Reported [1987] NZLR

Set 2

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 54/87

pt A

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

Second Applicant

A N D 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 betweeen 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 individious 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 diferent 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.

RB Cooke P.

Solicitors:
Luckie Hain Kennard & Sclater, Wellington, for First and Second Applicants
Crown Law Office, Wellington, for First, Second and Third Respondents
Perry Castle, Wellington, for New Zealand Coal Corporation Limited

IN THE COURT OF APPEAL OF NEW ZEALAND CA 54/87

BETWEEN THE NEW ZEALAND MAORI COUNCIL

First Applicant

A N D GRAHAM STANLEY LATIMER

Second Applicant

A N D HER MAJESTY'S ATTORNEY-GENERAL

First Respondent

A N D 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

A N D HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Third Respondent

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

Hearing: 4, 5, 6, 8 May 1987

Counsel: W D Baragwanath, Q.C., Ms Sian Elias and J M Dawson for First and Second Applicants
D P Neazor, Q.C., D A R Williams, Q.C., R B Squire and Miss Kirsty McDonald for First, Second and Third Respondents
M F Quigg and Mrs Rachael A Dewar for The Coal Corporation of New Zealand Limited

Judgment: 29 June 1987

JUDGMENT OF RICHARDSON J

This case is of the greatest public importance both in its social impact on racial relationships in New Zealand and in its significance for the launching of the State-owned enterprises established pursuant to the State-Owned Enterprises Act 1986 (the SOE Act). However in the context in which the matters for decision arise, that is of the SOE legislation itself, the legal and factual questions necessary for the determination of the present case can be readily identified.

The application by the New Zealand Maori Council and its Chairman, Sir Graham Latimer, is for the judicial review of the proposed exercise by Ministers of the power to transfer Crown land to State-owned enterprises. It is well settled that the jurisdiction to grant declaratory relief may be invoked both where the person to whom a statutory power of decision is entrusted fails to act in the exercise of the power in conformity with the proper legal standards and where the result of the exercise of the power does not conform with the requirements of the legislation. In the same way a proposed exercise of statutory power which fails to meet those yardsticks is also susceptible to judicial review. In this case and for reasons I can state quite shortly I am satisfied that the acts and proposed acts of the Government (which for these purposes must be attributed to the Ministers concerned under the SOE Act) fall down on both counts: that the failure to institute any system to determine whether any Crown land it and they proposed to transfer to State-owned enterprises was subject to the risk of claims under the Treaty of Waitangi Act 1975 actually made to the Waitangi

Tribunal after 18 December 1986 or which might be made to the Waitangi Tribunal in the reasonable future with a real possibility of success is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) and a breach of the process required to be followed in the exercise of the powers conferred under s 23 of the SOE Act; and that in terms of outcome for Ministers to transfer absolutely to State-owned enterprises some 4 or 5 million hectares in contemplation would be inconsistent with the principles of the Treaty of Waitangi and contrary to the provisions of the SOE Act.

But before expressing the reasons for those conclusions it is necessary to refer to the immediate background and the general scheme and object of the SOE legislation and, while it is not necessary for purposes of this case to enter into all of the complexities surrounding the Treaty of Waitangi and its significance in the life of New Zealand today, the principles of the Treaty do call for some consideration.

The statutory background and the present case

On 30 September 1986 the Deputy Prime Minister, the Right Hon Geoffrey Palmer, introduced the State-Owned Enterprises Bill. He described the constitutional importance of the Bill as lying in its provisions for new and enhanced systems of accountability for State-owned enterprises with the establishment of State-owned corporations to take over major sectors of State trading activity and to be run as profitable operations ((1986) 474 NZPD 4723). The Crown owned huge resources which were inefficiently managed

within the traditional departmental framework and the economic performance of State trading activities had to be improved. To that end Clause 22 of the Bill provided for assets to be valued at full commercial value and transferred by way of sale and purchase agreements. The Bill was sent to the Government Administration Committee of the House which, in reporting on 11 December 1986, recommended that the Bill proceed subject to certain policy changes affecting the transfer of Crown assets and liabilities to State-owned enterprises ((1986) 476 NZPD 6074). In response to submissions made by Lake Taupo Forest Trustees and Lake Rotoaira Forest Trustees a subclause was added which became s 23(10) prohibiting the transfer of leasehold interests of the Crown in Maori land leased to the Crown and administered by the Minister of Forests, except where the lessor consented or the lease itself permitted, but allowing for agreements to be made for the relevant State-owned enterprise to manage the land. The report of the Committee foreshadowed further changes by way of a supplementary order paper in response to a late submission from the Waitangi Tribunal.

