LAND LAW BASICS

- Interests in land = real property
- Real property is fixed, as opposed to chattels/personal property which can be moved.

Hereditaments

- *Hereditament* = property which at common law descended to the heir on intestacy (dying without a will).
- *Corporeal hereditament* = physical/tangible things over which rights of ownership may be exercised
- *Incorporeal hereditament* = non-physical things, but rights over land in the possession of another (ie. real property)
- Relevant incorporeal hereditaments in NZ include:
    - *Easements:* a right of way over adjoining land.
    - *Profits a prendres:* a right over land to take some natural thing that is on the land.
    - *Rentcharges:* arises under a lease agreement, where the lessor is given the right to take personal chattels of the lessee to enforce the payment of rent.

Legal actions in relation to property

- Where real property is unlawfully taken, you can take legal action to get the land itself returned to you (not just the monetary value of the land)
- Where personal property is unlawfully taken, legal action might only get you the monetary value of the property taken.

TENURE

Tenure in England

- Before 1066, there was allodial ownership (land which has no lord)
- After 1066, allodial ownership was replaced with feudalism: a system of land holding based around relationships between classes, where tenants held land under lords.
- A *tenure* then is the holding of the Crown's land, without ownership.
- Tenures concern the relationship between lord and tenant

Two types of tenure

- *Unfree tenure* = tenants were entirely subject to their lord, with no freedom
- *Free tenure* = spiritual, military and non-military.

Tenure in NZ

- We have inherited the doctrine of tenure from English common law. The Crown makes land grants to us, and all land can be traced back to a Crown grant.
- But *Ngati Apa*: CA holds that Maori customary land, because it exists before any Crown grant, lies outside the ordinary doctrine of tenure.
- 1992: Law Commission proposes that the doctrine of tenure be abandoned and that all private landowners become allodial owners.

ESTATES

- Developed though the common law
- An *estate* is an interest or "bundle of rights" in land.
- Estates concern the relationship between tenant and land.
- *Walsingham's case*: "an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time". Estates are categorised according to their length.

Freehold estates

- Uncertain duration

Fee simple

- Largest estate available under common law, equivalent to ownership itself.
- Practically unlimited duration: granted to a person and their heirs generally. Only terminates if the current owner dies without any successors.
- Rights of:
    - Possession: includes the right to exclude all other from the land. Protected by trespass. *Seisin* = taking possession. *Livery of seisin* = a transfer of possession through transferring a piece of the land itself in the presence of a witness (eg. a twig)
    - Use and enjoyment: including using the land for agriculture or for erecting buildings.
    - Alienation: ie. sell the entire interest in the land, during your lifetime or in your will.
- *Fee simple absolute*: duration of estate not modified by any particular future event
- *Determinable fee*: estate may come to an end if a specified event happens to occur
- *Fee simple upon condition*: estate will end if a condition imposed on the grantee or their successors is breached.

Fee tail

- Granted to a person and a certain class of their heirs, lasting until the current owner dies without descendants.
- Now abolished.

Stratum estate

- New statutory estate
- Unit Titles Act 1972: you might have a fee simple estate in your individual apartment, but also have a tenancy in common in undivided shares in the common areas of the building.

Life estate

- Lasts for the duration of the holder's life
- Most common in family arrangements
- Holder gets rights of use and occupation.
- Holder may alienate during their lifetime, but because the duration of the estate is uncertain (as you don't know when the holder will die) there is limited commercial value.
- Holder may have certain obligations (eg. preserving value of the land)
- When the holder dies, the estate either reverts back to the grantor/the grantor's heirs, or goes to another person specified in the grant.

<u>Less than freehold estates</u>

- Fixed date of termination, or able to be fixed.

Leasehold

- Fixed date of termination
- Very long leaseholds (eg. 999 years) are effectively fee simple estates.
- Includes tenancies
- Also known as *chattels real*

Equitable interests

- Eg. trusts
- For every legal estate there can be a corresponding equitable estate.
- Subject to equitable remedies.

Future interests

- Ie. being entitled to an estate at some future time.
- *Reversions*
    - Arise where the owner of a freehold or leasehold estate grants some lesser estate to another.
    - The then reduced freehold or leasehold estate is call a reversion.
    - Arises by operation of law.

