[56] Nearly a decade later, in October 2017, Mr Stafford became aware that ACC was proposing to sell this property. He immediately instructed his solicitors to lodge caveats over the seven titles. Steps were taken in accordance with those instructions, but the Registrar-General of Land (the Registrar) rejected the caveats.[20]

[20] It later transpired that, in fact, an agreement for sale and purchase had already been signed. The settlement date was 31 January 2018.

First application for judicial review

[57] On 18 December Mr Stafford filed an application for judicial review (CIV-2017-485-1033) challenging the rejection decisions. That proceeding was settled early the next year, on terms including agreement that—on the basis of further information provided—the Registrar would retrospectively accept and register the caveats previously lodged on behalf of Mr Stafford.

[58] ACC then immediately filed an application in the High Court (CIV-2018-485-47) seeking the removal of that caveat under s 143 of the Land Transfer Act 2017 on the grounds that Mr Stafford had no caveatable interest in the property.

The ACC caveat proceedings in the High Court

[59] ACC's application was heard by Collins J in February 2018. In his decision, Collins J noted that whether or not Mr Stafford had a caveatable interest depended on the answers to two questions.[21] Those questions were whether it was *reasonably arguable* that:[22]

(a) the ACC property might be applied towards settling any Crown liabilities arising from the *Wakatū* proceedings; and

(b) Mr Stafford currently had a beneficial—and so caveatable—interest in the ACC property.

[60] Because ACC is a Crown agent in terms of the Crown Entities Act 2004 (the CEA), the Judge said the first issue largely turned on whether it was reasonably arguable that the responsible Ministers could give ACC a lawful policy direction under the CEA in relation to the disposal of the Nelson property.[23] The

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21 *Accident Compensation Corporation v Stafford* [2018] NZHC 218, [2018] 2 NZLR 861.

22 Reasonable arguability is the standard required to sustain a caveat: *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 660. See also *Bishop Warden Property Holdings Ltd v Autumn Tree Ltd* [2018] NZCA 285, [2018] 3 NZLR 809 at [22].

23 While the effect of s 15(b) of the CEA is that all statutory entities (like ACC) are separate legal bodies from the Crown, Crown agents are most susceptible to policy directions from responsible Ministers.

powers of direction are contained in ss 103 and 107 of the CEA, which relevantly provide:

> **103 Power to direct Crown agents to give effect to government policy**
>
> (1) The responsible Minister of a Crown agent may direct the entity to give effect to a government policy that relates to the entity's functions and objectives.
>
> (2) Sections 114 and 115 apply to the direction.[24]
>
> (3) This section is subject to section 113.
>
> **107 Directions to support whole of government approach**
>
> (1) The Minister of State Services and the Minister of Finance may jointly direct Crown entities to support a whole of government approach by complying with specified requirements for any of the following purposes:
>
> (a) to improve (directly or indirectly) public services:
>
> (b) to secure economies or efficiencies:
>
> (c) to develop expertise and capability:
>
> (d) to ensure business continuity:
>
> (e) to manage risks to the Government's financial position.
>
> …

[61] Also relevant were parts of ss 113 and 114:

> **113 Safeguarding independence of Crown entities**
>
> (1) This Act does not authorise a Minister to direct a Crown entity, or a member, employee, or office holder of a Crown entity,—
>
> (a) in relation to a statutorily independent function; or
>
> (b) requiring the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons.
>
> …
>
> **114 Crown entities must comply with directions given under statutory power of direction**

[24] And s 115 sets out the procedure for making ministerial directions on government policy.

(1) A Crown entity must, in performing its functions, comply with—

(a) any direction given to it under a power of direction in this Act or another Act; and

(b) any direction under section 107.

…

[62] Collins J extrapolated the following propositions from the relevant authorities:

(a) Because the effect of s 15(b) of the CEA is that all Crown entities are separate legal bodies from the Crown, it is better to examine the relationship between the Crown and ACC in terms of agency rather than as ACC being a "emanation" or "instrument" of the Crown.

(b) That said, it was not particularly helpful to simply ask if ACC is an agent of the Crown because the answer will depend on the context: ACC may act as a Crown agent for some purposes but not for others. It is arguable that in following lawful Ministerial directions made under ss 103 or 107 of the CEA, ACC would be acting on behalf of the Crown.

(c) The key question is whether it is reasonably arguable that the responsible Ministers could lawfully direct ACC in a way that could lead to the Morrison Square property being used in the settlement of any Crown liability arising from the *Wakatū* proceeding. Only in those circumstances could ACC be said to be holding the property on behalf of the Crown.

[63] Collins J concluded that it was reasonably arguable that:

(a) The Minister could issue a direction to ACC under s 103 of the CEA forbidding the sale of any land held by ACC that is the subject of a claim by Māori on the basis that such lands may be used by

the Crown to settle those claims. A general policy direction of that kind would be unlikely to offend s 113(1)(b) of the CEA.

(b) Alternatively, the Minister of State Services and the Minister of Finance could give a similar direction under s 107(1)(e) of the CEA for the purpose of assisting the Government in managing fiscal risks concerning claims against the Crown by Māori.

[64] The Judge noted:

> [83] Such a direction or directions would be similar in nature to the instructions Minister Dyson gave ACC in September 2007 in relation to the then Government's "land of potential interest process" and which ACC accepted at the time as being a lawful instruction.[25]

[65] But in relation to the second issue he had identified, Collins J took the view that Mr Stafford did *not* have a caveatable interest in the ACC land at that time, reasoning:

> [94] … The unexercised ministerial powers of direction I have explained … do not give Mr Stafford a caveatable interest in this case. This is because
> Mr Stafford could not establish a beneficial interest in the land unless Ministers assert their control over ACC. In that respect, Mr Stafford is in much the same position as a discretionary beneficiary of a trust, who also lacks a caveatable interest in trust property.

[66] It is not entirely clear to me how directing a moratorium under s 103 or s 107 would give Mr Stafford an interest in the land that was derived from ACC. But, in any event, such a direction would—presumably—preclude the need for a caveat altogether.

[67] Mr Stafford appealed the High Court finding that he had no caveatable interest in the ACC land. ACC cross-appealed and also sought to support the judgment on other grounds. The Attorney-General intervened in the appeal and supported ACC's position.[26] The appeals were heard in April 2019 and the decision released on 20 May 2020. In that intervening period there were further

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25 These directions are considered later in this judgment.

26 The relevant outcome of the appeals is discussed at [98] and following, below.

relevant developments which it is helpful to outline before returning to consider the Court's decision.

The present application for judicial review

[68] Soon after the release of Collins J's caveat decision, Mr Stafford wrote again to the Attorney-General asking him to impose a moratorium on the disposal of *all* land held by the Crown, Crown agents, and State-owned enterprises within the Spain award area.

[69] On 10 May 2018 (after receiving no formal reply) Mr Stafford filed the first iteration of this present judicial review proceeding. The named respondents were the Attorney-General and ACC. In broad terms, Mr Stafford attacked the Crown's refusal or failure to make a direction under ss 103 or 107 of the CEA in relation to the Morrison Square property.

[70] Over a year later, the Ministers had still not made a decision. On 15 May 2019 a joint memorandum in the substantive *Wakatū* proceedings was filed. It advised the parties' agreement that it would be preferable for the judicial review proceeding to await a decision by the relevant Ministers on the critical issue, because that decision might obviate the need for the proceeding to continue. The memorandum advised that if no decision had been made by the end of June, then the judicial review proceeding should be timetabled to a hearing.

Black Horse Gully properties

[71] Mr Stafford subsequently became aware of a proposal to lift the reserve designation on certain Department of Conservation properties located in Wakapuaka, Nelson (the Black Horse Gully properties). Because these properties are within the Spain award area, Mr Stafford's lawyer wrote to Crown Law on 20 May 2019, asking whether it was planned to dispose of the properties, and for urgent confirmation that no further steps would be taken to do so.

[72] On 13 June Crown counsel responded that "the current intention is that the properties are to be disposed of following clearance under the relevant statutory processes". The email further advised:

> You have also asked me to confirm that no further steps will be taken to dispose of the DOC properties referred to above. I am unable to do so. As referred to above, the agreement was to an early warning of land for disposal, not a commitment that land will not be disposed. Having said that, DOC, LINZ and Te Arawhiti are aware of your client's purported interest in the property and I will inform you of any further steps that are to be taken and of relevant time lines as I am advised of these. I would be happy to work with you or counsel in relation to this matter should Mr Stafford indicate his preferred manner of dealing with this issue.

Amended applications for review and interim orders

[73] Ministers did not make a decision by the end of June. On 8 July Mr Stafford filed an amended application for judicial review, which included reference to the Black Horse Gully properties. The Attorney-General and ACC remained the only named respondents.

[74] In August 2019 a further amended statement of claim was filed, naming as respondents all Crown entities and SOEs owning land within the Spain award area. The seven newly joined respondents were:

(a) Fire and Emergency New Zealand—a Crown agent under the CEA;

(b) Kāinga Ora – Homes and Communities (Kāinga Ora)—a Crown agent under the CEA;

(c) Nelson Marlborough District Health Board—a Crown agent under the CEA;

(d) Housing New Zealand Limited—a Crown entity subsidiary under the CEA;

(e) Radio New Zealand Limited—a Crown entity company under the CEA;

(f) Nelson Marlborough Institute of Technology—a Crown entity and a tertiary education institution under the CEA; and

(g) Transpower New Zealand—an SOE.

Interim arrangements

[75] At the time of joining the further respondents, Mr Stafford also sought interim orders prohibiting the disposal of Spain award area land owned by any respondent, pending the outcome of the substantive claim for review. Arrangements were later agreed between Mr Stafford and the respondents that rendered the interim orders unnecessary. Those arrangements inure until the release of this judgment.

[76] It is also useful to interpolate that, ultimately, only the Crown, ACC and Kāinga Ora actively defended the review application and participated in the hearing. That is because it is only those three respondents who may wish to dispose of land in the Spain award area land—at least in the short to medium term. And the claims against the third (Fire and Emergency New Zealand), seventh (Radio New Zealand) and the ninth respondent (Transpower New Zealand Ltd) were discontinued, on the basis that there was no real prospect that they would dispose of the land owned by them within the Spain award area.

[77] These developments have necessarily affected the scope of this judgment because, for example, it has not been necessary to consider any particular ramifications of the State-Owned Enterprises Act 1986 (which would have been in play had Transpower remained a party). Similarly, I have received no submissions relating to the effect or significance of any specific statute governing the activities of the third, fifth, sixth or eighth respondents.[27] My conclusions need to be read and understood with those points in mind.

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[27] Although FENZ filed written submissions it was not represented at the hearing of the review application, and I have not taken them into account.