That Tribunal was established under the Treaty of Waitangi Act 1975. It was landmark legislation providing for the first time a legal forum to consider grievances arising under the Treaty. The object of the Act as stated in the long title is "to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi" which it proceeds to do "by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to

determine whether certain matters are inconsistent with the principles of the Treaty". The functions of the Waitangi Tribunal are to enquire into and make recommendations on any claims submitted to the Tribunal under s 6 and to examine and report on any proposed legislation referred to the Tribunal under s 8 (s 5).

Initially s 6 was restricted to claims arising in relation to legislation including regulations and orders in council for the time being in force, existing or proposed policies or practices of the Crown, and acts done or omitted after the commencement of the Treaty of Waitangi Act on 10 October 1975 or proposed to be done or omitted. With effect from 6 January 1986 such grievances in respect of past legislation, policies, practices, acts and omissions of the Crown extending back to 6 February 1840 were brought within its jurisdiction. Under s 6 any Maori may submit a claim to the tribunal claiming that he or she is or is likely to be prejudicially affected by any such legislation, policy, practice or act done or omitted by or on behalf of the Crown which was or is inconsistent with the principles of the Treaty. If the Tribunal finds the claim is well-founded it may recommend to the Crown in general or specific terms that action be taken to compensate for or remove the prejudice or to prevent other persons being similarly affected in the future (s 6(3) and (4)). Section 8 is concerned with the interpretation of legislative proposals. Proposed legislation may be referred for the opinion of the Tribunal on whether any provisions are contrary to the

principles of the Treaty - by resolution of the House of Representatives in the case of a Bill and by a Minister in the case of proposed regulations or orders in council.

In the course of the argument before the Waitangi Tribunal on a Northland claim it was submitted that the relief sought by the claimants was or was likely to be prejudiced by the enactment of the SOE Bill. In an interim report of 8 December 1986 the six member Tribunal concluded that:

> " The Treaty of Waitangi affirmed a special relationship between the Crown and the Maori people. The guarantee, in Article Two, to the undisturbed possession of lands so long as the Maori owners wish to retain the same, must be read in context of the preamble, that the Crown is 'anxious to protect their just rights and property'... We think it inconsistent with the principles of the Treaty of Waitangi that that particular relationship of the Maori and the Crown should in any way be diminished, or even threatened with compromise. We do not think in particular that the Crown should dispose of lands that are the subject of claims and risk thereby some prejudice to the Claimants' position. "

The Tribunal recommended that the Ministers involved decline to transfer the Crown land affected by those claims before the Tribunal pending its determination and went on to draw attention to the some 40 further claims pending before the Tribunal and claims which might be made in the future. The Tribunal added: "The question remains whether the Bill itself is contrary to the principles of the Treaty, at least without some amendment that continues the responsibility of the Crown for the return of land, and appropriately restricts alienations by the envisaged corporations."

That initiative coupled with consultation by the Government with Maori interests led to the introduction of further provisions in the Bill: what is now s 9 providing that "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi"; and s 27 dealing specifically with Maori land claims.

Concerned at the expressed intention of the Government to transfer very large areas of Crown land to State-owned enterprises the New Zealand Maori Council and its Chairman brought these proceedings by way of judicial review under the Judicature Amendment Act 1972. For the purposes of the argument in this Court it was agreed that the Council would advance 3 illustrative cases of grievances under the Treaty. The only other factual point which requires mention at this stage is that the Crown, in answer to an interrogatory, acknowledged it had not established any system to ensure in relation to each asset passing to a State-owned enterprise that the transfer would not be inconsistent with the principles of the Treaty.

