

Reported
(1987) NZLR

Set 2

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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 54/87

BETWEEN THE NEW ZEALAND MAORI COUNCIL

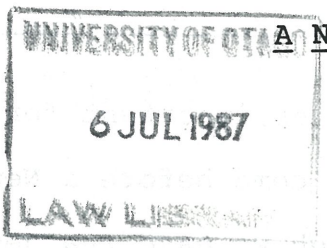
a body established by section 17
of the Maori Community Development
Act 1962

First Applicant

AND GRAHAM STANLEY LATIMER

of Papanoa, Farmer, suing on
behalf of himself and all persons
entitled to the protection of
Article II of the Treaty of
Waitangi

Second Applicant



AND HER MAJESTY'S ATTORNEY-GENERAL

sued on behalf of the Crown in
respect of the Departments of
Maori Affairs, Lands and Survey,
Internal Affairs, the New Zealand
Forest Service, the New Zealand
Electricity Department, and the
Ministry of Energy

First Respondent

AND THE HONOURABLE THE MINISTER OF
FINANCE, THE HONOURABLE THE
MINISTER OF ENERGY, THE HONOURABLE
THE MINISTER OF LANDS, THE
HONOURABLE THE MINISTER OF FORESTS

Second Respondents

AND HIS EXCELLENCY THE
GOVERNOR-GENERAL IN COUNCIL

Third Respondent

Coram: Cooke P.
Richardson J.
Somers J.
Casey J.
Bisson J.

Hearing: 4, 5, 6, and 8 May 1987

Counsel: W.D. Baragwanath Q.C., Ms S. Elias and J.M.
Dawson for Appellants
D.P. Neazor Q.C., D.A.R. Williams Q.C., R.B.
Squire and Miss Kristy McDonald for
Respondents
M.F. Quigg and Mrs R.A. Dewar for Coal
Corporation

Judgment: 29 June 1987

JUDGMENT OF COOKE P.

This case is perhaps as important for the future of our country as any that has come before a New Zealand Court. Accordingly, although we have reached a unanimous decision, each member of the Court is delivering a separate judgment setting out his reasons for joining in the decision. What the decision means is stated shortly in the last part of this judgment.

Introduction

The case arises from the State-Owned Enterprises Act 1986, which came into force on 19 December 1986 except for various machinery provisions which came into force on 1 April 1987. The Long Title indicates its scope:

An Act to promote improved performance in respect of Government trading activities and, to this end, to -

- (a) Specify principles governing the operation of State enterprises; and
- (b) Authorise the formation of companies to carry on certain Government activities and control the ownership thereof; and
- (c) Establish requirements about the accountability of State enterprises, and the responsibility of Ministers.

The principal objective of every State enterprise is declared by the Act to be to operate as a successful business. There is some elaboration of this in provisions not to be overlooked but not needing to be quoted here. Fourteen State enterprises are listed, some of which are to be reconstituted so that in the result there are nine companies called new State enterprises, namely Airways Corporation of New Zealand Limited, Coal Corporation of New Zealand Limited, Electricity Corporation of New Zealand Limited, Government Property Services Limited, Land Corporation Limited, New Zealand Forestry Corporation Limited, New Zealand Post Limited, Post Office Bank Limited and Telecom Corporation of New Zealand Limited. In these companies Ministers of the Crown are to hold all the shares. All decisions relating to the operation of a State enterprise are to be made by or under the authority of the board of directors. There is ultimate accountability to the Ministers and through the Ministers to the House of Representatives; more detailed monitoring provisions are contained in the State Enterprises Restructuring Bill now

before Parliament; but a concept underlying the 1986 Act is that the directors operate the companies to make profits and without day-to-day Government interference.

As is explained in the affidavit of Mr D.K. Hunn, then Deputy Chairman of the State Services Commission and now Chairman, the Act is the principal one giving effect to the Government's policy of corporatisation of some Government departments and functions. He puts it that 'The rationale behind corporatisation was the Government's view that the Crown owned huge resources which were inefficiently managed within the traditional departmental framework'. Over a period decisions were taken to restructure as corporations and as companies under the Companies Act 1955 all or parts of six Government Departments.

There are extensive provisions in the 1986 Act enabling the transfer or vesting of assets to or in the new State enterprises. In this judgment references to transfer should be understood to include other modes of vesting. It is enough to set out s.23(1):

23. Transfer of Crown assets and liabilities to State enterprises - (1) Notwithstanding any Act, rule of law, or agreement, the shareholding Ministers for a State enterprise named in the Second Schedule to this Act may, on behalf of the Crown, do any one or more of the following:

- (a) Transfer to the State enterprise assets and liabilities of the Crown (being assets and liabilities relating to the activities to be carried on by the State enterprise):

- (b) Authorise the State enterprise to act on behalf of the Crown in providing goods or services, or in managing assets or liabilities of the Crown.
- (c) Grant to the State enterprise leases, licences, easements, permits, or rights of any kind in respect of any assets or liabilities of the Crown - for such consideration, and on such terms and conditions, as the shareholding Ministers may agree with the State enterprise.

Mr Hunn describes the policy reflected in these provisions:

10. THE policy of the Government was that the new Corporations would be required to purchase from the Crown the businesses, including the assets to be transferred to them, at prices to be negotiated. They are also required to produce a commercial rate of return on those assets. That policy was consonant with the view that the Corporations should not enjoy any competitive advantage over other organisations operating in similar fields of endeavour.

The provisions for transfer in the State-Owned Enterprises Bill led to concern on behalf of the Maori people, reflected in an interim report of the Waitangi Tribunal to the Minister of Maori Affairs dated 8 December 1986. The Bill had been introduced into the House of Representatives on 30 September 1986. The Waitangi Tribunal is established by the Treaty of Waitangi Act 1975. It is not a Court, its main function being to inquire into and make recommendations to the Crown upon claims submitted to the Tribunal by Maoris. Only a Maori may make a claim and a majority of the members of the Tribunal must be Maori.