    - Vested in the person entitled to it = it's certain you will get it.
    - After the estate terminates the land reverts back to the grantor.
- *Remainders*
    - Arise when the owner of a fee simple estate grants an estate to one person and, at the same time, another estate(s) to someone else who will get it when the first person dies (ie. the remainder of the estate goes to another person)
    - Can be vested, or contingent = uncertain you will get it.
    - Only created by the act of the grantor.

POSSESSION

- Possession is at the heart of title.
- Estates give the tenant a right to possession of land for the appropriate period of time, at common law, actions for recovery of land have always turned o this right of possession.
- You don't need to establish an absolute title, good against all the world. It is relativity of title that is important (do you have better title than someone else?).

ADVERSE POSSESSION

- Significantly limited by statute in NZ, but it's still possible to get it
- You must have both factual possession AND intention to possess (animus possidendi)
- Possession needs to be continuous for the necessary length of time.
- Only one person can have possession of the land at any one time.
- *Enclosure* of land is strong evidence of adverse possession.
- Land Transfer Amendment Act 1963: you get adverse possession (called "prescriptive title") if you have possessed the land continuously for 20 years.

Limitation

- The law puts a time limit on when a true owner can come back to claim the land.
- After limitation ends the true owner loses the right to recover possession
- In NZ: Limitations Act 2010, s 21 = must recover possession within 12 years, or within 60 years if it's the Crown recovering.

Asher v Whitlock

Facts

- Tom Williamson enclosed some land, built a house on it, and raised his family there.
- He died and left his wife a life estate, with a condition that she remain unmarried. His daughter got the remainder in fee simple.
- The wife remarried Whitlock.
- The wife and daughter die.
- Whitlock continued to be in possession of the land. Asher is Tom Williamson's successor in title of the land.
- Asher seeks recovery of possession of the land

Result

- Tom Williamson had acquired title through adverse possession. That title was good against the whole world.
- He could pass that title onto his successors, including Asher.
- Whitlock could only have good title against Asher if he could show adverse possession himself, or if he could show that Tom Williamson's original title was bad.
- = Asher gets the land.

Buckinghamshire County Council v Moran

Facts

- In 1955 the council buys lands to construct a highway.
- Moran lived on a plot of this land.
- The council becomes aware that Moran is there, and denies Moran's right to the plot.
- Moran argues he had acquired title to the plot through adverse possession.
- 1985 the council brings proceedings to recover possession of the plot.

Result

- Council argues that Moran only had an implied licence to stay on the plot. So him staying on the plot wasn't "adverse" to the council's ownership.
- Moran argues he had adverse possession
    - Court finds this is true
    - He had factual possession, as the plot was completely enclosed and annexed
    - He had intention to possess: enclosure is evidence of this, and the strongest piece of evidence was him locking the gate to the plot.
        - Moran knew that the council was planning to build a highway on the land. This suggests that he didn't have intention to own, and can make it harder to prove intention to possess.
        - But, court finds he still had intention to possess for the time being, which is sufficient.
- More than 12 years had passed since Moran gained possession of the plot. This was outside the limitation period, and so the council could not recover possession from him.

PHYSICAL BOUNDARIES OF LAND

Subsoil

- Now governed by common law
- Eg. Crown Minerals Act 1991 = petroleum, gold, silver and uranium belong to the Crown
- For any other minerals, if the Crown has alienated the land then they are reserved to the Crown
- Pounamu in the South Island is vested in certain Maori tribes.
- Rights to take and use geothermal energy are vested in the Crown (Geothermal Energy Act 1953)

Airspace

- Common law = *Bernstein*, such height as is within the ordinary use and enjoyment of the land and the structures upon it
- Legislation: airspace rights will usually be subject height limits in district plan controls under the RMA 1991.

NZ territorial limits

- Land can be owned up to 12 nautical miles from the baseline of the territorial sea
- Beyond that the NZ government has sovereignty for up to 200 miles, but not interests in the land

Rivers

- Latin rule at English common law = owners of the land on the banks of non-tidal parts of rivers own the river to the centre line.
- Nowadays almost all activities in the beds of rivers and lakes are controlled by the RMA.
- Tidal parts of rivers are treated as foreshore

Lakes

- Same latin rule as for rivers
- Lakebeds belong to the owner of the surrounding land

Foreshore and seabed

- Since *Ngati Apa* in 2003: held that no general statutes had extinguished Maori customary rights in the foreshore and seabed.
- Foreshore and Seabed Act 2004 has also changed the law.
- Lagoons are treated the same as the foreshore and seabed.