Treaty of Waitangi

There are many difficult and complex questions surrounding the Treaty and its contemporary application. Many were raised in the course of argument. Others appear on any reading of the voluminous material tendered at the hearing and other published works of history. The chronological narrative can be put in a few sentences. Some 50 Chiefs signed the

Maori text of the Treaty at Waitangi; Hobson then set out to secure the adherence of other North Island Chiefs. Anxiety developed over the new settlement at Port Nicholson and on 21 May 1840 Hobson issued 2 proclamations declaring the Crown's sovereignty. One was in respect of the North Island and was based on cession. The preamble to the proclamation referred to the Treaty of 5 February 1840 [6 February 1840] between Captain Hobson vested for that purpose with full powers by Her Britannic Majesty of the one part and the Chiefs of the Confederation of United Tribes of New Zealand and the several and independent Chiefs of New Zealand (not members of the Confederation) of the other part, and to the Treaty's having been ratified and confirmed by the adherence of the principal Chiefs of the Northern Island. As it happened, while a considerable number of additional signatures had been gathered adherence was by no means universal - some Chiefs refused to sign, others were not reached. The second proclamation was in respect of the South Island and Stewart Island. At that date it seems that, while Major Bunbury had been despatched southwards to secure signatures, Hobson would not have been aware of any adherence from South Island or Stewart Island Maori. In any event, in maintaining as he had previously discussed with Governor Gipps of New South Wales and the Colonial Office that the natives there were in an uncivilized state, Hobson based the claim to sovereignty on Cook's discoveries. It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown

in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.

The matter is much more complex than that bare narrative indicates. Scholars differ both as to the precise legal basis for British sovereignty and as to the legal status of the Treaty under New Zealand law. Then, turning to the Treaty itself, how is it to be interpreted today? It is trite law in terms of the domestic law of New Zealand that a document must be construed in its factual setting having regard to the aim and the object of the transaction it embodies. Interpretation is a question of construction, of arriving at the true intention of the parties as expressed in the instrument, considered as a whole and against the surrounding circumstances as they existed at the time of its execution. But is the Treaty properly viewed as a purely domestic law contract; or is it an international Treaty to be construed in accordance with the international law of treaties as Mr Baragwanath for the New Zealand Maori Council submitted; or should it be approached as a basic constitutional document evolving in its application to changing circumstances over the years?

Here, too, there are various further special features. First, it is not a case of one agreed text. There were drafts and copies and there are some differences. What is much more important and of continuing significance, the Maori language text signed at Waitangi is not an exact translation of the original English language text approved by Hobson. The

preamble to the Treaty of Waitangi Act notes that the text in English differs from the text in Maori and, under s 5(2) and for the purposes of that Act, the Waitangi Tribunal has exclusive authority to determine the meaning and effect of the Treaty "as embodied in the 2 texts" and to decide issues raised by the differences between them. Second, while Hobson and the British authorities can be fixed with an understanding of the terms of the original English language version of the Treaty, it is not at all clear on what understanding more than 500 Maori signatories at the various venues signed - including the 39 Waikato and Maniapoto signatories to an English text. Given the emphasis on oral discussion and decision making and limited literacy their understanding would necessarily have depended on what explanations were given to the particular signatories and their appreciation of the concepts involved. That was recognised by those present when Colenso interrupted proceedings just before the first Maori subscribed at Waitangi on 6 February. And the New Zealand Maori Council in its paper Kaupapa - Te Wahanga Tuatahi published in February 1983 concluded that "... the Treaty was drawn up by amateurs on the one side and signed by those on the other side who understood little of its implications".

If the focus is on the texts themselves there are differing views as to the extent of the differences between the English and Maori texts scheduled to the Treaty of Waitangi Act. In recent years much learning has gone into the study of the Maori language text and with the assistance of a considerable body of material Mr Baragwanath took us patiently through its

provisions. It is not I think entirely clear on the material before us what was the contemporary meaning of some of the expressions used, especially when viewed in the context then under discussion where British settlement had hardly begun and Maoris were in a vastly numerical majority living in their own communities. In that regard the Royal Commission on the Electoral System (1986) has noted that "... what should be included in the concepts of 'rangatiratanga' and of 'a ratou taonga katoa' have not yet been settled" (para 3.101) and the Chairman of the Waitangi Tribunal speaking extra-judicially has observed (Part II and Clause 26 of the Draft New Zealand Bill of Rights at p 190) that "... it [the Treaty] can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines".