The claims that may be submitted are, in short, claims that Maoris are prejudicially affected by legislation, policies or acts or omissions of the Crown inconsistent with the principles of the Treaty of Waitangi. An English text and a Maori text of the Treaty are scheduled to the 1975 Act, and for the purposes of that Act the Tribunal has exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them. Since amendments which came into force in January 1986 the claims may extend to legislation, policies and acts or omissions at any time after 6 February 1840.

If the Tribunal finds that any claim is well-founded it may if it thinks fit recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons being similarly affected in the future. A recommendation may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

Although the Treaty of Waitangi Act is binding on the Crown, in that for instance the Crown would be bound to allow the Tribunal to perform its function of inquiring into a claim, the Act does not provide that the Tribunal's recommendations have to be acted on by the Crown. But the Tribunal is not confined to recommending monetary compensation and can recommend that Crown land taken from Maoris in breach of the principles of the Treaty

be returned to the appropriate tribe. The interim report was made while the Tribunal was inquiring into a series of claims by the five most northerly tribes - the Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takato and Ngati Kahu. The Tribunal feared that by enabling the transfer of land to enterprises such as the Forestry Corporation and the Land Corporation, with the result that the land would cease to be Crown land, the Bill would put it out of the power of the Crown to return the land to Maoris in accordance with a Tribunal recommendation. This fear is associated with two risks. First, the Crown might be unwilling or unable to negotiate a purchase back from the State enterprise at a full price. Secondly, the State enterprise might have disposed of the land in the meantime in the course of its own operations. The Tribunal raised the question whether the Bill itself was contrary to the principles of the Treaty, at least without some amendment that continued the responsibility of the Crown for the return of land and restricted alienation by the new corporations.

An indication of the scale of the proposed transfers which have given rise to this apprehension is found in the affidavit of Mr Hunn. He deposes that some 14 million hectares (about 52 per cent of the land surface of the country) were previously administered by the Department of Lands and Survey and the New Zealand Forest Service. Of these, some 6.5 million hectares are now to be administered by the new Department of Conservation - a change which is not

in issue in the present proceedings. But over three million hectares were intended to be transferred to Landcorp: including farmland, land under lease and licence, and unallocated Crown land. Forestcorp was planned to acquire by transfer 880,000 hectares, comprising exotic and indigenous forests, roads, etc. Government Property Services was to acquire some 280 properties, mainly mid-town sites for State office accommodation. The three new post office corporations were to acquire a range of city, suburban and rural retail sites and, in the case of Telecom, sites for transmission equipment, depots and other facilities.

To bring those figures into some perspective from a Maori point of view it may be mentioned that, according to a planning paper by Asher and Naulls published by the New Zealand Planning Council in 1987, estimates in 1986 were that there remained 1.18 million hectares of Maori freehold land, which together with some much smaller total areas of reserved, vested and other categories of land represented 'the remnants of the tribal estates'. That does not take account of general land in Maori ownership.

The position was explained as follows in the 1980 Report of the Royal Commission of Inquiry concerning the Maori Land Courts, chaired by Sir Thaddeus McCarthy:

8. There is a common misconception about Maori land ownership which needs immediate correction here. The Maori Land Court's jurisdiction applies chiefly to "Maori Land" as defined in the Maori

Affairs Act 1953. That definition is most complex and difficult to apply, as we shall later explain. Put very simply, such land is that which has never been alienated from Maori ownership and is still multiply-owned, predominantly by Maoris. The area of that land is estimated to be 1 224 104 ha or 4.5 percent of the total area of New Zealand. But it is widely, but mistakenly, understood that that figure, often quoted, includes all land owned by Maoris. That is not so. The amount of other land ("general land" as it is called in the legislation) owned by Maoris is very considerable, and is to be found in farms, in business sites, and in town and country house sections. This general land has been obtained by grant from the Crown to specific individuals, by purchase or by will. There is no way of telling the total of such land-holding, but it is certainly extensive.

The view generally accepted by historians and lawyers at the present day is that expressed as long ago as 1846 by Sir William Martin, the first Chief Justice. As he put it, before the Treaty of Waitangi the whole of New Zealand 'or as much of it as is of any value or man' was divided among the Maori tribes and subtribes. Communal ownership was not confined to areas in actual occupation. In its English text the Treaty guaranteed to the Maoris 'the full exclusive and undisturbed possession of their Lands ... so long as it is their wish and desire to retain the same in their possession...' The whole surface of New Zealand is about 27 million hectares. Whatever the precise figures of present-day holdings, it is certainly striking to note what a small proportion remains in communal ownership.

The response of the Government and Parliament to representations from the Tribunal and others was to make certain amendments to the Bill, notably the introduction of

what became ss.9 and 27 in the 1986 Act. The present case turns on the meaning of those provisions. The case is an application for judicial review filed in the High Court in Wellington on 30 March 1987 and based on the allegation, in the words of the statement of claim, that 'unless restrained by this Honourable Court it is likely that the Crown will take action consequential on the exercise of statutory powers pursuant to the Act by way of the transfer of the assets the subject of existing and likely future claims before the Waitangi Tribunal in breach of section 9 of the Act'.

On 1 April 1987 in the High Court Heron J. made an order at the instance of the applicants for judicial review removing the notice of motion for judicial review into the Court of Appeal under s.64 of the Judicature Act 1908. He also made an interim order concerned with preservation of the status quo until 5 p.m. that day, indicating that thereafter the matter might well be one for the Court of Appeal. Later that day counsel for the plaintiffs moved for an interim order in this Court and I dealt with it under s.8 of the Judicature Amendment Act 1972 and s.61A of the Judicature Act 1908.

The order then made was in wider terms than that originally made in the High Court but, as explained in the minute issued at the time, it was intended only to hold the existing position in the meantime, without prejudice to either side or the public interest. The Solicitor-General had stated

that no relevant action was contemplated at that stage under the 1986 Act other than management agreements or agreements or arrangements, such as licences, for the use of assets. Provided that the Crown was able to come back to the Court at the shortest notice to ask for a review of the position, he could see no prejudice to the Crown from the order.