Transfer decision

[78] Mr Stafford applied to the Court of Appeal for an order transferring this judicial review proceeding to that court so it could be heard at the same time as the caveat appeal. On 12 November 2019 the Court declined that application, saying:[28]

> [31] The Judicial Review proceedings were filed to determine the scope of the Crown's powers to itself preserve the status quo pending the outcome of the Fiduciary Duty claim. They have a broader scope than the Caveat Appeal. They affect more land. Also, and as noted, they assert a broad legal power to make directions to prevent the disposal of land within the Spain award area that is held today by the Crown, such power being sourced in the Crown Entities Act, the principles of the Treaty of Waitangi and/or the Crown's residual freedom to act with the powers of a natural person. It might be thought there can be little doubt that the Crown has the power to place a moratorium on the sale of Crown land, as that concept is traditionally understood, within that area. Accordingly, the "bite" of both sets of proceedings is as regards the broader category of Crown land that Mr Stafford asserts to be subject to the duties recognised by the Supreme Court in *Wakatū*, for which enforcement is now sought in the Fiduciary Duty claim in the High Court. That broader category particularly relates to land held by what may be called emanations of the Crown, such as ACC, that are not seen as part of the Crown, again as that term is traditionally understood.
>
> …
>
> [35] As noted, the essential questions the Judicial Review proceedings raise are whether:
>
> (a) the Crown has the power to direct that various categories of Crown entities are to put a hold on the disposal of land they own within the area of the Spain award; and
>
> (b) if that power exists, whether the Crown has in the current circumstances a duty to exercise it.
>
> [36] All of that is aimed at the preservation in the hands of the Crown generally of land once owned under customary title by Māori in the area of the Spain award (and which could have formed part of the Nelson Tenths). That is, the reservation of land which was the subject of the Crown's fiduciary duties.
>
> [37] That issue is one of considerable public importance: it goes to a proper understanding of the concept of the Crown in New Zealand in the early 21st century, and the significance of the passage of the State-Owned Enterprises Act 1986 and of various reforms to the structure of the public sector (including the passage of the Crown Entities Act).

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28 *Stafford v Attorney-General* [2018] NZCA 490.

> [38] But it is a separate question as to whether that is a matter which needs to be determined urgently. The Crown has not yet indicated a firm position on the nature or extent of any possible moratorium on sales of land within the area of the Spain award. It points to the difficulty and complexity of the issues involved. The terms on which the Supreme Court remitted the Fiduciary Duty claim to the High Court reflect the legal and, in this context more relevantly, the factual complexity of the issues involved. The Supreme Court itself identified the importance of the inquiry as to breach and consequential loss to be undertaken in the High Court as central to final determinations of liability and remedy. Those findings would, we assess, provide important context for the determination of the issues raised by the Judicial Review proceedings. …

[79] It may be observed, however, that there was no possibility of any determination of liability for breach of fiduciary duty—even at first instance—before the determination of this judicial review proceeding. Again, that remains a fundamental difficulty for Mr Stafford here.

The impugned decision

[80] Also in November 2019, the Attorney-General sought power to act for himself, the Minister of Finance, and the Minister for State Services, in consultation with other relevant Ministers, in order to consider whether to make the directions sought by Mr Stafford. The joint Ministers sought policy and operational advice from officials within Treasury, the State Services Commission, and Te Arawhiti, and sought legal advice from Crown Law.

[81] By letter dated 19 December, the Attorney-General advised Mr Stafford that the joint Ministers had decided:

> … it is not necessary to make the directions you seek to Crown entities or SOEs not to dispose of land they own within the Spain award area pending the resolution of the *Wakatū* proceeding.

[82] The Attorney-General said Ministers would write to the chairs of the boards of all the Crown entity/SOE respondents, advising that they were aware of the interim arrangements reached and that, accordingly, they did not consider it necessary to make further directions.

[83] The Attorney-General also said that Ministers were considering:

> … whether it is necessary or appropriate to request that the Crown entities and SOEs inform their responsible or shareholding Minister of any proposal to dispose of the relevant land so that the Crown has an opportunity to consider the implications of this for your claims in light of the stage they may have reached at the relevant time.

[84] The reasons for the joint Ministers' decision were then summarised as follows:

> - The Crown acknowledges that the land the subject of your claims is taonga tuku iho to you, to those you represent in the litigation and to the iwi and hapū within the Spain award area. This loomed large in joint Ministers' minds when considering your request.
>
> - Ministers lack any statutory powers to direct the relevant SOEs or the Nelson Marlborough Institute of Technology, or to issue a direction under s 103 of the Crown Entities Act 2004 to Radio New
> Zealand Ltd (a Crown entity company).
>
> - The joint Ministers doubt, but cannot discount, that directions in the nature of those you seek might be made:
>
> - to the relevant Crown agents under s 103 of the Crown Entities Act 2004;
>
> - to the relevant Crown agents and Crown entity companies under s 107 of the Crown Entities Act 2004.
>
> - The joint Ministers consider that if the power to do so is available, the making of directions under the Crown Entities Act in the 'blanket' manner you request would have a number of adverse implications for the operations and effectiveness of the entities concerned, on the economic development of the areas the subject of your claims, and on the state sector and public finance generally.
>
> - The statutory directions you seek 'across the board' are not the only means by which your interests in the ultimate outcome of the litigation can be protected.

[85] The letter then recorded that the joint Ministers considered that "their alternative approach" provided room for protecting Mr Stafford's interests "in a more specific and efficient manner, and without risking the adverse implications associated with blanket directions (if they can be made)". It concluded by saying that:

> (a) Crown counsel would write to Mr Stafford's lawyers "in order to explain further the reasons for the joint Ministers' decision"; and

(b) the letter related only to the directions sought in relation to land owned by Crown entities and SOEs, and that land owned by the Crown was a separate matter that would be the subject of separate correspondence.

Third amended statement of claim

[86] In late January 2020, Mr Stafford filed his third amended statement of claim in this proceeding, challenging the Attorney-General's/Ministers' December 2019 decision. It pleads that the decision was:

(a) wrong in law because, as representatives of the Crown (as fiduciary), they have the legal power to make directions, pending the resolution of the *Wakatū* proceeding, to prevent the disposal of any land within the Spain award area that is held today by:[29]

(i) the "core" Crown (being Her Majesty the Queen, the central government ministries and departments listed in Schedule 1 of the State Sector Act 1988, and the New Zealand Police);

(ii) Crown agents (being the Crown entities listed in Part 1 of Schedule 1 of the CEA);

(iii) Crown entities (being the entities falling within all five categories specified in s 7(1) of the CEA); and

(iv) State-owned enterprises (namely the State enterprises listed in Schedule 1 of the SOE Act).

(b) made in breach of the duty to make the decision in a timely way;[30]

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29 The power was pleaded to be sourced in (a) s 103 of the CEA, (b) s 107 of the CEA, (c) the principles of Te Tiriti o Waitangi and the duty of active protection and good faith that are consequent upon the Crown's Article II guarantee, and (d) the Crown's residual (or "third source") freedom to act with the powers of a natural person.

30 Because the decision was not made (a) by 30 June 2019, (b) until 28 months after the Supreme Court's decision, and (c) until 16 months after directions were first sought.

(c) made without regard to, or in disregard of, the fact that the protective arrangements entered into between the respondents and Mr Stafford were interim in nature and would cease after the hearing of the substantive application for judicial review; and

(d) based in whole or in part upon an irrelevant consideration, namely that the directions sought by Mr Stafford were not necessary because of the "early warning mechanism" and the "independently entered into arrangements" referred to in the Attorney-General's 19 December letter.

[87] The specific relief sought by Mr Stafford is:

(a) against the Attorney-General, declarations that:

(i) the Crown has the power [to direct]: and

(ii) the Crown has the associated duty [to direct]: and

(iii) the Crown has breached the associated duty [to direct in a timely manner]:

> that no fee simple estate of land within the Spain award area that is registered today in the name of the 'core' Crown, Crown agents, Crown entities or State enterprises, shall be transferred or otherwise disposed of pending the resolution of the fiduciary duty proceeding;

(b) against ACC:

(i) a declaration that, consistently with the Crown's ongoing obligations as a fiduciary in the fiduciary duty proceeding, and the correlative rights of Mr Stafford's and those he represents, the ACC property is not to be transferred or otherwise disposed of by ACC until the resolution of the fiduciary duty proceeding; and

(ii) an injunction prohibiting or preventing the transfer or disposal of the ACC property by ACC until the resolution of the fiduciary duty proceeding;

(c) against ACC, FENZ, Kāinga Ora, the DHB, HNZL, and NMIT:

(i) a declaration that, consistently with the Crown's ongoing obligations as a fiduciary in the fiduciary duty proceeding, and the correlative rights of Mr Stafford and those he represents in that proceeding, the fee simple estates of land within the Spain award area of which those parties presently are the registered proprietors are not to be transferred or otherwise disposed of until the resolution of the fiduciary duty proceeding; and

(ii) an injunction or an order of prohibition preventing any transfer or disposal of those fee simple estates until the resolution of the fiduciary duty proceeding.

[88] As I understand it, the availability of the (b) and (c) declarations depends on the proposition that the respondent Crown entities can for present purposes be regarded as part of the Crown "proper" and that those Crown entities are, for that reason, potentially parties to, and liable in, the substantive *Wakatū* proceeding. Later in this judgment I explain my view that this proposition is wrong. That aspect of the claim must therefore fall away.

The Attorney-General's further reasons

[89] On 17 February, after the filing of the third amended statement of claim, the Attorney-General wrote again to Mr Stafford, explaining the reasons for the Ministers' decision at length and in much more detail. The letter began by recording by way of context that:

> 3.1 You are the plaintiff in the long-running '*Wakatū* proceeding' and seek, on behalf of the iwi you represent, the return of land in the

Nelson, Motueka and Golden Bay regions ("the Spain award area").

3.2 The *Wakatū* proceeding could take many more years to resolve. In the meantime, the Crown has agreed with you that it will provide you with an 'early warning' of plans to dispose of land owned by the Crown in the Spain award area.

3.3 The Crown's early warning system does not extend to property held by Crown entities and State Owned Enterprises (SOEs). In March 2018, you asked Ministers to direct Crown entities and SOEs not to dispose of land they hold in the Spain award area pending the resolution of your claim. To this end, you asked Ministers to exercise powers under section 103 and/or section 107 of the Crown Entities Act 2004.

3.4 Seven Crown entities (ACC, Fire and Emergency NZ, Nelson Marlborough District Health Board, Transpower, Radio New Zealand, Nelson Marlborough Institute of Technology and Kāinga Ora/Housing New Zealand) hold land in the Spain award area and have been joined as respondents in the judicial review proceedings. Collectively they own approximately 700 properties in the area.

3.5 Your interest in preventing disposal of the land is currently protected. Each respondent Crown entity and SOE has independently agreed that, pending the hearing of the judicial review proceedings, it will provide early warning to you of the disposal of land it holds in the Spain award area.

3.6 You seek the return of as much land as possible within the Spain award area, not substitute land or cash.

3. 7 The *Wakatū* proceeding, while being a private law matter brought in the courts, concerns claims to land that was formerly customary land owned by Māori. As such, the Crown's obligations under the Treaty of Waitangi are engaged.

[90] The Attorney repeated that in considering Mr Stafford's request, the joint Ministers had paid mind both to the specific interests affected by the present proceeding, as well as wider operational and policy considerations. He said the Ministers considered that (in summary):

(a) Parliament's intention in establishing these entities is that they be, to varying degrees, operationally independent of the government of the day. For that reason, the extent to which Ministers can intervene in their day-to-day operations is statutorily limited.

(b) The directions sought by Mr Stafford relate to the disposal of an entities' assets (rather than their functions and objectives) and, so, stray into operational matters that are inconsistent with the practical parameters of the direction-making power as it has historically been used. There are good reasons for this historical restraint, including:

(i) The ability to hold property separate from the Crown is a central feature of the policy that entities operate at arm's length, and Ministerial interference in this area would undermine their operational independence.

(ii) Such directions would be likely to:

- undermine the independence of the entities' boards and have a detrimental effect on effective and efficient governance;
- lead to a loss of confidence by current and future board members, and make it more difficult in future to find people willing to take on the role;
- create ambiguity about the respective roles of the responsible Minister and the board; and
- create uncertainty for medium-term business planning.