Accretion and erosion

- The common law only recognises changes in boundaries by natural forces where it occurs as a slow and gradual process that is imperceptible from day to day.
- Accretion = addition of land to existing land by the action of water.
- Abrupt changes will not affect the boundaries of an estate.
- All these common law rules are also now subject to the Land Transfer Act 1952, which fixes boundaries and can cover situations of erosion or accretion.

Trees and crops

- Are part of the land under common law, also under the Land Transfer Act.

Water

- At common law, water cannot be owned by any person.
- But, Water and Soil Conservation Act 1967 has now nationalised rights to use natural water
- Further restrictions are also in the RMA.

Animals

- Like water, at common law wild animals on land are not capable of ownership.
- This common law has been altered in NZ by statute: all wildlife is the property of the Crown until it is lawfully killed, in which case it becomes the property of the hunter.
- The courts have held that any Maori customary rights over wild animals cannot override statutory enactments protecting them.

Inanimate objects

- Common law = *Waverley Borough Council v Fletcher*
    - Objects in or attached to land: the owner or lawful possessor of the land has better title that the finder
    - Objects unattached on land: the owner or lawful possessor has better title, but only if they've exercised manifest control over the land as to indicate an intention to control the land and anything found on it.
- Statute changes this: taonga tuturu (objects related to Maori) are prima facie the property of the Crown

Buildings and other fixtures

- See below

Fences and walls

- There is no general common law requirement for land to be fenced.
- But, Fencing Act 1978 provides that occupiers of adjoining land without an adequate fence are liable to contribute to work on a fence. An occupier may serve notice on an adjoining owner detailing the work to be undertaken and seeking an equal contribution to the fence.

FIXTURES OR CHATTELS?

- Where objects on the land become affixed such that they essentially add to the land, they are treated as real property and part of the land itself.
- Considerations
    - Is the object attached to the land by more than its own weight? (*Holland v Hodgson*)
        - If attached, onus on person trying to show it is a chattel, not a fixture
        - If not attached, onus on person trying to show it's a fixture, not a chattel
    - What is the object and degree of annexation?
        - Objective test
        - Have to look at all the circumstances
        - Does the object look like it is permanent and part of the land?
        - Why was the object put on the land: was it intended to be permanent and to improve the worth of the land?

Lockwood v Trust Bank Canterbury

Facts

- The Trust Bank was the mortgagee of land owned by Shearer.
- On the land was one of Lockwood's show homes, made up from a kitset.
- The home was not inhabited, but looked like it was. It was meant to be an advertisement for Lockwood, and was to be replaced every 12 months.
- The home was attached to foundations and had electricity, but was not fully plumbed.
- Shearer goes into receivership.
- Lockwood removes the show home, claiming it could do so because the home was only a chattel.
- The Trust Bank sues Lockwood for trespass. As mortgagee they have an interest in the land, and they argue that removal of the show home damaged the land.

Result

- In determining whether an object is a chattel of a fixture, you must look at the object and degree of annexation
    - An objective test: does the object look like part of the land, like it is permanent?
    - Here the court finds that the show home did look like a permanent and affixed structure.
    - It was nailed to foundations, looked like it was occupied, had electricity and a landline etc.
    - No one looking at the show home could reasonably conclude that it was intended to remain a chattel.

Lakes Edge v Kawarau Village

Facts

- Lakes Edge and Kawarau owned adjoining parcels of land
- Rock anchors straddled the boundary line. They were required for a resource consent to construct a hotel on what is now Kawarau's land. They also support the road which gave access to both parcels of land.
- Lakes Edge didn't know about the rock anchors until after it purchased its land.
- They claim the anchors are a continuing trespass.