The order made was a declaration that the Crown ought not to take any further action, affecting any of the assets referred to in the statement of claim, by way of transfer of assets or long-term agreement or arrangement, that is or would be consequential on the exercise of statutory powers conferred by the 1986 Act. At the hearing in this Court by five Judges in May, that interim order was continued in the same terms until the delivery of our present decision. The Crown did not object to this continuation.

Various incidental matters were dealt with by the Court in Chambers in 15 April, as recorded in a minute. Among other things there were directions that the Crown make available to the applicants forthwith the available schedules of lands to be transferred to State-owned enterprises; that the applicants give notice of three examples of parcels of land illustrating their contention that transfers of lands will be inconsistent with the principles of the Treaty and s.9; and that the first and second respondents answer the following interrogatory:

Did the Crown establish any and if so what system to consider in relation to each asset passing to a State-owned enterprise whether any claim by Maori claimants of breach of the principles of the Treaty of Waitangi existed?

By a letter from the applicants' solicitors dated 27 April three examples of such parcels of land were specified, namely the Otakou Block, Otago; land in the Woodhill State Forest near Muriwai; and certain land in Taranaki formerly owned by the Ngati Tama and confiscated after the land wars. I shall refer to these examples again later. The answer given to the interrogatory was No. Consequently at the May hearing an amendment was granted, without objection, to the relief sought in the statement of claim by adding paragraph (bb). The relief sought refers generally to land and waters at present in Crown ownership and being the subject of actual claims or the possible subject of future claims concerning breaches of the Treaty. The applicants seek:

- (a) Review of the proposed exercise of the statutory power to transfer all or any of the said lands and waters to a State-owned enterprise or enterprises.
- (b) A declaration that the exercise of such power prior to giving the Applicants and those they represent reasonable opportunity for the submission to and investigation by the Waitangi Tribunal of existing and potential claims would be unlawful.
- (bb) A declaration that the transfer of assets en bloc to State-owned enterprises without establishing any system to consider in relation to each asset passing to a State-owned enterprise whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

To complete this introduction it remains only to add that in addition to full arguments from counsel the Court has been presented with a mass of documentary material, including many affidavits and an extensive selection of statutes, court decisions, historical works, historical and legal theses, lectures and other writings. We have also studied all the reports made by the Waitangi Tribunal to date. Because of the exceptional nature of the case, and in particular its genesis in national circumstances and events more than a century ago, we thought it right to admit all this material. We have endeavoured to read and assimilate as much as might give any real help in deciding the case. It would be impracticable to refer specifically in our judgments to many of the sources of information or opinion that have been consulted. For clarity, I think, it is essential to confine the discussion to direct dealing with the fundamental points falling for decision.

That means that other issues, however important and interesting in themselves, are probably better left free of crumbs of dicta. For example, whether the Treaty of Waitangi has a status in international law; what are the principles for interpreting international treaties; whether, apart altogether from the Treaty, Maori customary title has protection at common law. These are big questions, not sensibly to be answered by an individual Judge's impressions based on argument and materials touching but not closely focussed on them.

We are here concerned with interpreting a far-reaching Act passed by the New Zealand legislature. Its significance lies partly in the transformation of State undertakings, partly in its express incorporation of the principles of the Treaty in this field of New Zealand domestic law. Obviously, to echo again a phrase given currency by a great British Judge of our era, it should not be approached with the austerity of tabulated legalism. A broad, unquibbling and practical interpretation is demanded. It is hard to imagine any court or responsible lawyer in New Zealand at the present day suggesting otherwise. Having said that, I will try to resist the temptation of side issues, and turn to the ones that we are truly called upon to decide.

Counsel for the applicants did not go as far as to contend that, apart altogether from the State-Owned Enterprises Act, the Treaty of Waitangi is a Bill of Rights or fundamental New Zealand constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in face of the decision of the Privy Council in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] A.C. 308 that rights conferred by the Treaty cannot be enforced in the courts except insofar as a statutory recognition of the rights can be found. The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent

developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State-Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act.

The Statutory Provisions Safeguarding Maori Claims

Sections 9 and 27 of the State-owned Enterprises Act 1986, the key sections for the case, must be set out in full. Section 9 is the last section in Part I, which is headed Principles. Section 27 is in Part IV, which is headed Miscellaneous Provisions. Such headings are not to affect the interpretation of the Act in the absence of special provision otherwise (s.5(f) of the Acts Interpretation Act 1924), but that is of no moment. It is obvious even without the headings that s.9 is one of a group of sections concerned with general principles and that s.27 is among the numerous sections concerned with matters of detail:

9. Treaty of Waitangi - Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

....
 27. Maori land claims - (1) Where land is transferred to a State enterprise pursuant to this Act and, before the day on which this Act receives the Governor-General's assent, a claim has been submitted in respect of that land under section 6 of the Treaty of Waitangi Act 1975, the following provisions shall apply:

- (a) The land shall continue to be subject to that claim:
- (b) Subject to subsection (2) of this section, the State enterprise shall not transfer that land or any interest therein to any person other than the Crown:
- (c) Subject to subsection (2) of this section, no District Land Registrar shall register the State enterprise as proprietor of the land or issue a certificate of title in respect of the land.

(2) Where findings have been made pursuant to section 6 of the Treaty of Waitangi Act 1975 in respect of land which is held by a State enterprise pursuant to a transfer made under this Act (whether or not subsection (1) of this section applies to that land), the Governor-General may, by Order in Council, -

- (a) Declare that all or any part of the land shall be resumed by the Crown on a date specified in the Order in Council; or
- (b) In the case of land to which subsection (1) of this section applies, waive the application of paragraphs (b) and (c) of that subsection to all or any part of the land.

(3) Where any land is to be resumed pursuant to subsection (2) (a) of this section -

- (a) The State enterprise shall transfer the land to the Crown on the date specified in the Order in Council; and
- (b) The Crown shall pay to the State enterprise an amount equal to the value of the interest of the State enterprise in the land (including any improvements thereon). The amount of any such value shall be that agreed between the State enterprise and its shareholding Ministers or, failing

agreement, that determined by a person approved for this purpose by the State enterprise and its shareholding Ministers.