[91] The Attorney-General said it was likely that ACC and Kāinga Ora would be most disadvantaged by any moratorium: ACC manages a significant portfolio of investments, including property, to cover the full lifetime costs of claims, and Kāinga Ora buys and sells property in its capacity as public housing landlord and as a developer of housing and of urban development projects.[31] He also made the

[31] This is, of course reflected in the point noted at [76] above. Apart from the Crown, only ACC and Kāinga Ora took an active part in responding to the review application.

point that the direction sought would be of only limited practical benefit to Mr Stafford because a moratorium on sales by those entities would not mean that the affected land would later be available as relief in the *Wakatū* proceeding, because it is not owned by the Crown.

[92] Then, he said:[32]

> 5.4 Your interests, and those of the people you represent, are underpinned by the Crown's Treaty obligations and coloured by issues concerning Māori-Crown relations. But there are other Treaty interests and Māori-Crown issues at stake too. Of particular relevance are the interests of settled iwi in the relevant parts of Te Tau Ihu, and other iwi in respect of existing and future settlements. In this regard, Ministers considered the following points:
>
> > 5.4.1 Wai 56, the historical Treaty of Waitangi claim, has been settled through the four relevant iwi settlements, and the members of those iwi overlap with the shareholders of Wakatū Incorporation.
> >
> > 5.4.2 The post-settlement governance entities of the settled iwi of Te Tau lhu have responsibility for and are representatives of their members in relation to the ongoing Treaty settlement obligations of the Crown.
> >
> > 5.4.3 The Crown has ongoing Treaty obligations to the settled iwi. It also has ongoing Treaty settlement-specific obligations in upholding commitments made in the Treaty settlement deeds and legislation, and also in relation to its former negotiations with the iwi, in relation to which utmost good faith must be maintained.
> >
> > 5.4.4 *SOE and Crown entity land has been included in Treaty settlements in the past, but never as a result of any direction by Ministers. Land has been acquired from the non-Core Crown bodies by agreement, and provided to iwi on a 'willing buyer, willing seller' basis*. The directions sought may therefore create risks for the Crown's relationship with settled iwi (where a settlement group sought SOE/Crown entity land, and were unsuccessful) and for future settlements as a precedent risk in which groups litigate to compel the receipt of redress from SOEs/Crown entities where the SOEs/Crown entities have not been willing sellers.

[93] As far as the Crown's Treaty obligations to Mr Stafford and those he represents were concerned, the Attorney noted that the relevant land was formerly customary land owned by their ancestors and that Ministers were aware of the

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[32] Emphasis added.

need to give due consideration to his request consistent both with the Crown's duties of utmost good faith in dealing with a Treaty partner and with the principle of redress. He said that Ministers had also considered the impact of not making the directions on the claims made in the *Wakatū* proceeding. Ministers had concluded that the risks and implications of not making the directions included:

> 7.1 Potential impairment of the Crown's ability to satisfy your claims, if they are successful, if disposal or other transfer of relevant land occurs despite the current early warning arrangements, or if those arrangements cease to have effect.
>
> 7.2 Risks that the Crown fails to meet its Treaty obligations if no other appropriate steps are taken to enable the land to be used to satisfy your claims.

[94] It is only at the end of the letter that the Attorney-General returned to the grounds originally advised, saying that Ministers had also noted that:

> 9.1 Ministers do not have power to issue directions under the Crown Entities Act to SOEs or Tertiary Education Institutes, or to issue a direction under s 103 to a Crown entity company.
>
> 9.2 Doubt exists as to whether your request for a moratorium on disposals of land in the Spain award area could properly be the subject of a direction under either s 103 or s 107 of the Crown Entities Act. As to this:
>
> > 9.2.1 Ministers noted that where the power to direct entities exists under s 103 or 107 it is not unfettered. The legislation that establishes and provides for each entity sets out the purposes and functions of each entity, which specifically constrains the manner and extent to which Ministers can intervene with its operations (both expressly and by implication). Further, s 113 of the Crown Entities Act safeguards the independence of all Crown entities by providing that Ministers are not authorised to direct entities in relation to a statutorily independent function or to require the performance or non-performance of a particular act or the bringing about of a particular result in respect of a particular person or persons.
> >
> > 9.2.2 Section 103 provides that the direction is to give effect to "a government policy", and section 107 relates to a direction to support "a whole of government approach". Ministers were not aware of an extant government policy or whole-of-government approach that would support the making of directions consistent with your request. Indeed, in relation to section 107, Cabinet Office Circular CO(13)4, which requires certain features of a s 107 direction and enjoins Ministers to consider alternatives to such directions, suggests that there is no

> current whole-of-government approach to the matters the subject of your request.
>
> 9.2.3 The directions sought appear to be outside the bounds of the types of purposes for which a direction might be made under s 107 (and as listed above), which can be said to promote internal government efficiency, services, management and the like.
>
> 9.2.4 Your request seeks directions in relation to the Spain award area as a consequence of your claims in the *Wakatū* litigation. There is a good argument that this offends section 113, on the basis that the direction relates to a specific act (or non-performance thereof) to bring about a particular result in respect of a particular group of persons. (Despite these points, Ministers could not discount the possibility that the directions you seek could properly be made, and so proceeded to consider your request as if such directions could be properly made).

[95] The letter then advised that Ministers believed there was a viable and sufficient alternative that could be achieved more quickly and with less risk. This alternative was to write to the relevant entities and inform them that Ministers:

(a) were aware of Mr Stafford's case and that the entities had independently entered into arrangements with him to warn him of any proposed disposition of relevant land;

(b) did not consider it necessary to make the directions sought; and

(c) were requesting that the entities inform their responsible Minister of any proposal to dispose of relevant land in order to give the Crown an opportunity to consider the implications of this for the claims, in light of the stage they any have reached at the relevant time.

[96] The Attorney-General said that officials were working on the terms of a draft letter to that effect and that he would keep Mr Stafford apprised of developments. The letter concluded:

> **Reasons for decision**
>
> 11. On balance, Ministers considered that making the directions sought would create a level of risk that outweighs the risks to you if the directions are not made, on the basis that the risks to your position and

> that of those you represent can be sufficiently mitigated by alternative approaches in a manner that avoids the operational, state sector design, economic and wider Treaty implications associated with the 'blanket' directions you seek. The alternatives also do not pre-empt the question as to whether Ministers have the power to issue the direction sought, nor do they raise procedural issues that accompany the making of 'blanket' directions to all relevant entities.

The letters

[97] As foreshadowed in his letter of reasons, on 4 March 2020, the Attorney-General wrote letters of request to Fire and Emergency New Zealand, the Nelson Marlborough District Health Board, Radio New Zealand, the Nelson Marlborough Institute of Technology and Transpower New Zealand Limited (but not Kāinga Ora and ACC). The letters relevantly read as follows:

> The purpose of this letter is to advise you that Ministers have considered Mr Stafford's request and decided not to make the directions he seeks. …
>
> We are however very conscious of the importance of the issue to Mr Stafford and those he represents. The land in question was formerly customary Māori land and so we consider the Crown's Treaty obligations are also engaged. We understand from Crown Law that [the addressee entity has] negotiated and entered into an undertaking with Mr Stafford which avoided the need for interim orders. We also understand from Crown Law that the Crown and the other respondents have independently negotiated and entered into analogous arrangements. We understand these arrangements, which subsist at least until the commencement of the hearing of Mr Stafford's application for review, allow each entity, Mr Stafford, and the Crown if necessary and appropriate, to consider on a case by case basis issues arising in relation to particular parcels of land that may otherwise be disposed of.
>
> We wish to emphasise that the acquisition and disposition of property by [the addressee entity] is a strategic and operational matter for your Board and management. Subject to this, we would be grateful if, beyond any expiry of the undertaking mentioned above, you would consider advising the Crown of your intentions to dispose of land in the area in order that the Crown may have an early opportunity to consider its position. In making this request, we do not mean to suggest that Ministers would require anything of [the addressee entity] at any stage.

The Court of Appeal's ACC caveat decision

[98] In Mr Stafford's appeal from Collins J's decision, he contended (as he had in the High Court) that all Crown land (including Crown Entity land) within the original 151,000 acres in the wider Nelson region is held subject to the interests of the customary owners to the extent of the shortfall in the 15,100 acres of the

tenths reserves.[33] More specifically, he argued that as a Crown agent subject to ministerial control pursuant to the CEA, ACC was an instrument of the executive government. He said the ACC land is therefore Crown land in which he has an equitable interest.

[99] By a majority comprising Gilbert and Courtney JJ, Mr Stafford's appeal was, in general terms, dismissed.[34] But it is important to be clear about what has and has not been determined in a way that is binding on me. The parties are not wholly in agreement about that.

[100] I begin with two general observations.

[101] First, and most obviously, the appeal involved only land owned by ACC and was determined—at least in part—by reference to the particular statutory landscape under which ACC operates. While that landscape includes the CEA (which is of wider application), it also includes the Accident Compensation Act 2001, which is particular to ACC.

[102] Secondly, because the case was concerned with the sustainability of a caveat, the focus was on whether the key aspects of Mr Stafford's position were reasonably arguable. Accordingly, findings by a majority in his favour cannot be viewed as a positive determination of the underlying issue. By contrast, a majority finding against Mr Stafford—that some aspect of his position was *not* reasonably arguable—would indeed be binding on me.

The majority decision and Williams J's dissent

[103] As for the decision itself, the majority held that:

(a) it is *not* reasonably arguable that ACC is subject to or bound by the fiduciary obligations found by the Supreme Court to be owed by the Crown to Mr Stafford;[35] and

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33 *Stafford v Accident Compensation Corporation* [2020] NZCA 164.
34 As was ACC's cross-appeal.
35 Per Gilbert J at [33] and Courtney J at [150].

(b) it is *not* reasonably arguable that any interest that Mr Stafford might have in the land is derived from the registered proprietor (ACC, which was not the Crown), so the caveat should be removed.

[104] In his dissent, Williams J expressed the view that:

(a) it *is* reasonably arguable that Mr Stafford and those he represents have a beneficial interest in the ACC property arising from the Crown's alleged reduction of the tenths reserves and failure to exclude the occupied lands; and

(b) it *is* reasonably arguable that this interest derives from ACC as the registered proprietor, which may be treated as the Crown because:

(i) ACC is designated by statute as a Crown agent; and

(ii) the Executive (Ministers) has sufficient operational control over ACC to satisfy the common law "control" test for all relevant purposes.[36]

[105] In relation to this last issue of "control" it is useful—for reasons that will later become apparent—to refer to aspects of Williams J's reasoning in a little more detail.

[106] First, he considered that the powers of direction under s 103 and s 107 were, arguably available. And secondly, he noted that, as a matter of established policy and practice, the Crown has historically been willing to access land held by Crown entities and SOEs for broader government purposes, including the settlement of claims by Māori. While not conclusive, he said, "it is hardly irrelevant that government asserts control over ACC land in fact, and that ACC

[36] He said that s 15(b) of the CEA cannot logically displace this because the very operation of the control test is premised on separate legal personality.

complies or is willing to comply".[37] He went on to note that there were or had been, in practice, several relevant policies or processes.