Result

- The anchors are fixtures
    - They were substantial and permanent
    - The cost and difficulty of removing them is great and would probably destroy them.
    - They weren't installed only for some temporary purpose, they were intended to be permanent.
    - = they are part of the land.
- The anchors are not a continuing trespass
    - The installation of the anchors was consented to by the common owners of land
    - If there was no original trespass, then there can't be a continuing trespass
    - Furthermore, the anchors are part of the land as fixtures and therefore cannot "trespass" upon the land

FORMALITIES

- Transfer of land is a big deal, so it requires certain conditions for it to be valid.
- Land is a very valuable asset, and often the most valuable asset a person can have in their lifetime
- Transfers need to be certain, unambiguous, deliberate and visible.
- Formalities also protect against fraud.
- Failure to comply with formalities may mean that you won't obtain a proprietary right (though you may get a personal right against the person you made the contract with)

Examples of formalities in NZ

- A valid and enforceable contract creates only an equitable interest in the land (also need registration)
- Writing
    - Ss 24 and 25 of the Property Law Act
    - The 5 Ps need to be in writing: property, price, parties, payment and possession.
- Registration
    - S 24 of the Land Transfer Act 2017: can only transfer a legal estate if your register.
- If only an oral contract?
    - Can still validate to confer an equitable interest
    - Have to show the equitable doctrine of part performance = an act done in performance of the contract (*Dellaca*). In reliance is not sufficient.
    - S 26 PLA: the part performance doctrine is not affected by the writing requirements.

Salt of the Earth v Finer

Facts

- The applicant purchased property next to the respondent's property. There is a concrete driveway between them.
- After purchase the applicant realised that a legal right of way easement had not been created.
- The applicant's representative met with the deceased (the owner of the adjacent property) to discuss an easement.
- The deceased thought there was already a formal right of way, but couldn't find the paperwork. So the pair decided to create an easement.
- The applicant arranged for the required survey and documentation to be completed.
- After the deceased's death, the executors of his estate refused to honour this alleged agreement. They applied a caveat over the land, preventing the applicant from using it.
- The applicant argues there was an equitable easement created via oral contract with the deceased.

Result

- Did Salt of the Earth have an equitable interest in the land?
    - The right to be granted must possess the essential characteristics of an easement: satisfied on the facts
    - There must be valuable consideration given: satisfied, the proposed easement involved each landowner granting to the other the right to use a portion of his land in exchange for being able to use the landowner's piece of land.
    - There must be a memorandum satisfying s 24 of the Property Law Act, or part performance: no memorandum, but there was part performance (the survey and preparation of the easement documents amounted to a step in the performance of the contractual obligation incurred by the applicant pursuant to the contract)
- Overall: formalities satisfied, easement was created.

Dellaca Ltd v PDL Industries

Facts

- Dellaca was looking for more warehouse space. He approached Bainbridge (PDL) and anted to negotiate to purchase a property owned by PDL.
- The purchase is discussed, and Bainbridge indicates that PDL would be happy with a price of $55,000. Dellaca sends a fax confirming this conversation to Bainbridge.
- Bainbridge's secretary reads Dellaca a memorandum confirming the agreement to sell. It was not signed by or sent to Bainbridge.
- Dellaca proceeded to take possession of the property, and did $10,000 of work to it. He also insured it and surrendered his previous lease.
- PDL notifies dellaca that the agreement was only an offer.

- Dellaca sues for specific performance.

Result

- There was an enforceable oral agreement reached between Dellaca and Bainbridge
    - There was intention to be bound
    - There was sufficient certainty as to the 5 Ps
- Did it matter there was no signed memorandum?
    - S 2(2) of the Contracts Enforcement Act 1956 (now under s 24 PSA) requires that a contract like the one in this case is not enforceable unless the contract, or some memorandum/note, is in writing and is signed by the party to be charged, or by some other person lawfully authorised by him.
    - The contract, note or memorandum must contain all the material terms of the contract sought to be enforced
    - A plaintiff is not confined to a single document. Linking up doctrine = can read more than one doc together.
    - Here, there was a sufficient memorandum of essential terms, but it wasn't signed by Bainbridge.
    - Authenticated signature fiction not satisfied here.
- So, was there part performance instead?
    - Part performance is an equitable doctrine.
    - Three conditions
        i. Sufficient oral contract; and
        ii. Part performance of contract;
        iii. Which makes it unconscionable for the defendant to rely on the statute
    - What is "part performance"?
        - Acts which are done *in performance* of the oral contract
        - Here, none of Dellaca's acts were in performance of the contract, though they were in reliance upon it (reliance is not enough).

NATIVE TITLE

Mabo v Queensland

Facts

- High Court of Australia, 1991-1992.
- The Murray Islands had been occupied by the Meriam people long before colonisation.
- The present inhabitants are descendants of the Meriam people
- Over time the land was alienated:
    - 1879: the islands were annexed and became part of the Colony of Queensland
    - 1985: the islands are vested in the Crown, free of all other rights/claims/interests
- Three inhabitants bring an action against the State of Queensland. The seek declarations that the Meriam people are entitled to the islands as owners, possessors and occupiers.