Considering s.27 alone, it is to be noted that the section makes a significant difference according to whether or not as at the date of the Governor-General's assent (18 December 1986) a claim has been submitted to the Waitangi Tribunal. If before then a claim has been submitted to the Tribunal in respect of certain land and that land is transferred to a State enterprise pursuant to the Act, the land continues to be subject to the claim. And then, unless there is a waiver where permitted by subs.(2), the State enterprise cannot transfer the land except back to the Crown and the State enterprise does not even obtain a registered title. As regards any transferred land still held by a State enterprise at any time, the Governor-General in Council has a discretion to cause it to be resumed by the Crown to give effect to Waitangi Tribunal findings. In that case the Crown has to pay the full value to the State enterprise. But if the State enterprise no longer holds the land that discretion will be unavailable. So, under s.27 considered alone, if a claim has not been submitted to the Tribunal in respect of certain land before 18 December 1986, it is possible for that land to be transferred to a State enterprise in such a way as to confer a registered title. So the corporation in turn will be free, as far as s.27 is concerned, to dispose of the land in the course of its ordinary business activities.

None of all that affects the ability of the Crown to act on Waitangi Tribunal recommendations for compensation in money. The main complaint by the Maori Council is that where a relevant claim has not been submitted by a Maori to the Waitangi Tribunal before 18 December 1986 the prospect of a restoration of the land to Maori ownership following a later claim will or may be less. The question is whether s.9, on its true interpretation, gives Maoris some added protection against that risk.

In his argument the Solicitor-General stressed the inconvenient practical consequences that would flow from an interpretation in favour of added Maori protection. He contended that Parliament could not have meant the transfers contemplated by the Act to be delayed as urged by the present applicants. He pointed out that, although shareholding Ministers are given a choice of methods of placing assets in the hands of State enterprises, the financing of the enterprises will depend on the nature and value of assets vested in them, 'since there is no provision for the appropriation of funds for this operation'. The consideration for transfers or other arrangements has to be agreed between the shareholding Ministers and the State enterprise concerned. Naturally it is likely to reflect the extent to which the enterprise will be free to deal with the assets.

Mr Hunn's affidavit indicates that the book value alone of assets to be transferred to the corporations (land

being part only of those assets) is much in excess of \$11.8 billion. Further, the affidavit records that already (29 April 1987) 54,000 people have transferred to the corporations or the new departments; while nearly 5000 have taken voluntary severance at a total cost to the taxpayer of over \$93 million. These figures further underline the significance of the issues in this case for the whole community.

An affidavit by Mr Verrity, the deputy director of the Tribunals Division of the Department of Justice, records that as at 29 April 1987 the Waitangi Tribunal had disposed by substantive reports and recommendations of six claims. Eleven had been disposed of by way of withdrawal or otherwise. Reports or decisions were pending on four more. There were still 88 claims lodged with the Tribunal, 58 of them since the 1985 amendment (in force from early 1986) which extended the jurisdiction back to matters occurring ever since the Treaty. Of these 88, 32 had been lodged since 18 December 1986. I italicise that sentence because of the cut-off date in s.27.

It is evident therefore that the Solicitor-General had a solid basis for contending that the consequence of the submissions for the applicants is that the intention manifested by the 1986 Act as a whole would be put in limbo for an unpredictable time; that the corporations or many of them would be able to act only 'in a withered and crippled way'. Management and licensing arrangements for short terms or with provisions for termination would be in order, but

undoubtedly changes in the actual titles to assets has been a prime element in the planning. The momentum evidently expected by Parliament would be largely lost.

While describing s.9 as a legislative exhortation to Ministers as to the way they carry out their functions under the Act for which they are answerable to Parliament, the Solicitor-General inevitably accepted that the obligation is not solely parliamentary and that in the end it must be the province of the Court to determine what the Act means and whether it has been complied with. But he submitted that we could and should read down the general words of s.9 so as to place no fetter on the transfer of land to a State enterprise. Special, and on that approach exhaustive, provision in respect of land is made by s.27. In effect the Crown argument would treat s.27 as a self-contained code regarding land claims based on the Treaty.

The great difficulty with that approach is that it leaves so little scope for s.9. Reference was made to fishing rights, but even if any such rights could be affected by transfers of assets under the Act, they were certainly not in the forefront of parliamentary consideration. Certainly the Act extends to a range of assets other than Crown land, but patently the transfer of Crown land is a central subject dealt with by the Act. It would be strange if the uncompromising wording of s.9 - 'Nothing in this Act ...' were read as meaning nothing except the provisions about Crown land.

A more tenable interpretation, in my view, is that s.9 applies to Crown land as it does to any other assets, but that it is a statement of general principle and s.27 makes specific and exclusive provision defining the way in which Parliament meant the general principle to be applied as far as land is concerned. In other words, s.9 declares the broad principle that nothing in the Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty; then s.27 specifies what Parliament intends to be the practical effect of that broad principle in the particular case of land.

But the difficulty remains that on that interpretation s.9 adds little or nothing to the protection that s.27 would give in any event. It is true that a difficulty of this kind is not necessarily fatal. From time to time overlapping or surplus provisions are found in complicated legislation. Nevertheless in matters of such transcendent importance for the Maori people as land and the Treaty of Waitangi a court would reach that conclusion with great reluctance. The wording of s.9 is plain and unqualified. In its ordinary and natural sense the section has the impact of a constitutional guarantee within the field covered by the State-Owned Enterprises Act.

Before finally rejecting the limited interpretation put forward on behalf of the Crown, or any variant of it, I think it right to refer to the parliamentary debates. This Court has been willing to look at Hansard to see whether

significant help in ascertaining the purpose of legislation is to be obtained: see for instance Marac Life Assurance Ltd v. Commissioner of Inland Revenue (1986) 9 T.R.N.Z. 331, 337-8, 345, 350, 353, 355; compare Proprietors of Atihau-Wanganui v. Malpas [1985] 2 N.Z.L.R. 468, 478. Not to do so in a case of the present national importance would seem pedantic and even irresponsible. Counsel on both sides were content that we should do so.