[107] The first of those was the 2007 process for disposal of all Crown land sold by Crown agencies:[38]

> [349] First, in 2007, Cabinet issued its "permanent process" for the disposal of Land of Potential Interest (the LPI process). This process applied to "all Crown land sold by Crown agencies". These covered all Crown entities, SOEs, Crown Research Institutes, District Health Boards, and departments. Under this process, if ACC was considering disposing of "land of potential interest", it had to notify Land Information New Zealand (LINZ) "as a matter of priority". LINZ would then assess the "potential values" of the land to determine whether steps should be taken for its protection. Such steps included withholding the land from disposal. The relevant values included:
>
> (a) conservation, ecological and biodiversity value;
>
> (b) heritage value and historical ownership;
>
> (c) Māori historic and cultural values;
>
> (d) recreational values; and
>
> (e) potential for use in an historical Treaty settlement.
>
> [350] If protections were required, ministers would, in consultation with the Minister of Finance, determine the appropriate compensation to the Crown agency.
>
> [351] The then responsible Minister wrote to ACC on 28 September 2007 confirming that this process would apply to ACC's land holdings. On 28 November 2007, the then chief executive of ACC replied that "ACC will be complying with the new requirements".
>
> [352] The LPI process was discontinued in 2009. In its place, Cabinet introduced a policy known as the "Protection of Values on Crown-owned Land". This policy remains current. Again, it is intended to apply to all "Crown agencies," including all Crown entities and SOEs. Under it, Crown agencies are expected to ensure:
>
> > that any values that may be present on the land are properly identified, appropriately managed and protected if necessary before the land is disposed of.
> >
> > If significant values are identified or issues arise during management or disposal of the land, the relevant oversight agency or Minister should be notified as soon as possible.

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37 At [347].

38 Footnotes omitted.

> [353] Values to be considered include potential use in a future Treaty settlement. Suggested protections for any values identified include, depending on the nature of the value, "transferring the land to another Crown agency".
>
> [354] According to LINZ, ministers have written to all agencies advising them of this expectation. There was no suggestion in the evidence that ACC opposed this expectation.

[108] And then, there was the "Protection Mechanism" introduced to further protect Māori interests in surplus Crown-owned land:[39]

> [355] Second, in the Treaty settlement area, there is a system called the "Protection of Māori Interests in Surplus Crown-owned Land", otherwise known as the Protection Mechanism. It is a process "for the Crown to consult with Māori when it wishes to sell surplus land". If after consultation the Crown agrees to retain the land for possible use in a future Treaty settlement, the Office of Treaty Settlements (now Te Arawhiti) will purchase the property and hold it in a landbank. The Protection Mechanism applies to surplus land owned by the Crown and its departments, Crown Research Institutes, District Health Boards, and Crown entities as agreed to by Cabinet on a case-by-case basis, including school boards of trustees.
>
> [356] In his affidavit, Mr Healy noted that there has been no Cabinet direction subjecting ACC to the Protection Mechanism. This, however, is beside the point. What is important is the implication, apparently accepted by Mr Healy, that if Cabinet chose to apply the Mechanism to ACC, it would be binding.

[109] After noting the existence of other such "soft" powers (including notified Crown expectations regarding investment management that are required to be treated by Crown entities as an expression of government policy), the Judge concluded:

> [359] To summarise, ministers and Cabinet have intervened in respect of the disposal of land assets of Crown entities, generally using the more informal mechanism of letters of expectation. While Treaty land banking has not been applied to ACC, it seems to be accepted that such application would not be inconsistent with the legislation. The slightly more formal mechanism of Cabinet Office Circular has been imposed on investment management and performance, with an indication that Treasury may impose stringent controls on the disposal of ACC's investments depending on its Investor Confidence Rating.
>
> [360] From a practical point of view, therefore, government can and *does* exercise operational control over land investment and disposals by

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39 Footnotes omitted.

Crown agencies where wider government policy is considered to require it.

Potential application of s 103 and s 107

[110] In terms of the outcome of the appeal itself, the majority conclusions noted at [103] above were fatal to the caveat. Whether Ministers could make directions prohibiting ACC from disposing of the Morrison Square property either under s 103 or s 107 of the CEA did not need to be decided. It was for this reason that Gilbert J preferred not to enter that particular fray at all.[40]

[111] By contrast, and after a detailed analysis of the specific statutory context in which ACC operates (and, in particular, its investment functions), Courtney J opined that:

(a) it was not reasonably arguable that a direction could be issued under s 103 because this would cut across the ACC's core statutory function of investment;

(b) it was not reasonably arguable that a direction could be issued under s 107 because it would likely offend s 113(1)(b) for "bringing about a particular result in respect of … particular persons"; and

(c) ACC can properly be regarded as being under the control of the Crown only to the extent that ministerial control exists under those statutory provisions and so an application of the "control test" or an argument to the effect that ACC was an instrument of the Crown added nothing to the ss 103 and 107 analysis.

[112] As noted earlier, Williams J considered the question of ss 103 and 107 in the context of his wider analysis about the extent of the control that was exercisable by the Crown over ACC. In that context, he said, it was reasonably

[40] I disagree with the suggestion by counsel for the Attorney-General and for ACC that Gilbert J concurred with Courtney J on this point; he made it clear he did not intend to express a view on the issue.

arguable that a direction could be given (under either provision), noting that such a direction would not necessarily be:

(a) inconsistent with ACC's objectives, even if it does not further them; or

(b) barred by s 113 of the CEA because it would not relate to "particular persons" and, in any case, *Tauihu iwi*[41] are not "particular" persons any more than the residents of Nelson.[42]

Observations on the reach of the Wakatū claim

[113] The final point of note about the Court of Appeal's judgment is that both Gilbert J and Williams J take some time to consider how specific land within the Spain award area that is not directly or explicitly the target of the *Wakatū* proceedings might nonetheless form part of any redress. As discussed later, the potential reach of Mr Stafford's claim is or may be relevant to future applications in those proceedings.

[114] Gilbert J rejected the suggestion that the *Wakatū* claimants could have any interest in the five parcels of Morrison Square land (known collectively as Section 443) that had once been part of the tenths reserves but had been dealt with appropriately.[43] He said:

> [27] The caveat asserts an interest by virtue of an institutional constructive trust in two categories of tenths reserve land as envisaged by the Spain award. First, land that was not included in the reserves but should have been and, secondly, land that was included but then removed. Section 443 falls into neither category. It was included in the tenths reserves but was not one of the 47 town sections that were relinquished in 1847, nor was it removed at any later date. To the extent section 443

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41 This being the term used by the judge (at [158]) to describe the descendants of the beneficiaries of the Crown's fiduciary obligations in relation to the tenths and occupied lands, as determined by the Native Land Court in 1893.

42 It may be noted in passing that Courtney J and Williams J seem to have proceeded on slightly different bases in terms of the *content* of any direction to ACC under either ss 103 or 107 of the CEA. More particularly, the focus of Courtney J's analysis was whether a direction could be made under one or both of those sections requiring ACC to hold the Morrison Square land for the purposes of settling the Crown's potential Wakatū liabilities. But Williams J framed his "Wakatū direction" as one that simply required ACC to refrain from selling the Morrison Square property.

43 See [11] to [13] of the judgment.

> can properly be regarded as a specific trust asset, it was dealt with as such appropriately. The Crown fulfilled its strict fiduciary obligations as trustee to "get in" this trust asset and deal with it in accordance with the trust for the benefit of the customary owners. There is no claim to the contrary, nor could there be. It may be observed that the substantive proceedings are only concerned with alleged breaches of fiduciary duty up to 1882.
>
> [28] The caveat does not explain any basis for the claimed interest in the five parcels of land that form part of what was section 443—land that was included in the tenths reserves and not removed. Nor is there any reference in the Supreme Court's judgment in *Wakatū* to any claim having been made in respect of this land or any other land falling into the same category. The *Wakatū* claims are in relation to the alleged breaches arising from the Crown's failure to set aside the reserves, particularly the rural reserves, to exclude the occupied lands and those transactions which diminished the tenths estate, none of which could include section 443. Leaving to one side entirely whether ACC can be regarded as the Crown for present purposes, the caveat cannot be sustained against the single title comprising these five parcels of land. In summary, the caveat does not assert a tenable claim to an interest in this part of the ACC land. It was a specific trust asset, but it was dealt with accordingly.

[115] As regards the other six parcels of land (referred to collectively as Sections 442 and 439), he noted that they were not selected as one of the original 100 one-acre town tenths reserves and so fell outside the second category over which Mr Stafford claims an institutional constructive trust (land included in the tenths reserves and then removed). Rather, he said that the question was whether the sections might arguably constitute "land that should have been part of the Tenths Reserves as envisaged by the Spain award, but was not included in those reserves".

[116] Gilbert J noted that it was an agreed fact in the *Wakatū* proceedings that Sections 442 and 439 were *not* included among the 100 one-acre town tenths reserve sections identified in 1842, and that there was nothing in the Spain award to suggest it was envisaged that the sections would be part of the tenths. Nonetheless, he said:

> [31] However, the plans attached to the Spain award do not necessarily conform to the stipulations in the text of the award, particularly because not all the occupied lands had been identified and surveyed at that time. Mr Stafford's substantive claim in the High Court includes a contention that some of the sections selected as part of the 100 one-acre town tenths reserve sections were at least partly occupied (up to 12 sections). If that were proved, there was arguably a breach of the Crown's fiduciary obligation to exclude occupied lands and make up the

> corresponding shortfall in the tenths—in other words, to get in the trust assets. For the purposes of the present appeal, I accept it is arguable (the low threshold applicable) that the Crown could be called to account for the shortfall and the land it acquired (excluding the identified tenths and the occupied lands, neither of which could be touched for the purpose of making up the shortfall) was impressed with a trust until that was done.

[117] Williams J went further and suggested that a fiduciary obligation might be owed even in relation to all of the Morrison Square property, including Section 443.

[118] As regards Sections 442 and 439, part of his reasoning was similar to Gilbert J's. As Elias CJ and Glazebrook J had suggested in the Supreme Court, Williams J said that if it transpires there had been a failure in 1842 to exclude all cultivations and occupations within the town and suburban reserves selected in 1842 as part of the tenths, then it is arguable that the unreserved lands transferred to the New Zealand Company—including Sections 442 and 439—were subject to a continuing obligation.

[119] Alternatively (the Judge observed), the Supreme Court had also suggested that the withdrawal of 47 town acres that were initially reserved may also have been in breach of the Crown's fiduciary obligation, which arguably remained at large. He said the Court had left open the possibility that any such breach could be remedied (and the fiduciary obligation satisfied) by the provision of any 47 acres (including Sections 439 and 442) within the town area.

[120] Similarly, and as far as Section 443 was concerned, Williams J acknowledged that it was in fact reserved and the Crown's fiduciary obligation was at that point discharged. But, he said:

> [378] … The question then is whether, despite the initial reservation, the fiduciary obligation may be re-enlivened over Section 443, in light of the Crown's arguable failure to meet its overall obligations in respect of town sections generally.

[121] The Judge noted that Mr Stafford relied on the "swollen assets theory" of tracing, which arguably posits that where a trustee has misappropriated trust assets, the beneficiary is entitled to an equitable charge over all of the trustee's assets so long as the trustee continues to be enriched by the misappropriation.

Equally, however, it might be sufficient simply to apply the same reasoning as he had for Sections 442 and 439. Thus, he said:

> [380] … it is at least arguable that the Crown's obligation applies to town sections generally, so that it must continue to make available any assets it may own in that asset class until the obligation is satisfied. If that is right, then the fact that Section 443 was originally in the beneficial ownership of Tauihu iwi will arguably be irrelevant. What is important is that the Crown currently owns Section 443 and remains in overall breach of its obligations to Tauihu iwi.

[122] Of course, the Judge's reasoning on this last point was expressly predicated on the Morrison Square property currently being in Crown ownership—contrary to the majority's more specific and fundamental findings.