On the other hand, Dr Orange in her evidence concluded that, while the Treaty in its English form is a fairly straightforward agreement on its face in which the Maori ceded sovereignty and gave the Crown sole rights of pre-emption and in return were guaranteed possession of lands, forests, fisheries and other possessions, promised Crown protection and granted the rights of British subjects, the Maori might naturally have drawn the conclusion from explanations of the Maori texts that they were being asked to share some of their authority with a British administration and that it was a protectorate type relationship that was being represented at Waitangi, one in which power and authority would be shared.

There are differing views too as to the proper approach to interpretation where there are differences between the 2 language texts, and in particular whether a Court should seek to reconcile the differences and harmonise the texts so as to achieve a consensus as far as possible - which for the Waitangi Tribunal may be what is indicated in the direction in s 5(2) that it determine the meaning and effect of the Treaty "as embodied in the 2 texts" - or whether a Court must simply adopt the interpretation favouring the indigenous people of New Zealand rather than the Crown as was submitted by Mr Baragwanath.

Finally, the Treaty has never been legislatively adopted as domestic law in New Zealand. And any reading of our history brings home how different the attitudes of the Treaty partners to the Treaty have been for much of our post 1840 history: on the one hand, relative neglect and ignoring of the Treaty because it was not viewed as of any constitutional significance or political or social relevance; and on the other, continuing reliance on Treaty promises and continuing expressions of great loyalty to and trust in the Crown. It is only in relatively recent years and as reflected in the Treaty of Waitangi legislation itself that the lagging partner has started seriously addressing these questions. Particularly in recent times a great deal of research has been done in relation to these matters and in relation to the subsequent history of the conduct of the Treaty partners. Much still remains in order to develop a full understanding of the constitutional, political and social significance of the Treaty in contemporary terms and our responsibilities as New Zealanders under it.

The principles of the Treaty

Against that background it is readily understandable that much of the contemporary focus is on the spirit rather than the letter of the Treaty, and on adherence to the principles rather than the terms of the Treaty. Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are. This was apparent in the rival contentions of the New Zealand Maori Council and the Crown in this case. Mr Baragwanath for the New Zealand Maori Council relied on the terms of the Treaty, particularly the Maori language text, as themselves constituting principles of the Treaty, and in addition submitted that there were 10 implicit principles reflected in these concepts: (i) the duty actively to protect to the fullest extent practicable; (ii) the jurisdiction of the Waitangi Tribunal to investigate omissions; (iii) a relationship analogous to fiduciary duty; (iv) the duty to consult; (v) the honour of the Crown; (vi) the duty to make good past breaches; (vii) the duty to return land for land; (viii) that the Maori way of life would be protected; (ix) that the parties would be of equal status; and (x) where the Maori interest in their taonga is adversely affected, that priority would be given to Maori values.

For the Crown Mr Williams rejected the concept of implied principles altogether as having no basis in the texts nor in the law of treaties. Thus he rejected Mr Baragwanath's

basic proposition that there was a duty to consult on matters affecting Maori people. His submission was that 5 principles can be identified from analysis of the Treaty and the preamble: (1) that a settled form of civil Government was desirable and that the British Crown should exercise the power of Government; (2) that the power of the British Crown to govern included the power to legislate for all matters relating to "peace and good order"; (3) that Maori chieftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed; (4) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown; and (5) that the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.

I have mentioned these matters in this way in part because of the wide-ranging arguments in the present case and in part because much of the popular discussion of the Treaty seems to assume that the answers to these questions are simple and straightforward. Unfortunately this is not so. The way ahead calls for careful research, for rational positive dialogue and, above all, for a generosity of spirit. Perhaps too much has at times been made of some of these differences and too little emphasis given to the positive and enduring role of the Treaty. Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly

require a broad interpretation and one which recognises that the Treaty must be capabale of adaptation to new and changing circumstances as they arise.