As is so often the case, however, Hansard ultimately provides no significant help. The relevant debates are reported in volume 476. In moving the second reading of the Bill, the Minister of Justice and Deputy Prime Minister said that the Government was prepared to write into the Bill a specific preservation of the Crown's responsibilities under the Treaty, together with detailed provisions to ensure that land that is subject to a claim before the Waitangi Tribunal does not pass into private ownership and is capable of resumption by the Crown (p.6118). When the House of Representatives subsequently considered the Bill in Committee it appears that an opposition Member moved unsuccessfully an amendment which would have strengthened what became s.27(1) by inserting the words 'or after' after the word 'before' (p.6190).

In moving the third reading the Minister spoke of the consideration by the Committee of a supplementary order paper. He said that the Bill as it emerged from the Committee specifically mentioned that nothing in the Act

shall permit the Crown to act in a manner inconsistent with the principles of the Treaty, and 'in addition' Maori land claims were specifically dealt with in a new clause (p.6193). He went on to give some further explanation, including:

But, when a future claim, of which we have not yet heard, is not known, it will be treated in the same way as many claims that are contingent and unknown, and will have to be dealt with by the Waitangi Tribunal on the basis of recommendations it would make to the Government. It is always up to the Government to decide whether to follow those recommendations, and what compensation or remedy should be given to Maori claimants under the treaty's provisions.

The Minister did not specify the precise relationship between the new clause about land (s.27) and the new general clause (s.9). In the subsequent debate, opposition Members criticised the amendments as denying rights to Maoris whose claims had not been put forward to the Waitangi Tribunal, if the lands came to be sold by the State enterprises (pp.6196-7). Again no helpful reference by any Member of the House to s.9 is reported.

My strong impression is that Members who took part in the final debate thought that the Act would have the effect now contended for by the Crown. But, if so, the lack of discussion of s.9 makes that understanding on their part inconclusive and of no real help for present purposes. The fact is that after deliberation the legislature enacted s.9 as well as s.27. The duty of the Court is to interpret, in the context of the Act as a whole, the simple and

comprehensive words deliberately chosen by Parliament. We could not be justified in cutting down the scope of the words without at least much more specific evidence of what the legislators had in mind. Whether we would have been justified in doing so had Hansard contained such evidence is a question which need not be decided.

The case is an illustration of some of the reasons for the former practice of never referring to Hansard on questions of statutory interpretation. Perhaps it also illustrates a disadvantage of the unicameral system. If there had been a second House, the conflict or obscurity of provisions in the amended Bill would have been more likely to be brought to attention, debated and clarified after careful consideration. As it is, the third reading occurred on the afternoon of Saturday 11 December, immediately after the Committee stage. There had been lengthy discussion in Committee and the legislative timetable will have been pressing. The fault, if there was one, lay in the system, not in any individual parliamentarian.

Counsel for the applicants stressed to us the amplitude of the language of s.9 and its apparent intention of prevailing over everything else in the Act. In that part of their argument they were, in my opinion, on sound ground. What this means remains to be considered shortly. In addition Mr Baragwanath went as far at one stage as to describe s.27 as merely a slip or backstop section, designed to catch cases where for some reason, contrary to the intention of s.9,

transfers are in fact made in breach of the principles of the Treaty. I do not find this addendum convincing.

Section 27 recognises that occasions may well arise when the Governor-General in Council considers, after findings have been made by the Waitangi Tribunal, that former Crown land now held by State enterprises should be re-acquired by the Crown. Certainly the section has limits, in that if the claim was not lodged before 18 December 1986 the State enterprise may have on-sold the land and no machinery is then provided for its recovery. Still, the section does provide valuable machinery for giving effect to meritorious Maori claims as far as it goes.

It also recognises in subs.(1) that land may have been transferred to a State enterprise pursuant to the Act notwithstanding that before 18 December 1986 a claim in respect of it has been submitted to the Tribunal. In that situation the land continues to be subject to the claim, the State enterprise cannot transfer any interest in it to third parties, and the State enterprise is not registered as proprietor unless and until there is a waiver by the Governor-General in Council after the Tribunal's findings. These are major safeguards; I can see no reason to confine them to cases of transfers by mistake. On the contrary it is reasonably apparent that, in the matter of initial transfers to State enterprises, Parliament regarded these safeguards as sufficiently taking care of Maori rights whenever a claim in respect of the land had already been

lodged when the Act was passed. The land can be transferred to a State enterprise while the claim remains pending before the Tribunal and up to the date of the final decision of the Governor-General in Council - but transferred only in a quite severely restricted and unusual way. Because of the safeguards in s.27(1) no violation of the principles of the Treaty occurs by a restricted transfer in such cases. That, in my view, is clearly how Parliament saw the matter and it is a perfectly reasonable solution.

A situation where some risk not sufficiently covered by s.27 arises can result from transfers of land not subject to any claim submitted to the Tribunal before 18 December 1986. The risk is highlighted by the fact that between that date and 29 April 1987 32 claims were lodged. The retrospective operation of the Treaty of Waitangi Act did not begin until 1986. Time, initiative, energy, research and money can be needed to prepare a claim. At least one of the specimen cases put before us by the applicants, Woodhill, has not yet been submitted to the Tribunal. As regards claims and potential claims after the State-Owned Enterprises Act received the Governor-General's assent, the restraint placed by s.9 on the exercise of the Crown's powers under the Act has particular importance. When such claims have been made or are reasonably foreseeable it will be necessary for the Court to take steps to ensure that a transfer violating the principles of the Treaty does not occur. I will have to enlarge on this when discussing what

are the principles of the Treaty, in the following part of the present judgment.

It must be appreciated too, I think, that s.9 may be of very real importance when the Governor-General in Council is considering recommendations of the Waitangi Tribunal, whether they relate to pre-Act or post-Act claims. If, on any successful claim, the Tribunal were to recommend that land be returned to Maori ownership rather than that monetary or other compensation be provided, it might be inconsistent with the principles of the Treaty for the Crown to act inconsistently with that recommendation. The case is hypothetical and we are not now called upon to express a final opinion on it, but attention should be drawn to the possibility.