The Attorney-General's August 2020 affidavit

[123] Shortly before the hearing of the application for judicial review, the Attorney-General filed a further affidavit "in relation to the position with the Crown's own land as well as further correspondence I have sent to ACC and Kāinga Ora, and to the Minister for Land Information." He deposed that following advice he had received after the release of the Court of Appeal's caveat decision, he did not "consider it appropriate to recommend moratorium as sought by Mr Stafford". More specifically, he said:

(a) The Crown is concerned with the implications on the value and integrity of local Treaty settlements. Though the relevant settlements (and so the RFRs) are subject to Mr Stafford's equitable interests (if established), the RFRs still form part of the settlement packages for many iwi.

(b) A blanket moratorium for the open-ended duration of the *Wakatū* proceedings may not be acceptable to those affected iwi, particularly those who are not also members of the beneficiary class that Mr Stafford represents. Such a moratorium is therefore too blunt a tool to properly give effect to the Crown's Treaty obligations.

(c) Mr Stafford's best arguments for a constructive trust are in respect of the Crown's own land, but even that is far from clear cut and will depend on the history of the land in question.

(d) The Crown is currently undertaking historical research, in consultation with Mr Stafford's advisers, to properly identify (for the *Wakatū* proceedings) the full histories of the Crown's landholding in the area.

(e) The Crown seeks to consider, for each parcel of land proposed to be disposed, the particular interests of local iwi and Mr Stafford in an attempt to find an agreed outcome. The early warning system will give Mr Stafford the required notification and protections, with the prospect of bringing his concerns to the Court as a backstop in the event of an impasse.

[124] The Attorney-General reiterated that the Crown was confident that these "more targeted approaches" were sufficient to protect Mr Stafford's interests, but said he had taken on board his concerns about the integrity of the early warning system. As a result, he had written:

(a) to the Minister for Land Information and the departmental heads of land holding government departments to emphasise the importance of the early warning system; and

(b) to the Chairs of both Kāinga Ora and ACC "along the same lines as my earlier correspondence to the remaining respondents to this litigation".

[125] The relevant correspondence was annexed to the affidavit. The letter to the Minister for Land Information advised:[44]

> To prepare for the next stage of the [*Wakatū*] litigation the Crown is undertaking historical research to identify the precise boundaries of the

[44] Emphasis added.

> Spain award area and the full extent of Crown-owned land within it … As Mr Stafford claims a proprietary interest in the Crown's land, the Crown has also established an "early warning system" where the Crown informs Mr Stafford through his lawyers of any proposed disposal of land in the area. This allows Mr Stafford and the Crown to consider the interest in the land in question and, if necessary, for Mr Stafford to seek injunctive relief in the proceeding to prevent the Crown disposing of the land if that would prejudice his claims before the litigation process is complete. Given its central role in administering the transfer of the Crown's land holdings, Land Information New Zealand has played a critical role to date in ensuring that no Crown owned land is disposed of without the Crown fulfilling its commitments to Mr Stafford to provide notice.
>
> Mr Stafford also wishes to assert interests in land owned by a range of Crown entities and companies. He has commenced a separate application for judicial review directed at compelling the Crown to make directions he has requested Ministers to make that the relevant entities not dispose of land in the Spain award area pending the outcome of his primary litigation. In the context of that judicial review application, Mr Stafford has raised concerns about the integrity of the Crown's early warning system. Although no land has been inadvertently disposed of and, for that reason, Mr Stafford's concerns may not be well founded, I nevertheless write to you to emphasise the importance to the Crown that the early warning system operates as it should do. *In terms of the Crown's obligations to Mr Stafford and those he represents, and also for the sound management of litigation with which the Crown is involved, it is critical that your officials notify Crown Law of any proposed disposal of land within the Spain award area.*
>
> I am very grateful for your assistance in this matter. I have copied this letter to your chief executive and all departmental heads for their information and action.

[126] As noted by the Attorney, the letters to ACC and Kāinga Ora were in similar terms to the letter set out at [97] above. Critically, they advised:

> We wish to emphasise our view that the acquisition and disposition of property by [you] are strategic and operational matters for your Boards and management. Subject to this, we would be grateful if, beyond any expiry of the arrangements mentioned above, you would consider advising the Crown of your intentions to dispose of land in the area in order that the Crown may have an early opportunity to consider its position.
>
> On behalf of the joint Ministers who considered Mr Stafford's request, I have communicated the same to the other respondent entities who are party to Mr Stafford's judicial review proceeding. I appreciate however that unlike those entities who may hold land on a long-term basis, the nature of [your] operations may present particular challenges to keeping the Crown informed in the manner anticipated. In making this request, we do not mean to suggest that Ministers would require anything of [you] at any stage. We are also anxious to ensure Mr Stafford's litigation, and

> any steps which may be adopted to support the Crown's management of the wider litigation, does not have a chilling impact on your operations or otherwise impair your capacity to perform your functions in the public interest.

The amended prayers for relief

[127] The iterative way in which the relevant decisions were made in this case means that the third amended statement of claim is not wholly responsive to those decisions. Notably, both the detailed reasons for the first (Crown entity land) decision as well as the entirety of the second (Crown land) decision were communicated after that statement of claim had been filed.

[128] Both as a consequence of this, and as a result of discussions during the hearing, Ms Feint attempted to articulate a set of revised orders that she asked the Court to make. For the purpose of the revised orders, she adopted the following definitions:

> "Crown land" means land registered in the name of **the 'core' Crown** (comprising Her Majesty the Queen; the departments of public service that are listed in Schedule 1 of the State Sector Act 1988; and the New Zealand Police, which section 7(1) of the Policing Act 2008 confirms is an instrument of the Crown), **Crown entities** (as defined in section 7 Crown Entities Act) or **State enterprises** (as defined in section 2 and Schedule 1 in SOE Act).
>
> "core Crown land" means land registered in the name of **the 'core' Crown** (comprising Her Majesty the Queen; the departments of public service that are listed in Schedule 1 of the State Sector Act 1988; and the New Zealand Police, which section 7(1) of the Policing Act 2008 confirms is an instrument of the Crown).
>
> "disposal of Crown land" means to transfer or vest the fee simple estate in the land or to grant a lease of the land for a term that is, or will be (if any rights of renewal or extension are exercised under the lease) for 20 years or longer.

[129] I set out the orders sought, in full, as follows:

> 2. The Crown has acted unlawfully, in failing, by 30 June 2019, to impose a moratorium on the Spain award area pending e disposal of Crown land within the resolution of the fiduciary duty remedies proceeding.
>
> *Core Crown*

3. The Crown will undertake that if it decides to commence a process for the transfer or other disposal of any core Crown land within the Spain award area, it will provide written notice to the applicant of not less than 30 working days.

4. The Crown will undertake not to commence a process to transfer or otherwise dispose of any core Crown land unless:

   4.1 The applicant agrees that the Crown may commence a process to transfer or otherwise dispose of such a fee simple estate; or

   4.2 Following the hearing of an urgent application filed (in the applicant's proceeding against the Attorney-General under CIV-2010-442-181 ("the substantive proceeding")) by the Attorney-General for interim relief seeking to transfer or dispose of the fee simple estate, a High Court order permits the Crown to dispose of the fee simple estate.

5. The Crown will undertake that, if the Attorney-General makes an application contemplated in paragraph 4.2, it will:

   5.1 waive any undertaking as to damages that may be required; and

   5.2 pay Mr Stafford's costs on an indemnity basis.

6. The Crown will further undertake to:

   6.1 Copy this memorandum and any subsequent order to the Commissioner for Crown Land (and Land and Information New Zealand); and

   6.2 Provide notice to the applicant of any land disposal process within the Spain Award area being considered by the Commissioner for Crown land or that it is aware is subject to a statutory disposal process.

Other Crown

7. Against ACC:

   7 .1 A declaration that, consistently with the Crown's ongoing obligations as a fiduciary in the fiduciary duty proceeding, and the correlative rights of the applicant and those he represents in that proceeding, the ACC property (being the Morrison Square property) is not to be transferred or otherwise disposed of by ACC pending the resolution of the fiduciary duty proceeding;

   7.2 An injunction or an order of prohibition preventing the transfer or disposal of the ACC property by ACC pending the resolution of the fiduciary duty proceeding;

8. Against ACC, the DHB and NMIT:

8.1 A declaration that, consistently with the Crown's ongoing obligations as a fiduciary in the fiduciary duty proceeding, and the correlative rights of the applicant and those he represents in that proceeding, the fee simple estates of land within the Spain award area that those parties presently are registered as proprietors of are not to be transferred or otherwise disposed of pending the resolution of the fiduciary duty proceeding;

8.2 An injunction or an order of prohibition preventing any transfer or disposal of those fee simple estates pending the resolution of the fiduciary duty proceeding;

9. Against Kainga Ora and HNZL - *Lands* orders to enable opportunity for bespoke arrangement to be agreed or otherwise court imposed.

[130] It may usefully be observed at this point that the orders sought against ACC and the other Crown entity respondents (orders 7 – 9) are predicated on the Court finding that those entities constitute "the Crown" for the purposes of the *Wakatū* proceeding. By that I mean that the allegation is that those entities, themselves, are potentially directly liable in the *Wakatū* plaintiffs, and their land is (therefore) directly available for redress in those proceedings.

Relevant propositions emerging

[131] Before considering the claim for review, it is useful to try and summarise the relevant propositions that emerge from the rather complex legal and factual narrative I have set out above.

[132] As regards the Crown "proper", they are:

(a) The Crown owes Mr Stafford and those he represents fiduciary duties in relation to the tenths and occupied lands.

(b) The fiduciary duties owed are separate from, but underscored and supported by, the Crown's Treaty obligations to Mr Stafford and those he represents.

(c) While issues of breach and of defences have yet to be determined, it is reasonably possible that Crown liability will in due course be established, particularly in relation to the rural tenths and the occupied lands.

(d) In the event of liability being established, Mr Stafford seeks—where possible—the return of the relevant land, in preference to monetary compensation.

(e) Mr Stafford is likely to have a caveatable interest in any land in the Spain award area that remains in (or has been returned to) Crown ownership, provided there is evidence of a link—or a potential link—between the land in question and the *Wakatū* claim.

(f) The *Wakatū* claim and Mr Stafford's remedies in relation to it (in the event that the claim is, indeed, partly or wholly successful) are expressly preserved and protected by the Settlement Act, which binds the Crown.

(g) The Settlement Act also imposes binding RFR obligations for the benefit of the settled iwi, which are triggered when it is proposed to dispose of land owned by the Crown or Crown entities within a geographical area that includes the Spain award area.

(h) The RFR process is, nonetheless, expressly subject to pre-existing legal and equitable interests, which potentially include Mr Stafford's interests in specific land within the Spain award area.

(i) The existence of his interest in specific land has, however, not yet been identified or determined. But—once ascertained—any such interest would exist retrospectively.

(j) The existence of any such interests depends on the nature, location and history of the land in question, the identity of the present-day

owner and, presumably, any defences available to the Crown, including the possible operation of the doctrine of laches arising, in particular, from the Settlement Act.

(k) The land in which such interests exist may not be confined to land that can be identified as being directly the subject of a breach and may also include substitutable land.

[133] As regards the position of Crown entities, I have noted earlier that the majority of the Court in the caveats appeal held that:

(a) it is *not* reasonably arguable that ACC is subject to or bound by the fiduciary obligations found by the Supreme Court to be owed by the Crown to Mr Stafford;[45] and

(b) it is *not* reasonably arguable that any interest that Mr Stafford might have in the land is derived from the registered proprietor (ACC, which was not the Crown) so the caveat should be removed.