Result

Crown's arguments

1. Terra nullius: no other proprietor of the land = Crown is beneficial owner
2. Doctrine of tenure: Crown owns all land
3. Patrimony of the nation: the Crown acquired ownership on behalf of the nation
4. Royal prerogative: ownership of vacant land in a new colony was part of the royal prerogative.

Brennan J (majority)

- Acquisition of sovereignty in Australia was based off the doctrine of terra nullius (other ways of acquiring sovereignty = conquest, cession etc.)
- Terra nullius = occupation of uninhabited land.
- The doctrine of terra nullius was enlarged by the British when they acquired sovereignty in Australia, to include inhabited land:
    - Australia was clearly inhabited.
    - But the Aboriginal people were seen as backwards, with no social system or recognizable sovereign, and with customs that were so low on the scale of social organization that they were deemed as not existing.
- Brennan J rejects the view that terra nullius must be the basis for non-recognition of native title:
    - This was how sovereignty was taken, yes.
    - But we do not then have to assume that the Crown is the absolute beneficial owner of all land in Australia.
    - Ie. sovereignty does not confer ownership.
- The difference between radical title and ownership:
    - On acquisition of sovereignty, the Crown gained radical title (*imperium*) over all the land. Imperium is a public law power which represents the potential for the crown to acquire ownership.
    - The Crown **did not** gain absolute beneficial ownership (*dominium*) upon acquisition of sovereignty. Dominium is a proprietary right.
    - Absolute and beneficial ownership (ie. dominium) can only be acquired through the exercise of appropriate sovereign power, eg. legislation or executive action.
- Native title and the "skeletal principles" of tenure:
    - Terra nullius cannot be accepted, as it is discriminatory. But, we cannot fracture the skeletal principles of tenure.
    - Australia inherited English common law, and as such inherited the doctrine of tenure.
    - Tenure survives as the Crown's radical title. Tenure can therefore exist alongside native title.
- It is only the fallacy of equating sovereignty with beneficial ownership of land that gives rise to the notion that native title can be extinguished by the acquisition of sovereignty:
    - Native title is a common law concept.

        - The common law position is that a change in sovereignty **does not** extinguish native title.
        - Pre-existing rights and interests (native title) survive a change in sovereignty, and constitute a burden upon the Crown's radical title (tenure).
- In order to extinguish native title, the Crown must have a clear and plain intention to do so:
    - Here, the Meriam people had pre-existing native title
    - The Crown has not shown clear intention to extinguish this title
- = the Meriam people are entitled as against the whole world to possession, occupation and use and enjoyment of the islands (except for those areas which have been leased or validly appropriated).

<u>Dawson J (dissenting)</u>

- Upon annexation the Crown became the absolute owner of the land. Any rights in land must derive from the Crown, and must be less than absolute ownership.
- Annexation does not extinguish pre-existing rights by itself.
    - But those rights only survive if the Crown chooses to recognise them.
    - There is no presumption that the Crown intends to recognise pre-existing rights.
    - Non-recognition = extinguishment.
    - Native title is not a proprietary right.
- Here the Crown exercised its full rights in the land, inconsistently with and to the exclusion of any Aboriginal rights.
- Whether there are any Aboriginal interests in land that have been extinguished by the acquisition of sovereignty is a question of fact, determined by reference to the surrounding circumstances.

Attorney-General v Ngati Apa

Facts

- Court of Appeal, 2003.
- Several Maori iwi and interests applied to the Maori Land Court for declarations as to the status of foreshore and seabed.
- The MLC and Maori Appellate Court found that the MLD had jurisdiction to hear the application.
- The HC found the MLC did not have jurisdiction to hear the application, because the foreshore and seabed as vested in the Crown either at common law or as a result of statute.
- The Maori interests appeal to the CA
- Issue: whether the MLC had jurisdiction under the TTWMA to determine the status of the foreshore and seabed.