So, in my opinion, the firm declaration by Parliament that nothing in the Act shall permit the Crown to act inconsistently with the principles of the Treaty must be held to mean what it says. Cases will arise when the machinery provisions made for meeting Maori land claims by s.27 will not be enough. I have mentioned two categories, but it is as well to disclaim any suggestion that they are necessarily exhaustive. The Court cannot and should not try to solve all the problems relating to the Treaty, even so far as the State-Owned Enterprises Act is concerned, in one case.

What is now our responsibility is to say clearly that the Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty. It becomes the duty of the Court to check, when called on to do so in any case that arises, whether that restriction has been observed and, if not, to grant a remedy. Any other answer to the question of interpretation would go close to treating the declaration made by Parliament about the Treaty as a dead letter. That would be unhappily and unacceptably reminiscent of an attitude, now past, that the Treaty itself is of no true value to the Maori people.

On that view it is necessary to go on to consider what are the principles of the Treaty that bind the Crown in relation to former Maori land and waters affected by the State-Owned Enterprises Act.

The Principles of the Treaty

The phrase 'the principles of the Treaty of Waitangi' is beginning to come into common use in New Zealand statutes. It is found in s.9 of the State-Owned Enterprises Act 1986, s.6 of the Treaty of Waitangi Act 1975 (the first legislative use cited to us), the Long Title of the Environment Act 1986, and s.4 of the Conservation Act 1987. The Maori Affairs Bill at present before Parliament has recitals in the Maori and English languages which may be seen as referring to some of the principles:

E tika ana hoki, ko te Tiriti o Waitangi te taonga whakatapu i te nohoanga i waenganui i te Iwi Maori me te Karauna. E tika ana ano hoki kia maharatia ake te wairua o te Tiriti o Waitangi: te tuku a te Iwi Maori i tona Kawanatanga, i te whakarite hoki a te Karauna kia tiakina te rangatiratanga o te Iwi Maori. Ko taua rangatiratanga, ko nga taonga tukuiho a te Iwi Maori. A, kia maharatia ano hoki te ahua nei, ko te whenua te turangawaewae o te Iwi Maori. No reira me kaha te pupuri i te whenua me aru tikanga e pumau ai te noho, a, e puta ai he hua ki te Iwi Maori. A, e tika ana, me hanga he ahuatanga hei awhina i te Iwi Maori ki te whakamana i enei kaupapa:

Whereas the Treaty of Waitangi symbolises the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of sovereignty for the protection of rangitiratanga embodied in the Treaty of Waitangi be re-affirmed: And whereas rangitiratanga in the context of this Act means the custody and care of matters significant to the cultural identity of the Maori people of New Zealand in trust for future generations: And whereas, in particular, it is desirable to recognise the special relationship of Maori people to their land and for that reason to promote the retention of that land in the hands of the owners' descent groups, and to facilitate the occupation and utilisation of that land for the benefit of the owners' descent groups: And whereas it is desirable to establish agencies to assist the Maori people to achieve the implementation of these principles:

Section 9 of the 1986 Act requires the Court to interpret the phrase 'the principles of the Treaty of Waitangi' when necessary. In doing so we should give much weight to the opinions of the Waitangi Tribunal expressed in reports under the Treaty of Waitangi Act 1975. In the reports made by the Tribunal so far, particular help is obtainable from No. 4, the Kaituna Claim, report dated 30 November 1984; No. 6, the Te Atiawa's Waitara Fishing

Claim, report dated 17 March 1983; No. 8, the Manukau
Claim, report dated 19 July 1985; No. 11, the Te Reo Maori
Claim, report dated 29 April 1986. We have benefited
greatly from considering these.

At the same time it is necessary to say that the
opinions of the Tribunal, expressed in reports under the
1975 Act, are not of course binding on Courts in proceedings
concerned with other Acts. It may be noted that, as if to
illustrate the desirability of that position, the
last-mentioned report, in paragraphs 4.32 to 4.35, does not
correctly state the decision of this Court in Mihaka v.
Police [1980] 1 N.Z.L.R. 453. That case as far as relevant
was concerned with the defendant's claim that the whole
proceedings should be conducted in Maori, not merely that
anything which he wished to say should be said in Maori.

While having to make that reservation, I repeat that
the opinions of the Waitangi Tribunal are of great value to
the Court. In this case we have also had the advantage of
affidavits from an impressive range of persons of the Maori
race. They include eloquent and moving passages. The force
of the affidavits comes from the insight of the deponents
into such matters as the significance of the Treaty for the
Maori over the years since 1840; the bond between the Maori
and his or her tribal land; the special bond created by the
Treaty between the Maori people and the British monarch;
grievances, general or particular, resulting from Pakeha

attitudes and actions seen or sensed to conflict with the spirit of the Treaty.

As it would be indvidious to do otherwise, I list the makers of the affidavits as follows. Sir Graham Stanley Latimer, chairman of the New Zealand Maori Council; Sir Henare Kohere Ngata of Gisborne, chartered accountant; Dame Whina Cooper of Panguru, founder of the Maori Women's Welfare League; Sir James Clendon Henare of Moerewa, retired farmer; Hikaia Amohia of Taumarunui, farmer; Mason Harold Durie of Wellington, registered medical practitioner; Harold Charles Evison of Christchurch, retired senior lecturer; Denese Letitia Henare of Auckland, solicitor; Trevor Hapi Howse of Christchurch, researcher; Ian Hugh Kawharu of Reweti, university professor; Benedict William Kingsbury, presently of England, research fellow; Peter Maru Love of Orewa, social worker; Te Kahuiiti Morehu of Rewiti, homemaker; Claudia Josepha Orange of Wellington, historian; John Nathan Pickering of Porirua, proofreader; Harata Riateuira Solomon and Matuaiwi Solomon of Wellington, retired; Huhurere Tukukino of Te Puru, retired; Stephen Taitoko White of Urenui, farmer; Whatarangi Winiata of Wellington, professor of accounting.