[134] A question then arises as to whether those conclusions apply equally to the other Crown entity respondents in these proceedings. In my view, they do. In particular, the points made by Gilbert J at [33] of the caveats appeal decision necessarily apply to them. He said:

> [33] Mr Stafford's substantive claim is not against ACC, rather it is against the Crown for its alleged breaches of fiduciary obligations dating from the time of its acceptance of the Spain award in 1845. ACC did not come into existence until 1998, over 150 years later. ACC is a legal entity separate from the Crown. It is not suggested that ACC assumed fiduciary obligations to the customary owners and it cannot be said to have breached, in the period up to 1882, the obligations found to have been owed by the Crown. Any judgment Mr Stafford may obtain in the substantive proceedings currently before the High Court will not be enforceable against ACC, which is not even a party to that proceeding. The defendant is the Attorney-General who is being sued on behalf of the Sovereign, in right of her Government in New Zealand. The Attorney-General, sued in this capacity, is the correct defendant. Mr Stafford could not choose to sue ACC, which cannot be held liable for the Crown's breaches of fiduciary obligation in this context.

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[45] Per Gilbert J at [33] and Courtney J at [150].

[135] Although Courtney J reached the same conclusion, her analysis was based more specifically on the absence of Crown control over ACC's operational functions, of which buying and selling investment property (such as Morrison Square) forms part. But no identifiable basis was advanced before me on which it might be said that a different conclusion could be reached in relation (for example) to Kāinga Ora, whose dealings in property are even more clearly and intrinsically linked to its core operational roles namely:

(a) as a public housing landlord, whereby it manages the tenancies in its homes and maintains the properties in its portfolio; and

(b) as an urban development engineer (whereby it is said to be tasked with "accelerating the availability of build-ready land, and building a mix of housing, including public housing, affordable housing, homes for first home buyers, and market housing of different types, sizes and tenures").

[136] For myself, the short point—at least as far as ACC and Kāinga Ora are concerned—is that s 15 of the CEA specifically states that a statutory entity[46] is a body corporate and a legal entity separate from the Crown. Whatever control Ministers might or might not be able to exercise over such an entity, the *Torrens* implications of its clear and separate legal status, in terms of land ownership, seem to me to be inescapable. On any analysis, land of which a Crown agent (as defined under the CEA) is the registered proprietor is *not* Crown land.

[137] It follows that, regardless of whether Mr Stafford is able to establish relevant and specific determinations of historic breach of fiduciary duty by the Crown in relation to land now owned by Crown entities, he does not have a caveatable interest in such land.[47] This is because—provided the land was acquired by the entity as a bona fide purchaser for value and without actual or

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46 Namely those Crown agents, autonomous Crown entities and independent Crown entities named in Schedule 1, including ACC and Kāinga Ora.

47 Although the Court of Appeal's caveats decision concerns only land owned by ACC, it is difficult to discern any basis on which the Court's reasoning would not apply equally to all other Crown entities (and Crown agents, in particular).

constructive notice of Mr Stafford's interest in the land—any such interest cannot be said to have been derived from the registered proprietor (the Crown entity).

[138] But more importantly, for present purposes, the Court of Appeal's conclusions—and my view that they apply equally to other Crown entities—make it clear that there *is* a distinction between Spain award area land that is owned by the "core" Crown and such land that is owned by Crown entities. So there can be no declarations made directly against the Crown entity respondents on the basis of the fiduciary duties owed to Mr Stafford by the Crown, as sought in orders 7 to 9 set out at [129] above.

[139] That said, there remain "soft" powers that have historically been exercised whereby Crown entities are made subject to Crown "expectations" as to the identification and notification of Māori interests when disposing of surplus land. And the Crown entities themselves may have their own obligations to Māori, or obligations to support the Crown in its Treaty relationship. I return to those matters shortly, below.

ANALYSIS

[140] It is on the basis of the propositions just summarised that I turn, finally, to consider the application for review. For the reasons just explained, my analysis proceeds on the basis of my conclusion that the Crown entity respondents cannot be treated as the Crown and the land of which those entities are the registered proprietors is not Crown land.

Could and should a moratorium have been directed under the CEA?

[141] I begin with the claim for review as it relates to ss 103 and 107 of the CEA. In essence the allegation is that the Crown has acted unlawfully in refusing to use one of those provisions to direct a moratorium on land sales by Crown entities within the Spain award area. There is a related timeliness complaint in relation to the failure to make any decision before 30 June 2019, but given that one has since been made, a victory on that point alone would not much assist Mr Stafford.

[142] I have set out the relevant text of ss 103 and 107 and related provisions at [60] above. But for convenience, and by way of summary, I reiterate that a direction may relevantly be made:

(a) under s 103 to a Crown agent, "to give effect to a government policy that relates to the entity's functions and objectives"; and

(b) under s 107 to a Crown entity, "to support a whole of government approach by complying with specified requirements … to manage risks to the Government's financial position".

[143] And, by virtue of s 113, directions may *not* be given that:

(a) relate to a statutorily independent function; or

(b) require the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons.

[144] Here, Mr Stafford seeks a direction to the effect that:

> no fee simple estate of land within the Spain award area that is registered today in the name of the 'core' Crown, Crown agents, Crown entities or State enterprises, shall be transferred or otherwise disposed of pending the resolution of the fiduciary duty proceeding …

[145] At the hearing before me, counsel for Mr Stafford confirmed that reliance was no longer placed on s 103 as the source of the relevant power. As I understand it, this concession was driven principally by the more limited reach of a s 103 direction; while it would apply to the Crown *agent* respondents (including both ACC and Kāinga Ora), it would not apply to entities such as the Nelson Marlborough Institute of Technology.

[146] Beyond that, however, the concession is a little puzzling. My tentative view is that the s 103 power is more apt here than the s 107 power. That is particularly so for an entity such a Kāinga Ora, whose own statutory operating principles (discussed in more detail later, below) could arguably provide the link

required by s 103 between a relevant "government policy" and Kāinga Ora's own functions and objectives.[48] But given Mr Stafford's concession—and the consequent absence of submissions on the point—I do not propose to consider s 103, by itself, further.

Would a s 107 direction be barred by s 113?

[147] Turning now to s 107, the starting point is that this provision (like s 103) is subject to s 113. And in the caveats appeal, Courtney J suggested that s 113 was a barrier to the use of s 107—in particular, its prohibition of directions requiring the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons. She said:[49]

> [105] The Wakatū proceedings were brought because the Crown was not prepared to consider a discrete settlement of the Nelson tenths claims brought under Wai 56 but, rather, sought a wider settlement of all grievances with all iwi groupings in Te Tauihu represented by Tainui Taranaki ki te Tonga. It is clear from this history that the claimants in Wakatū have sought to have a distinct identity throughout and to be dealt with by the Crown separately from others. They may now number in their thousands, *but it is difficult to view them as anything other than "particular persons" for the purposes of s 113(1)(b).*

[148] I respectfully disagree that s 113 would be a bar to directing a moratorium here. Rather, I agree with Williams J that:

(a) The statutory definition of "statutorily independent function" contained in s 10 is a narrow one, effectively requiring that the particular entity's own statute expressly state that the relevant function is an independent one and, in ACC's case, its investment function was not one of these.[50]

(b) Directing ACC to refrain from selling (in the meantime) the Morrison Square property might be a direction requiring ACC not

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48 By which I mean that a policy that—for example—the Crown will take all available steps to honour its fiduciary obligations in relation to the tenths lands, sits quite easily with Kāinga Ora's own statutory obligations in relation to Maori interests in land that it owns.

49 Emphasis added.

50 The term is defined as "any matter in respect of which the entity's Act provides that—(a) the function must be carried out independently; or (b) Ministers of the Crown may not give directions.

to perform a certain act, but arguably would not relate to "particular persons" because:

(i) a general prohibition on sale (which focused on the land itself) was not the same as a direction that the land be transferred to a particular person or group, such as Mr Stafford and those he represents; and

(ii) the Wakatū claimants are not "particular persons" in the private sense contemplated by s 113 but rather a public class or community of persons.

[149] By way of elaboration, it seems to me that the purpose of s 113 is to preclude Ministerial interference with the core operational activities of the relevant Crown entity. It would—for example—be quite wrong (and wholly contrary to ACC's independence) if the ACC Minister could direct ACC to deal with claims made by certain individuals or groups of individuals in a particular way. Similarly, it would be wrong for Kāinga Ora's Minister to tell Kāinga Ora that it should favour (or disfavour) a particular individual or group when allocating houses. The moratorium sought by Mr Stafford is not the kind of direction.

[150] Viewing the matter in a slightly different way, it is difficult to see how a direction that properly falls within the ambit of s 107 could ever offend s 113. I suspect that it may be for that reason that s 107 (unlike s 103) is not expressly stated to be subject to s 113. A s 107 direction is necessarily concerned with requiring Crown entities to support a whole of government approach in relation to certain matters. It is hard to conceive of a "whole of government approach" that would either involve cutting across a particular Crown entity's independent functions or require the performance of specific acts or the bringing about particular results "in respect of a particular person or persons". The magnitude of purpose that is required of a direction given under s 107 significantly diminishes the risk of any infringement of s 113.

Is the direction sought properly within the ambit of s 107?

[151] But even proceeding on the basis that s 113 is not an obvious impediment to a direction of the kind sought here, I am unable to agree with counsel for Mr Stafford that such a direction might—in terms of s 107 itself—tenably be said to support a "whole of government approach" for the purpose of "managing risk to the Government's financial position".

[152] I begin by noting that this was not a question addressed in any detail at all by Collins J, who first posited the idea of a s107 direction; he simply made a conclusory statement that it was reasonably arguable that a s 107 direction could be given "in order to assist the Government fiscal risks concerning claims against the Crown by Māori".[51]

[153] And even in the Court of Appeal, Williams J addressed the issue only briefly and, again, in a somewhat conclusory—and necessarily contingent—way. He said:[52]

> [277] Is a *Wakatū* direction covered by any of the five purposes in s 107? It must be arguable that such direction would assist the government in managing risks to its financial position arising from the *Wakatū* litigation. Its effect would be to create a land bank in Te Tauihu to better enable the Crown to meet any award, should one be made. I do not consider that "risks to the Government's financial position" relate only to existential risks. In any event, given that the claim seeks to hold the Crown to a promise to reserve ten per cent of Te Tauihu, together with pā, urupā and cultivations circa 1845, it must represent a more than de minimis risk to the government's financial position. That is all that is required for a direction aimed at better managing this risk. Once again, there seems no particular reason to adopt a narrow construction of that purpose.
>
> [278] By my count, there are seven Crown agents with a physical presence in the Tauihu area. And there will no doubt be a number of other Crown entities in the district. The requirements of s 107(2)(c) could therefore be satisfied if a *Wakatū* direction were made to multiple Crown entities.
>
> [279] I therefore find it reasonably arguable the Minister could make a *Wakatū* direction that is consistent with the purposes in s 107(1) and the multi-agency requirements in s 107(2).

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51 At [82].

52 I agree with Williams J's analysis in relation to s 107(2).

[154] For present purposes, it is necessary to dig deeper. Just how could a directed moratorium on land sales in the Spain award area be said to be aimed at managing risks to the Government's financial position?

[155] I acknowledge that Crown litigation risk is (on a broad view at least) capable of constituting a risk to the Government's financial position. I would also be inclined to accept that the financial risk created by a particular piece of litigation—such as the *Wakatū* proceeding—might also qualify, although it is perhaps more difficult to see that a single proceeding could prompt the need for a "whole of government" response, as s 107 requires. But as Williams J noted, s 107(2) makes it clear that a s 107 direction need not have a national focus.