It is not necessary for the purposes of this case to attempt to write a general treatise on the subject. This is because as in all cases it is a matter of determining what are the relevant principles having regard to the context in which their identification arises. There is however one overarching principle - to which I shall return - which in its application here is sufficient to answer the present case. It is that considered in the context of the SOE Act, the Treaty of Waitangi must be viewed as a solemn compact between 2 identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees. That basis for the compact requires each party to act reasonably and in good faith towards the other. In this regard there is much force in the observation of Sir Henare Ngata in his evidence in this case that "... a contentious matter such as the Treaty will yield to those who study it whatever they seek. If they look for difficulties and obstacles, they will find them. If they are prepared to regard it as an obligation of honour, they will find that the Treaty is well capable of implementation".

As Adams, Fatal Necessity - British Intervention in New Zealand 1830-1847, in a chapter headed "The Obligations of

Good Faith" has observed (p 239): "The acquisition of sovereignty was undertaken from motives both humanitarian and nationalistic, both idealist and pragmatic, both for the benefit of the Maoris and the benefit of the settlers": and, he added, the 2 main reasons for British intervention were humanitarian concern to protect the Maori from the worst consequences of European invasion of their country and to protect British subjects wishing to settle in New Zealand. Indeed the preamble to the Treaty reflects those dual objectives. In relation to land - and it is land with which this case is concerned - the Crown was to be the buffer, the intermediary. The settlers were to obtain land for settlement but only by purchase from the Crown which had the sole right to buy from Maoris willing to sell. The Maori people were to be protected in their ownership through the second article's guarantee of protection. As expressed in the English text, that guarantee to the Maori collectively and individually was of "the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties" as long as they wished to retain them. In the Maori text it is the rangatiratanga, the chieftainship of those lands, which is protected. The third article according "the natives of New Zealand all the rights and privileges of British subjects" has been the subject of sharply contrasting perspectives: on the one hand it reflected in British eyes the goal of assimilation and eventual submergence of Maori custom in a superior British civilisation and on the other hand it was seen as providing protection of the right of the Maori people to retain their own culture and heritage just as the

British maintained theirs. Common to both perspectives was the recognition that the article provided for Maoris to be accorded equal status with other British subjects.

There are difficulties in ascribing either perspective as having the full understanding of the Treaty partners at the time. However, read in conjunction with article II, 2 points at least are clear. One is that the protection accorded to land rights is a positive "guarantee" on the part of the Crown. This means that, where grievances are established, the State for its part is required to take positive steps in reparation. The other is that possession of land and the rights to land are not measured simply in terms of economic utility and immediately realisable commercial values. The uncontested evidence in this case, and particularly that of Dame Whina Cooper, Sir James Henare and Sir Henare Ngata, amply justifies and supports conclusions of historians as to the crucial importance of land in Maori culture. The New Zealand Maori Council in its paper Kaupapa - Te Wahanga Tuatahi expresses it in this way:

> " It [land] provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangatawhenua of this country. It is proof of our tribal and kin group ties. Maori land represents turangawaewae.
>
> It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last. "

The 3 illustrative cases

By arrangement 3 separate kinds of claims were advanced by the New Zealand Maori Council on the argument of the application. I am satisfied that each raises an arguable case for consideration by the Waitangi Tribunal. Subject to a brief explanation of each claim and the potential application of the Treaty of Waitangi I shall leave that conclusion there for it is not our function to intrude into areas which are the proper concern of the Tribunal and which do not require further resolution in these proceedings.

The first concerns the lands of the Ngai Tahu at Otakou. The Crown waived its right of pre-emption to permit the New Zealand Company to purchase the Otakou block - and the lawfulness of the waiver is not in question at this point. It was a consideration of the waiver that one-tenth of the total purchase would be conveyed to the Crown for Maori reserves. When the company ran into financial difficulties it surrendered its charter to the Crown, which took over its assets subject to existing contracts. But the "tenths" land was never allocated and Ngai Tahu has never received land or financial compensation.

The area of the Otakou block acquired by the company was nearly 600,000 acres, and the claim by Ngai Tahu which was made to the Waitangi Tribunal on 16 December 1986 (and thus within the protective provisions of s 27(1)) is very large. If met by a vesting of land it would involve substantial areas of land. The grievance is long standing and has been pursued over a

very extended period, receiving some acknowledgment in the past but never any reparation. What is said for the New Zealand Maori Council is that the failure by the Crown to honour the undertaking in respect of the tenths land breaches and continues to breach the Crown guarantees under Article II of the Treaty and the implicit obligation reflected in the rights of British subjects under Article III that the Crown should perform its agreements with its subjects.