Result

Elias CJ

- The Crown did not acquire sovereignty through terra nullius (as in Australia), but through cession (the Treaty)
- *Wi Parata/Ninety-Mile Beach:*
    - *Wi Parata* per Prendergast J:
        - The Maori people had insufficient social organization to be recognised by the British.
        - Native title did not survive the acquisition of sovereignty.
        - = equating sovereignty with ownership.
    - This view influenced the decision in *Ninety-Mile Beach*: upon acquisition of sovereignty, the Crown took ownership of all land in NZ.
- Influence of Sir John Salmond:
    - Believed that the doctrine of tenure meant that when the Crown acquired sovereignty, all land became the property of the Crown.
    - = equating sovereignty with ownership.
- Why *Ninety-Mile Beach* is wrong:
    - The decision in *Ninety-Mile Beach* was premised on the idea upon acquisition of sovereignty, the Crown acquired ownership of all land.
    - This is wrong because native title is not displaced by the doctrine of tenure.
    - In NZ there was pre-existing native title at the time of colonisation. NZ was not a "place of forgetfulness" as to the presence of native title.
    - The common law recognises native title, and native title continues under the common law until it is extinguished.
    - There must be clear and plain intention to extinguish.
- Overall: an investigation and Crown grant of title does not extinguish native title in the adjacent foreshore and seabed.

Gault P (dissenting in part)

- Doesn't overrule *Ninety-Mile Beach*
- Finds that any land which wasn't investigated, and in which interests were not identified, must be regarded as having been reserved by Crown grant = native title is extinguished and the Crown's radical title remains.
- The majority disagree
    - Tipping J: tikanga Maori is the key factor in NZ, not the English common law.
    - Elias CJ: a Crown grant in land cannot extinguish native title in the adjacent foreshore and seabed.

Paki 1

Facts

- Supreme Court, 2012
- In the late 19th century the Crown acquired some blocks of land adjacent to the Waikato River, from Maori owners.
- The Crown was deemed to have acquired the riverbed as well, ad medium filum aquae (to the centre line).
- At this time, the river was not used/navigated very much.
- The s 14 of the Coalmines Act Amendment Act 1903 deemed the beds of navigable rivers to be and always to have been Crown property.
- The plaintiffs represent the original Maori owners of the blocks of land. They claim that the river was not navigable as at 1903, and therefore the Coalmines Act does not apply. They also claim that the Crown held the riverbed in a constructive trust in the Maori owners' favour.
- HC: found the river was navigable "as a whole"
- CA: upholds HC decision.

Result

Elias CJ

- English common law conveyancing presumption
    - = ownership of the riverbed to the centre line is included in the land obtained by the Crown.
    - This presumption is rebuttable if the surrounding circumstances show that the grantor did not intend to part with the riverbed.
    - If the river is navigable, the presumption is easier to rebut.
- Meaning of "navigable river"
    - HC/CA's "whole of the river" approach (what proportion of the river's length is navigable) is wrong.
    - Navigability in fact approach should be used.
        - Assessed according to actual use of the relevant segments of the river.
    - Here, the relevant segments of the river in 1903 were used in a sporadic, extremely sparse and restricted manner. There is no record of transportation of people or goods (ie. as a highway).
    - = not a "navigable river", s 14 doesn't apply. Riverbed did not vest in the Crown under the Coalmines Act.

William Young J

- Dissents on "navigable land" issue
- S 14 is aimed at the "physical capacity" of the river to be used for navigation, not its actual use.
- Here the relevant segments of river were plainly capable of being used for navigation.
- = is a "navigable river" and s 14 applies, vesting the adjoining land in the Crown.

Paki 2

Facts

- Supreme Court, 2014
- Facts same as above.

Result

- English common law conveyancing presumption
    - Not a rule of law
    - Really just common sense, in that in many cases it would be useless for a vendor to retain a section of land that is half underwater and half above water.
    - But this "common sense" basis of the presumption does not easily translate to Maori land
    - For Maori, retention of an interest in the riverbed can be valuable in terms of a food source of a focus of tribal identity.
- *Re the bed of the Whanganui River*
    - = not authority for the rule of riparian ownership ad medium filum aquae
    - There is no general proposition of law that the presumption applies to the exclusion of customary interests in the riverbed.
    - The surrounding circumstances must be considered.
- *Ngati Apa* = found that an investigation and grant of title through the Native Land Court did not extinguish Maori native title below the high water mark
    - For consistency then, the presumption only arises if there is no uninvestigated customary land in the river.
- = the HC was wrong to conclude that riparian ownership to the centre line is established either as a matter of custom or as a matter of law.