[156] Although I am prepared to proceed on the basis that Crown litigation risk generally, or the *Wakatū* litigation risk specifically, could be said to constitute a "risk to the Government's financial position", I cannot see how the imposition of a moratorium might have the effect of *managing* that risk. The breaches of fiduciary duty alleged in the substantive litigation relate to events prior to 1882;[53] the Crown's potential liability (and associated financial risk) would not be affected by the existence of a present-day moratorium. And while I acknowledge that Mr Stafford understandably seeks, ultimately. the return of land rather than monetary compensation, the logical reality is that—from the Crown's perspective—there would be little difference (in terms of financial risk) between the two. That is largely because, in order for Crown entity properties to be capable of return to Mr Stafford as relief in the *Wakatū* proceedings, the Crown would first have to reacquire those properties for value. From the perspective of any financial risk to the Crown, the difference between having to buy back Crown entity land the prior sale of which has been frozen by a moratorium and having to compensate Mr Stafford because the land has—in the absence of a moratorium—been sold, is far from obvious.

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[53] See *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [34]–[35] and *Stafford v Accident Compensation Corporation* [2020] NZCA 164 at [27].

[157] Viewing—and interpreting—s 107 with a Treaty lens (which I was urged to do and which I accept is appropriate, if possible) does not alter this conclusion. I consider the terms of s 107 are simply too clear to yield any other.

Could there be an obligation to direct?

[158] In the end, however, my views as to the possible application of s 107 (or s 103) are neither here nor there. That is because, even assuming that either provision might be capable of empowering a direction as to the (non) disposal of Crown entity land within the Spain award area, I do not consider there could be any obligation to exercise such a power here. Indeed, there are strong considerations pointing the other way, for the reasons that follow.

[159] First, it will be difficult for Mr Stafford to be able to establish, in the *Wakatū* proceedings, a constructive trust over land that is presently owned by a Crown entity. That is the necessary effect of the conclusion that Crown entities are not to be regarded as the Crown for the purposes of those proceedings. As noted earlier, he would need to show that the Crown entity had obtained the land in question with either actual or constructive knowledge of his interest in it. That seems possible only where the land was transferred directly from the Crown to the Crown entity (or possibly its predecessor). I presently have no information as to whether that scenario is grounded in reality.

[160] Secondly, it seems to me that the Settlement Act is a specific impediment to the exercise of such a power. While the Act preserves Mr Stafford's "ability … to obtain any relief claimed in the *Wakatū* proceedings to which [he] is entitled", his entitlement to relief remains undetermined. In light of the point that he is unlikely to obtain as relief land owned by a Crown entity, there must be real doubt around whether such entitlement will ever be established. That counts against the argument (to which I might otherwise be attracted) that the wider context of his claim, together with the duty of active protection under the Treaty, might require the Crown to act defensively—by doing what it can to safeguard even his contingent interest in such lands.

[161] Thirdly and relatedly, there is here also an important and competing statutory reality. For so long as Mr Stafford's interests in Crown entity land within the Spain award area remain (very) contingent, any obligation owed by the Crown to protect and preserve his interests must be tempered by its existing, binding, statutory RFR obligations to settled iwi. A moratorium on land sales of the kind sought by Mr Stafford would, at best, be inimical to the spirit of the RFR process. At worst, it would defeat it. The duty of active protection cuts both ways. It is not open to Ministers to disregard Parliament's clear intent in that regard.

[162] Fourthly, and regardless of the statutory authority relied on, a moratorium would not, by and of itself, have the effect ultimately sought by Mr Stafford. As just noted (at [156] above), in order for Crown entity land to be available to him for return or redress in due course, the land must first be transferred to the Crown. Given the conclusion that the Crown and its entities are separate for all relevant intents and purposes, any transfer would need to be agreed on a commercial basis between the Crown and the entity concerned. A moratorium would neither achieve nor promise such transfer.[54]

[163] In conclusion on this point, therefore, I consider that the Crown is neither empowered by s 107 nor (alternatively) obliged to direct a moratorium of the kind sought here. To the extent the impugned decision was based on that view, it was correct in law.

[164] As to the question of the timeliness of the relevant decision, it is unclear to me why it took quite so long. But this is not a case where the Ministers were required by law to make a decision: the question of whether and when a direction under s 107 (or s 103) should be made is really for them. While it would undoubtedly have been helpful (to both Mr Stafford and the Court) to know of the Ministers' declinature at some earlier point I am unable to see the delay as constituting or giving rise to any material administrative law error.

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[54] Whether or not the Crown might be under some kind of obligation to pursue such a transfer is beyond the scope of this proceeding, but such an obligation seems to me unlikely (not least because of the Settlement Act), at least until the nature and content of Mr Stafford's interest in particular land is established.

If not s 103 or s 107, then what?

[165] For the reasons just given, I regard a formal Ministerial direction under the CEA is an inapt tool in the circumstances of this case. But what I think plainly *is* required—as a function of the fiduciary duties found to be owed and as a consequence of the statutory protection given to the *Wakatū* claim and (ultimately) the plaintiffs' remedies by the Settlement Act—is a means by which Mr Stafford can be confident that he will be given adequate and timely notice of any proposed disposal of Crown entity land in the Spain award area. He can then take steps, or urge the Crown to take steps, to expedite the historical research necessary to determine whether that land or any part of it is of identifiable significance in terms of the *Wakatū* proceeding. If it is, then he can, perhaps, discuss with the Crown any available means by which it might be reacquired, protected or retained for the purposes of relief.[55] And possibly—depending on the circumstances in which the Crown entity came to possess the particular land in question—there may also be an argument that it is still held subject to a constructive trust in his favour.[56]

[166] It seems clear that the letters sent by the Attorney-General to the various Crown entities (an example of which is set out at [97] above) have not given Mr Stafford the confidence he deserves. At their highest, the letters do no more than:

(a) advise the Crown entities of Mr Stafford's claim;

(b) emphasise that the acquisition and disposition of property by the entities is a strategic and operational matter for them;

(c) politely request that the entities "consider advising" the Crown of any intentions to dispose of land in the Spain award so that the Crown can "consider its position"; and

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55 Subject, of course, to any competing RFR obligations.

56 If some sort of direct transfer from Crown to Crown entity ownership could be established there might be room for argument that Mr Stafford has a caveatable interest in the land and for saying that the land is exempt from the statutory RFR process.

(d) reemphasise that the request is not to be taken as suggesting that the Crown would actually intervene in the sale process.

[167] While I appreciate the perceived need for caution, in terms of any potential interference with an entity's independent functions, it seems to me that the phraseology used in those letters is wrongly equivocal and circumspect. More "direction" is both possible and necessary here, particularly when regard is had to:

(a) the Crown's historic willingness to express its expectations around land disposal processes involving such entities in much more forthright terms, where potential Treaty claims are in play; and

(b) what I consider to be the role of Crown entities, in terms of supporting the core Crown meet its obligations to Māori, particularly (but not exclusively) in relation to land.

[168] As regards the first point, the past exercise of "soft" powers of this kind was referred to in both the High Court and the Court of Appeal's caveats decisions.[57] And in the present proceeding, Mr Purdy of ACC further deposed that:

> … in July 2014 Cabinet decided that responsible ministers should write to non-core Crown agencies setting out Crown expectations in relation to the disposal of land. Those expectations included engaging with iwi, having regard to the customary interests of iwi and altering responsible ministers to any issues regarding iwi or Māori interests in land arising from proposals sales or disposal of land.

[169] While Mr Purdy noted that ACC has no record of receiving finalised notification of that decision, he said:

> When disposing of a property, ACC would endeavour to ensure that any values present on that land are properly identified, appropriately managed, and protected (consistent with the expectations set out in the LINZ Factsheet[58]) in a manner that best matches ACC's statutory obligations and commercial imperatives.

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57 See in particular Williams J's discussion set out at [107] to [109] above.

58 The LINZ factsheet records the "Protection of Values on Crown-owned land" policy referred to at [352] of Williams J's decision.

[170] There are a number of threads to the second point. The first is that the obligation of support has already been expressly recognised by the Crown entities themselves. By way of example only, Courtney J noted in her caveats decision that ACC has stated in both its 2015–19 Statement of Intent and its 2017 Annual Report that it will support the Crown in its Treaty relationship.[59] Such statements are an appropriate acknowledgement that such entities remain—notwithstanding their legal separation and independence—"creatures" of the Crown. As a matter of constitutional principle, it would simply be wrong if, by the simple act of creating such entities, the Crown could shed its obligations to Māori in the areas in which those entities operate.

[171] As it happens, there are more concrete examples of this constitutional principle in action. Most notably (for present purposes) Kāinga Ora is subject to specific *statutory* obligations in relation to Māori land interests. As s 4 of the Kāinga Ora–Homes and Communities Act 2019 (the KOA) explains:

> **4 Māori interests**
>
> In order to recognise and respect the Crown's responsibility to consider and provide for Māori interests, this Act provides,—
>
> …
>
> (c) in section 14(1), that the operating principles of Kāinga Ora–Homes and Communities include—
>
> (i) identifying and protecting Māori interests in land, and recognising and providing for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga:
>
> (ii) partnering and having early and meaningful engagement with Māori and offering Māori opportunities to participate in urban development:
>
> (d) in section 20, that Kāinga Ora–Homes and Communities cannot use the exemptions for Housing New Zealand Corporation and its subsidiaries to dispose of land subject to rights of first refusal under Treaty settlement legislation:[60]

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59 *Stafford*, above n 33, at [131].

60 Previous Treaty settlement legislation (including the Settlement Act) routinely included an exemption that allowed Housing New Zealand Corporation (and its subsidiaries) to dispose of land subject to a right of first refusal if, in its opinion, the disposal was "to give effect to, or assist in giving effect to, the Crown's social objectives in relation to housing or services related to housing". However, in recognition of the importance of the rights of first refusal

(e) in section 23(2)(e), that a GPS must include the Government's expectations in relation to Māori interests, partnering with Māori, and protections for Māori interests.

[172] The "GPS" referred to in that section is a government policy statement on housing and urban development issued under pt 2 of the KOA. Kāinga Ora is obliged to give effect to a GPS.[61] So by way of elaboration, it may usefully be observed that:

(a) the obligations summarised in s 4 of the KOA are clearly intended:

(i) to co-exist and, if necessary, be reconciled, with Kāinga Ora's operational functions and activities; and

(ii) to support and reflect the Crown's own parallel obligations;

(b) the GPS mechanism referred to in s 4(e) and s 23 of the KOA would appear to be an apt and focused means by which a Ministerial direction about land disposal could be given to Kāinga Ora;[62] and

(c) in any event, the existence of the KOA obligations in relation to Māori interests in land would arguably make it wrong for Kāinga Ora to dispose of land in the Spain award area *without* first advising and consulting with Mr Stafford.[63]

[173] To the extent that other Crown entity respondents are *not* subject to specific statutory obligations of the kind imposed by the KOA,[64] the reality is that they now have clear notice of Mr Stafford's claims relating to land in the Spain

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to iwi who benefit from them, s 20 stipulates that Kāinga Ora will not seek to invoke such exemptions.

61 The first GPS under the Act must be issued no later than 1 October 2021.

62 Section s 25(a) of the KOA expressly states that a GPS does not constitute a direction for the purposes of Part 3 of the CEA.

63 Notwithstanding that Mr Stafford does not have a caveatable interest in the land owned by Kāinga Ora, his claim is indisputably concerned with (in the words of s 14(1) of the KOA) "the relationship of the customary owners with their ancestral lands, sites and wāhi tapu". As noted above, the logical object of such consultation would be to give Mr Stafford the opportunity to determine whether the land in question forms part of his claim and, if so, to discuss with the Crown whether steps can and should be taken to protect it.