The argument for the Council then is that in the face of that existing claim for the Crown to transfer such substantial lands to State-owned enterprises that could otherwise be utilised to satisfy future findings of the Waitangi Tribunal would necessarily impede the prospects of the Crown's subsequently doing so and would interpose a stranger to the compact between Maori and Crown in that respect.

The second concerns the lands of Ngati Tama at Taranaki. The Crown land remaining comprises some 16,000 hectares and is a very small part of what were the ancestral lands of the Ngati Tama, confiscated by the Crown under the New Zealand Settlements Act 1863. The Sim Commission (Sir William Sim, Hon Vernon H Reed and William Cooper) was asked to inquire whether the confiscations in various areas including Taranaki "exceeded in quantity what was fair and just". In their report of 29 June 1927 they firmly concluded that the Waitara purchase was the cause of both the Taranaki wars; that it was a blunder and was abandoned by the Governor, Sir George Grey; that the Government

was wrong in declaring war against the natives for the purpose of establishing the supposed rights of the Crown under that purchase; that it was an unjust and unholy war and the second war was only the resumption of the original conflict; and that the natives who took part ought not to have been punished by the confiscation of any of their lands. The net total area finally confiscated was 462,000 acres. The Commission concluded that it was difficult if not impossible to arrive at any satisfactory conclusion as to the value of the land at the date of its confiscation and recommended that the wrong done be compensated by a yearly payment of 5,000 pounds.

It is clear from the evidence that both the Crown and Maori interests have accepted the basic findings that the confiscation was unjust. They have always considered the sums (initially 5,000 pounds and increased to 10,000 pounds in the 1930s) to be in partial compensation only. The Consumer Price Index has multiplied 25 times since the mid 1930s and on that basis 10,000 pounds is now worth $\$\frac{1}{2}$ million per year. But, it was further submitted, the Ngati Tama people, who are now for all practical purposes landless, see their only chance of obtaining some of their ancestral lands back from the Crown as following on from a recommendation by the Waitangi Tribunal.

That these 2 claims were not put initially in terms of the Treaty of Waitangi is not surprising given the lack of legal recognition of the Treaty at the time and the apparent inviolability of the colonial legislation. It cannot stand in

the way of claims to invoke the Treaty for the purposes of the SOE Act in reliance on the recognition accorded to the Treaty by the Act which necessarily involves recognition of the role of the Waitangi Tribunal in considering claims for redress of grievances under the Treaty, now extending back to 1840 and extending to the legislation and conduct now in question under these claims.

The third concerns the lands of the Ngati Whatua at Woodhill. The claim has not yet been lodged with the Waitangi Tribunal. There are 2 classes of claim. One relates to areas of Maori land comprising approximately 9,000 acres belonging to the Ngati Whatua taken pursuant to the Public Works Act 1928 for the purposes of sand dune reclamation by proclamation of 31 October 1934. Subsequently, by declaration of 20 February 1957 land included in the original Crown acquisition was notified under s 35 of the Public Works Act as not required for such public work.

The other class of case relates to certain lands totalling 75 acres taken pursuant to s 11 of the Reserves and Other Lands Disposal Act 1934 for the purposes of sand dune reclamation and being urupa in which the rights of the Maori owners to continue to use the land for burial purposes were expressly reserved. Those lands were subsequently the subject of a similar notice under s 35 of the Public Works Act but subject to the rights of Maoris interested in the land to bury deceased Maoris. What is said is that all the lands in question are of especial spiritual significance to the Ngati Whatua and

that it is proposed to contend before the Waitangi Tribunal that the provisions under which the lands were taken were contrary to the principles of the Treaty of Waitangi; that the use of s 35 to retain them as Crown lands when no longer required for the original public purpose relied on without offering them back to the Ngati Whatua was also a breach of the principles of the Treaty given the significance of land and especially this land to the Ngati Whatua; that denial of access to the lands to the Ngati Whatua, failure to consult in their management and failure to protect special areas of wahi tapu from forestry management are all breaches of the Treaty; as is the now proposed absolute transfer of the lands (which form part of the Woodhill State Forest) to the new Forestry Corporation.