The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts in the First Schedule to the Treaty of Waitangi Act 1975 are not translations the one of the other and do not necessarily convey precisely the same meaning. The story of

the drafting of the Treaty and the procurement of signatures from more than 500 Maori chiefs, including some Maori women of appropriate rank - events in which no lawyer seems to have played a part - is an absorbing one, but not within the ambit of this judgment.

Instead of repeating the two texts scheduled to the 1975 Act, I set out what a distinguished Maori scholar, Professor Kawharu, calls his 'attempt at a reconstruction of the literal translation' of the Maori text. It was put before us on behalf of the applicants. The Crown likewise accepted it for the purposes of this case:

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The first

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

The second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

Signed William Hobson
Consul and Lieutenant Governor

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and marks thus

Was done at Waitangi on the sixth of February in the year of our Lord 1840

The Chiefs of the Confederation

Points on which that version may be open to debate include the following. The word rangitiratanga, here rendered as chieftainship, may have no precise English equivalent. Williams' Maori Dictionary gives evidence of breeding and greatness. So too with the kawanatanga given absolutely to the Queen of England. The version proffered for the applicants renders this as complete government. Other alternatives are governance and that of the English

text scheduled to the Treaty of Waitangi Act - sovereignty - a concept said to have no equivalent in Maori thinking. Taonga, rendered in the foregoing version as treasures, is represented in the English text as other properties and in Williams as property, anything highly prized. The Waitangi Tribunal has treated the word as embracing the Maori language. The provision that the chiefs 'will sell' land to the Queen is treated in the English text as conferring on the Crown an exclusive right of preemption, although the meaning of this in the context is itself controversial. The provision in the third article to the effect that, in the words of the attempted reconstruction, the Queen will give the ordinary people of New Zealand the same rights and duties of citizenship as the people of England is commonly rendered as referring to the rights and privileges of British subjects.

The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. It is necessary also because the relatively sophisticated society for whose needs the State-Owned Enterprises Act has been devised could not possibly have been foreseen by those who participated in the making of the 1840 Treaty. In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the

Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.

The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Maori to the Pakeha, was the goal which in the main successive Governments tended to pursue. In 1967 in the debates on the Maori Affairs Amendment Bill, a measure facilitating the alienation of Maori land, the responsible Minister, the Hon. J.R. Hanan, saw it as 'the most far-reaching and progressive reform of the Maori land laws this century ... based upon the proposition that the Maori is the equal of the European ... The Bill removes many of the barriers dividing our two people' (353 N.Z. Parliamentary Debates 3657). Another supporter of the Bill expressed the hope that 'it will mark the beginning of the end of what still remains of apartheid in New Zealand' (ibid. 3659). Such ideas are no longer in the ascendant, but there is no reason to doubt that in their day the European Treaty partner and indeed many Maoris entertained them in good faith as the true path to progress for both races. Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity.

In 1980 the Royal Commission to which I referred earlier noted in the preface to its Report the diversity of Maori opinions and warned that 'times and attitudes change, and no man can assert that today's philosophies and urgings will be for ever dominant'. The wisdom of that is incontestable. Yet it is equally clear that the Government, as in effect one of the Treaty partners, cannot fail to give weight to the 'philosophies and urgings' currently and, it seems, increasingly prevailing.

In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty. It was argued for the applicants that whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a question of fact. That is so, but it does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

I use 'reasonably' here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be

irrational or capricious or misdirected. Lawyers often speak of Wednesbury unreasonableness, in allusion to the case reported in [1948] 1 K.B. 223, but I think that it comes to the same thing.

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

Not surprisingly the argument for the applicants encountered some difficulty in trying to put such broad propositions into more concrete forms. A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds

merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.

A duty 'to consult' was also propounded. In any detailed or unqualified sense this is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty. For the same reason, on full reflection I do not favour granting relief in terms of prayer (b) in the statement of claim or any revised version of it incorporating a fixed time limit as suggested in argument. I think it would savour of granting an opportunity to conceive or even drum up claims where no grievance has previously been voiced.

Prayer (bb), introduced by amendment, is a different matter. The transfer of Crown lands to State enterprises is such a major change that, although the Government is clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy. The

Government has already shown willingness to listen to the Maori point of view, and with dramatic consequences, inasmuch as ss.9 and 27 have been inserted in the 1986 Act. Now that the Act is in force a further stage of planning and opportunity for comment is needed.

I think that it has now become obligatory on the Crown to evolve a system for exercising the powers under the Act. The need relates to cases not already within the protection of s.27(1). The system should be designed to give reasonable assurance that lands or waters will not be transferred to State enterprises in such a way as to prejudice Maori claims. Safeguards are needed for claims already known to the Crown, whether or not they have yet been submitted to the Tribunal, and also for claims reasonably foreseeable on the basis of information possessed by the Minister or Government Department concerned. As regards claims made on or after 18 December 1986 the system should aim to ensure, if there is any likelihood that the Waitangi Tribunal will recommend return to Maori ownership, that such a recommendation can be acted upon.

One way of ensuring this would be to provide for handing over the management of assets on terms ruling out their disposal to third parties pending any foreseeable Waitangi Tribunal investigations, so that the assets can be returned readily if need be. Section 23 gives shareholding Ministers a choice of arrangements other than outright transfers. Section 27(1) might be useful as an analogy for

claims not submitted to the Tribunal before 18 December 1986. At this stage, however, it would be wrong for us to go further than to indicate the general aim. In the first instance it is for the Crown to formulate its proposals.

The Crown's proposed system should be submitted to the Maori Council for agreement or comment. After that, with any changes that may have been agreed to, it should be placed before this Court for consideration as to whether it adequately carries out the intention of the Court. At that stage both sides would have a further opportunity of being heard as far as necessary. There should be a timetable to avoid delay. Three weeks for working out the Crown's proposals should be ample, then the Maori Council should have three weeks to agree or comment.

A reasonably effective and workable safeguard machinery is what is required. Further than that the Crown should not be obliged to go. Any major grievances are likely to have come to the surface in some form by now. The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation. The first applicant in the proceedings, the New Zealand Maori Council, is at the present day the

appropriate body to represent Maori interests for the purpose of any discussion between the partners on major matters of principle under the State-Owned Enterprises Act. If that fails to result in a system acceptable to both sides, the Court will have to settle any outstanding points.