64 The Accident Compensation Act, for example, contains no specific reference to the Treaty or to Maori interests.

award at area. As far as I know, they are subject to the Government expectations to which Mr Purdy referred. I have referred to what I regard as a wider constitutional principle also at play. So, in the event a Crown entity wishes to dispose of land within the Spain award area, I would suggest that there is something akin to a duty to advise Mr Stafford (whether directly or through the Crown) of that intention, in a timely way. Notwithstanding that the entities themselves owe no specific fiduciary duties to Mr Stafford in relation to tenths land, they must, I think, be subject to a wider obligation of good faith—as a function of their status as *Crown* entities—in circumstances such as the present. The existence of such an obligation is not sourced in any Ministerial direction and, in my view, is not inconsistent with the independence of the entities concerned.

[174] The short point is that, unless the Crown entity can say with some certainty that there is no possibility that the particular piece of land might be held on constructive trust for Mr Stafford, it is difficult to see how entering into a disposal process *without* notifying him would be consistent with such an obligation.

[175] I acknowledge that an obligation to give Mr Stafford adequate notice of any proposed disposal of Crown entity land in the Spain award area is unlikely to be regarded as satisfactory for anyone. From a Crown entity perspective, it is likely to slow down any disposal process. But that is hardly a remarkable matter; delay is a necessary feature of disposals that are subject to the Public Works Act processes, the RFR or the LPM. And from Mr Stafford's perspective, I appreciate that receiving notice will not necessarily enable him to halt a proposed disposal. I also acknowledge that it places a burden on him to establish that there is some basis on which to say that the particular land should not be sold. But I am confident that the Crown will share that burden with him, as its historians already are, in the wider context of the *Wakatū* claim.

And what about land owned by the Crown "proper"?

[176] As noted earlier, the likelihood of Mr Stafford being able to establish a caveatable interest in land within the Spain area that remains in, or has been

returned to, Crown ownership is comparatively high, although—again—it remains subject to the availability of sufficient information about the history of the land and its connection with the *Wakatū* claim. But as the discussions in decisions of both Gilbert and Williams JJ in the caveat appeal make clear, it is arguable that the relevant connection need not be a direct one.

[177] If that is so, then the historic fiduciary and current Treaty obligations owed by the Crown to Mr Stafford—underscored by the terms of the Settlement Act—require that he be provided with adequate opportunity and assistance to take steps to protect his (potential) interests in the event of a proposed disposal. Given that the RFR process in the Settlement Act is made subject to existing interests, I cannot see that providing Mr Stafford with those things would be inconsistent with that process.

[178] I accept that the LPM agreed between the Crown and Mr Stafford in 2017 goes some way towards achieving this. Equally, however, I acknowledge and understand that:

(a) Mr Stafford's ability to assert such an interest is largely dependent on historical research about the land in question which may or may not have been done, and is largely being undertaken by the Crown;

(b) Mr Stafford's faith in the LPM may have been shaken by the apparent failure by LINZ to provide him with the promised monthly reports and the proposed sale of the Black Horse Gully land; and

(c) There is both a burden and a cost to Mr Stafford in having to apply to the Court to protect his (potential) interests every time a possible disposal comes to his attention.

[179] It is my sense that the Crown already recognises these concerns. Indeed, in the course of the hearing, some draft orders were prepared by Crown counsel

that were intended to go some way further towards meeting them.[65] The draft orders were in the following terms:

> 1.1 The Crown will undertake that if it decides to commence a process for the transfer or other disposal of any fee simple estate that is registered today in the name of [the Crown] within the Spain award area, it will provide written notice to the applicant.
>
> 1.2 The Crown will undertake not to commence a process to transfer or otherwise dispose of any fee simple estate that is registered today in the name of [the Crown] unless:
>
> 1.2.1 The applicant agrees that the Crown may commence a process to transfer or otherwise dispose of such a fee simple estate; or
>
> 1.2.2 Following the hearing of an urgent application filed (in the applicant's proceeding against the Attorney-General under CIV-2010-442-181 ("the substantive proceeding")) by Mr Stafford for interim relief seeking to restrain the transfer or disposal of the fee simple estate, a High Court order permits the Crown to dispose of the fee simple estate; or
>
> 1.2.3 The applicant has not, within 30 working days of the date of notice set out in paragraph 1, either agreed with the Crown's commencing a process of transfer or other disposal in accordance with paragraph 1.2.1; or has not filed an urgent application for interim relief in accordance with 1.2.2.
>
> 1.3 The Crown will undertake that, if the applicant makes an application contemplated in paragraph 1.2.2, it will:
>
> 1.3.1 pay the applicant's filing fee for the application;
>
> 1.3.2 waive any undertaking as to damages that may be required; and
>
> 1.3.3 should Mr Stafford's application be unsuccessful, seek that any costs be reserved until the conclusion of the substantive proceeding.
>
> 1.4 The applicant and the first respondent will seek that any order of the Court formalising the arrangement set out above will be reviewed by the Court at the expiry of 12 months.
>
> 1.5 The applicant and the first respondent acknowledge that the Crown's undertaking cannot alter statutory requirements or affect powers and functions of statutory officers. The Crown will further undertake to:

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[65] It is not my understanding that the orders were proposed on a without prejudice basis and, indeed, their provision to the Court suggests that they were not.

1.5.1 Copy this memorandum and any subsequent order to the Commissioner for Crown Land; and

1.5.2 Provide notice to the applicant of any land disposal process being considered by the Commissioner for Crown Land or that it is aware is subject to a statutory disposal process.

[180] To be frank, the differences between these draft orders and orders 3–6 as sought by Mr Stafford (as set out at [129] above) seem relatively minor. After reading the two sets of proposed orders together, it seems to me that the key elements of a protective process have been agreed. Thus, it is (or was at the time of the hearing) agreed that:

(a) the Crown will provide Mr Stafford with 30 working days' notice of any proposed disposal of core Crown land within the Spain award area;

(b) the Crown will not commence such a disposal process without first obtaining Mr Stafford's consent or following the hearing (and presumably determination) of an urgent application for interim relief made in the substantive *Wakatū* proceeding;[66]

(c) the Crown will waive any undertaking as to damages that may be required in relation to such an application;

(d) the Crown will provide a copy of the orders to the Commissioner for Crown Land (and LINZ); and

(e) the Crown will provide notice to Mr Stafford of any land disposal process within the Spain award area that is being considered by the Commissioner for Crown land or that it is aware is subject to a statutory disposal process.

[181] The only possible areas of disagreement are:

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[66] It is explicit in the Crown's draft orders, and implicit in Mr Stafford's requirement for 30 working days' notice, that any application would need to be made within 30 working days of that notice being given.

(a) the Crown's proposal is limited to any proposed disposal of a fee simple estate in land, whereas Mr Stafford's would include a proposed grant of a leasehold interest in such land of 20 years or longer;

(b) whether any urgent application to the Court should be made by Mr Stafford or by the Attorney-General;

(c) whether the costs of any such application should be reserved or whether Mr Stafford's should be paid by the Crown on an indemnity basis; and

(d) the Crown's qualification to the orders at [180](d) and [180](e) above—namely that they are subject to any relevant statutory requirements, powers or functions.

[182] Although I have not had the benefit of submissions on the concerns underlying these differences, I am not presently inclined to accept Mr Stafford's position in relation to (a), (b) or (d). More particularly:

(a) It is not immediately clear to me why the grant of a leasehold interest would prevent the return of the fee simple in the land to Mr Stafford in the shorter term.

(b) The rationale for Mr Stafford's position—that the Attorney-General is the appropriate applicant for interim relief, in proceedings brought by Mr Stafford and in which the Attorney-General seeks no relief—is unclear. Any interim relief sought would be aimed at preserving Mr Stafford's position in those proceedings, and he must surely be the appropriate applicant. While I acknowledge that this does place some burden upon him, it would be ameliorated (at least a little) by the Crown's offer to pay his filing fees.

(c) As regards (d), the qualification made explicit by the Crown is simply a legal fact. The parties cannot by agreement, and this Court cannot by order, override statutory requirements, powers or functions.

[183] The question of costs is, perhaps, more difficult. It is difficult to see why they should be reserved if an application for interim relief made by Mr Stafford were to be successful. Equally, there may be arguments to be made that he should not have to bear the Crown's costs, even where he is not. But the basis on which indemnity costs might be awarded is also unclear, particularly before determination of the substantive *Wakatū* proceeding. Much will likely depend on the particular circumstances and, perhaps, the reasonableness of the positions taken. I merely observe that Clifford J's caveat decision, and the later obiter comments of both Gilbert J and Williams J as to potential reach of the *Wakatū* claim, should assist the parties to assess when interim relief might be granted or caveats might be maintained, and to guide any decisions about whether to make, or defend, a relevant application.

[184] As a matter of natural justice, however, it is necessary to seek Mr Stafford's comment on all these matters.

CONCLUSIONS

[185] Beginning with those aspects of Mr Stafford's application that relate to Spain award area land owned by the Crown entity respondents, I consider that:

(a) the Crown entity respondents are separate legal entities from the Crown for the purposes of the *Wakatū* proceeding and so land owned by them is not directly available as relief in those proceedings; *and*

(b) the power of Ministerial direction contained in s 107 of the CEA is inapt, and cannot be used to order a moratorium on the sale by Crown entities of land within the Spain award area; *and*

(c) even if the power conferred by s 107 was, on its face, available, Ministers were not wrong to refuse to exercise it; *but*

(d) Ministers were able to, and should have, advised Crown entities that they were expected to notify Mr Stafford in a timely way of any proposed disposals within the Spain award area; *but in any event*

(e) the Crown entities themselves, having been advised of the nature and history of Mr Stafford's claim, are obliged—in Kāinga Ora's case by dint of its own statute, but otherwise as a matter of general good faith arising in the particular and unusual circumstances of this case—to notify Mr Stafford in a timely way of any proposed land disposals within the Spain award area.

[186] And as for those aspects of Mr Stafford's application for review that relate to Spain award area land owned by the "core" Crown, I think the Crown accepts that the LPM previously agreed needs to be strengthened. As I have noted, the parties have, during the hearing, reached some agreement as to how this might be achieved, and my strong preference is to make orders on the lines of that (almost) agreement. But again, I have not heard from counsel on the disputed matters outlined above, and as a matter of fairness I should do so.

[187] Mr Stafford's claim for review as articulated by him has not succeeded. But neither has it wholly failed. In particular, he has achieved, or will achieve, the Court's endorsement of a strengthened LPM. As well, I regard the conclusions I have summarised at [185](d) and [185](e) as substantive ones in his favour. But whether they should take declaratory form is also a matter on which I also need to seek further submissions.

[188] As to costs, my inclination is to let them lie where they fall, but, again, I wish to hear from the parties about that.

[189] Accordingly, I direct that (unless agreement is reached):

(a) Counsel for Mr Stafford are to file brief further submissions addressing the questions of declaratory relief (in terms of [185](d) and [185](e) above), his position on the identified areas of disagreement in terms of the revised LPM in relation to Crown-owned land, and costs within 10 working days of the date of this judgment; and

(b) Counsel for those respondents who participated in the hearing and who wish to make submissions on any or all of those issues are to do so within a further 10 working days.

[190] After considering those submissions I will then make appropriate final orders.

Rebecca Ellis J

Solicitors:
Pitt & Moore, Nelson for Applicant
Crown Law, Wellington / Meredith Connell, Wellington for First Respondent
Accident Compensation Corporation, Wellington for Second Respondent
Bell Gully, Wellington for Fourth and Sixth Respondents