The scheme of the SOE Act

The object of the Act as stated in the long title is to "(a) specify principles governing the operation of the 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". It does so by a careful division of the Act into 4 parts: Part I - Principles; Part II - Formation and Ownership of New State Enterprises; Part III - Accountability; and Part IV - Miscellaneous Provisions.

Section 4(1) specifies the principal objective of each State-owned enterprise as being "to operate as a successful

business". The State-owned enterprise is to be "(a) as profitable and efficient as comparable businesses that are not owned by the Crown" and the policy obligations to be a good employer under (b) and to exhibit a sense of social responsibility under (c) are similar to policies that would be adopted by responsible public companies. Section 5 is concerned with directors and their role; s 6 with the responsibilities of Ministers to the House of Representatives; s 7 with entry into agreements with the Crown where in respect of non-commercial activities the Crown wishes a State-owned enterprise to provide goods or services to any persons; and s 8 with industrial relations. And the inclusion in s 9 of Part I of the obligation on the Crown not to act in a manner that is inconsistent with the principles of the Treaty of Waitangi is I think an indication of the importance accorded to it as one of the key principles of the legislation.

Part II is concerned with the formation of and 100% shareholding in the new State-owned enterprises and Part III with the accountability of the boards of directors. The only direct accountability is to the shareholding Ministers and there the legislation takes pains to mark out the responsibility in terms of presentation of a statement of corporate intent (s 14 and s 13(1)(a)), the provision of annual and half-yearly reports and the payment of dividends (ss 15, 16 and 13(1)(b)), and the supply of information relating to the affairs of the State-owned enterprise on Ministerial request following consultation with the board (s 18). Subject to those accountability safeguards

each board is left to govern its own affairs in operating as a successful business. That necessarily involves the efficient use of the resources of the State-owned enterprises. The statutory assumption reflected in s 23 is that initially the Crown will pass over to the State-owned enterprises assets and liabilities previously employed in commercial activities of the Crown. Subsection (1) provides:

> " 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. "

The Chairman of the State Services Commission who has had particular personal responsibility for the implementation of the Government's policy of corporatisation said in evidence that the policy of the Government was that the new corporations would be required to purchase the businesses from the Crown, which would include the assets to be transferred to them at prices to be negotiated, and they would also be required to produce a

current rate of return on those assets. Of 14 million hectares of Crown land previously administered by the Department of Lands and Survey and the New Zealand Forest Service, some 6.5 million hectares will be under the administration of the new Department of Conservation which was created to administer lands of the Crown to be retained by the Crown because of conservation values or because they are otherwise not suitable for productive or commercial use. The residual Department of Lands will administer some 2.5 million hectares in pastoral leases to be retained by the Crown and will also continue to administer some lands of the Crown pending decision on allocation to the Department of Conservation, Land Corporation Limited, or some other appropriate agency or body.

Thus it is contemplated that the State-owned enterprises will acquire some 4 to 5 million hectares of Crown land. It is obvious enough that an important factor in the movement of assets is that the Crown will benefit from obtaining market values of assets sold. By the same token and because of the financial costs involved for them the State-owned enterprises can be expected to release any land surplus to their trading needs insofar as they are free to do so. In short, what seems contemplated is a passing over to the new State-owned enterprises of Crown land suitable for commercial or productive use (except for pastoral leases) with the State-owned enterprises then deciding what lands to sell and what to retain for their trading purposes.

On that general philosophy it is apparent that no special significance has been attached within Government to s 9 as providing any limitation on the ability of the Crown to transfer land absolutely to the State-owned enterprises. In argument in this Court the Crown justified that stance on 2 grounds: first, that s 27 is a code in respect of Maori land claims and no further protection is accorded under the legislation; and second that if s 27 is not a code and s 9 applies to land, then there is nothing in the principles of the Treaty of Waitangi which inhibits the transfer or other disposition of Crown land to State-owned enterprises under s 23.