For these reasons I would substantially accept the argument for the applicants in support of prayer (bb), to the extent of granting a declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful. This to be supplemented by directions for the preparation of a scheme as just outlined.

For the time being the interim declaration preventing transfers of assets and long-term agreements or arrangements should be renewed, to continue in force until discharged; with leave reserved to the Crown to move for discharge at any time.

Leave has already been reserved to the Coal Corporation to lodge submissions in writing on particular matters affecting it.

The Formal Orders

In the result these are the proposed orders.

1. A declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.
2. Directions as follows:
 - (i) Within 21 days from the delivery of this Court's present decision the Crown is to prepare a scheme of safeguards giving reasonable assurance that lands or waters will not be transferred to State enterprises in such a way as to prejudice Maori claims that have been submitted to the Waitangi Tribunal on or after 18 December 1986 or may foreseeably be submitted to the Tribunal.
 - (ii) The scheme is to be submitted to the New Zealand Maori Council for agreement or comment as to whether it adequately gives effect to the intention of the Court as stated in the present judgments. Such agreement or comment to be given by the Council within 21 days after receipt of the scheme.

(iii) The scheme as finally proposed by the Crown having regard to the Council's agreement or comments is then to be lodged in this Court and an early hearing will be arranged at which the question whether it should be approved will be considered.

3. A declaration that in the meantime the Crown ought not to take any further action, affecting any of the assets referred to in the statement of claim, by way of transfer of assets or long-term agreement or arrangement, that is or would be consequential on the exercise of statutory powers conferred by the State-Owned Enterprises Act 1986. The Crown to have leave to move for the discharge or variation of this declaration at any time.
4. Leave is reserved to the parties to apply in writing for any incidental directions and to the Coal Corporation to lodge submissions on particular matters affecting it.

The Effect of the Court's Decision

The prosaic language of the Court's formal orders should not be allowed to obscure the fact that the Maori people have succeeded in this case. Some might speak of a victory, but courts do not usually use that kind of language. At the outset I mentioned that each member of the Court was writing a separate judgment. It will be seen that approaching the case independently we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.

That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.

All too clearly there have been breaches in the past. For example it has been recognised for many years that the confiscation of lands in Taranaki after the wars of the eighteen-sixties was unjust. The wars stemmed not from disloyalty by Maoris, but from the Government's persistence in trying to complete the purchase of land at Waitara when it knew or ought to have known that the subchief and his party who agreed to sell the land did not have the sole right to do so. Such at least was the opinion of the Royal Commission of 1927, chaired by Sir William Sim, the senior

Supreme Court Judge of the day. It has been the constant verdict of historians of standing from Pember Reeves to more recent scholars, including Sinclair, Miller and Ward. While a full exploration is beyond the scope of any inquiry which this Court can make in this case, there is no reason for us to question a view so strongly supported. The only question would seem to be whether the monetary compensation paid on the recommendation of the Commission, now a mere \$15,000 annually, should be much increased or whether some other mode of belated extra compensation, such as land, should be offered even at this stage.

Sir David Smith, who as quite a young barrister appeared as counsel for the Maoris before the Sim Commission, wrote in 1969 that the Commission had been seen by those who sought it as a 'full scale investigation of the festering sore of the confiscations'. Despite the attempt at redress sixty years ago, the grievance is still sorely felt and is represented by one of the sample cases put before us by the Maori Council.

The other two sample cases are dealt with in the judgments of other members of the Court. I note only that they illustrate different kinds of grievances. As to the Woodhill State Forest, the grievance is that land was compulsorily taken from Maori owners for one purpose but is now allegedly being used for another, and without consultation or adequate steps to protect burial sites. As to the Otakou Block, the grievance is that there has been a

simple - indeed, as the case was put to us, blatant - failure by the Crown to honour a promise to set aside a tenth of the land for Maori reserves.

Such complaints are open to investigation by the Waitangi Tribunal. The Otakou claim appears to be protected wholly or in part by the express provisions in the State-Owned Enterprises Act, s.27(1), preventing an outright transfer to a State enterprise if a claim has been submitted to the Tribunal before 18 December 1986. The same does not apply to at least one of the other sample cases, and there may be many other cases not protected by that machinery. It is for cases such as these that the Court's orders give protection.

I would also mention Te Heuheu Tukino's case itself, cited earlier. By past standards it could have been called the leading case on the Treaty of Waitangi. The Privy Council in a judgment delivered by the then Lord Chancellor, Viscount Simon, held that without statutory rights Maoris could not rely on the Treaty in the courts. That judgment represented wholly orthodox legal thinking, at any rate from a 1941 standpoint, but it is of interest that Smith J., as he had by then become, recorded in his judgment in the Supreme Court that counsel on both sides agreed that the Maori owners had cause to feel a sense of injustice: [1939] N.Z.L.R. at 112. This concerned the imposition by Act of Parliament of a charge on their land to compensate for the surrender of timber-cutting rights. The Privy Council

judgment, after noting what Smith J. had said, added 'However, it is not within the province of this Board to criticise the policy of the legislature. The Board's duty is to construe and apply the enactments made by the legislature'.

~~✱~~ The effect of our present decision, built on the Treaty of Waitangi Act and the State-Owned Enterprises Act, is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance in that way. The Crown now has to work out a system to safeguard Maori claims regarding land covered by the 1986 Act before any land can be transferred to a State enterprise. The Maori Council can come back to the Court if not satisfied with the proposed system. In the meantime no outright transfers can be made.

In short the present decision together with the two Acts means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

The Maori Council has therefore been vindicated in bringing this case. There may well be ground for ordering the Crown to pay the Council's full costs on an indemnity basis. Or the Crown may so agree. But the question of costs should be left until any necessary negotiations and further hearing are concluded, when the whole conduct of the matter on both sides can be reviewed.

The Court being unanimous, the declarations and directions previously set out are made. Costs are reserved.

R B [unclear] P.

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