The legal test

The starting point is s 23 for that is the authority for the passing over of Crown lands to State-owned enterprises. The discretion reposed in the shareholding Ministers under s 23(1) is to be exercised within the powers conferred on them. As in the case of any authority entrusted with statutory powers of decision they must direct themselves properly in law and then act according to law. They must observe the criteria expressly or implicitly laid down in the legislation. So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous. In the end it is for the Court to decide whether those entrusted with authority have acted within their statutory discretion both in the determination of whether the facts on which the exercise of the discretion depends exist and

whether the discretionary decision has indeed been made upon a proper self-direction as to the legal criteria and their application to those facts. These principles are well settled in our law and it is perhaps sufficient to refer to the discussion in CREEDNZ Inc v Governor-General [1981] 1 NZLR 172, 182-183, 196-198 and 208-209. The other side of the coin is that the outcome of the exercise of the discretion must be reasonable otherwise the only proper inference is that the power itself has been misused. Discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute. And the result or outcome may itself be such as to compel the conclusion that the discretion was exercised unreasonably in that sense (Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; and Wheeler v Leicester City Council [1985] 1 AC 1054).

Is s 27 a code?

In essence the argument of the Solicitor-General was that, as a matter of interpretation considering the SOE Act as a whole and in its historical setting, s 27 was intended to be exhaustive of the statutory protection to be accorded to Maori grievances in respect of land. He accepted that this would involve giving s 9 less effect than the breadth of its words would suggest - indeed it would involve reading in a qualification "except in relation to land" - but submitted that was necessary in order to give proper effect to other provisions

of the Act, to make the statute workable and to reflect the legislative history where, he said, s 27 should be viewed as a comprehensive legislative response to the concerns expressed by the Waitangi Tribunal in its interim report of 8 December 1986.

If approached in terms of the exercise of statutory power and restraints on the exercise of statutory power then the starting point is that under s 23(1) Ministers have 4 options available to them when considering any assets of the Crown: (1) to transfer the asset to the relevant State-owned enterprise; (2) to authorise the State-owned enterprise to manage the asset; (3) to grant the State-owned enterprise a lease, licence, easement, permit or right of some kind in respect of the asset; or (4) to retain ownership and control and not involve the State-owned enterprise with the asset. Under (1) (2) and (3), the Ministers have a choice of methods of placing assets in the hands of State-owned enterprises but the fourth option is also there. In deciding what course to follow the Ministers must always obey s 9. On its face it applies in all circumstances and so to any class of asset to which the principles of the Treaty of Waitangi apply. Given the emphasis in the Treaty on land and the historical concerns of Maoris in relation to land ever since the Treaty was signed reflected in recent years in the experience of the Waitangi Tribunal under the Treaty of Waitangi Act, it would be a bold step for any Court in the guise of interpretation to exclude land from the scope of s 9. I am not persuaded that any of the matters on which the Solicitor-General relied, considered separately or cumulatively, requires that conclusion.

The first point he raised is that under existing laws the Crown was entitled to sell or otherwise dispose of Crown land without being inhibited in any legal way by the Treaty. And, the argument continued, the procedure for remedying grievances under the Treaty which lay in the opportunity to obtain from the Waitangi Tribunal a favourable recommendation, did not include any right to an adjudication affecting the ownership or title to land. In brief, the exercise of the broad powers under s 23(1) did not take away any existing legal rights in relation to the Treaty. The short answer is that occasional sales of Crown land over the years cannot be equated with the wholesale disposal of commercially useable land of the Crown in one swoop. It was the nature and magnitude of what was contemplated that led to the entrenchment of these protective provisions.

The second concerns the function of s 27 under the scheme of the Act. In terms of subs (1), where land which is transferred to a State-owned enterprise pursuant to the Act is subject to a claim made under the Treaty of Waitangi Act before the SOE Act came into force on 18 December 1986, the land continues to be subject to that claim and pending action taken under subs (2) the State-owned enterprise must retain the land. Subsection (2) applies to all land held by the State-owned enterprise pursuant to a transfer made under the Act which becomes the subject of findings of the Waitangi Tribunal. It applies whether the claim was made to the Tribunal before or after the SOE Act came into force and it allows for the land to be resumed by the Crown with payment to the State-owned enterprise of the value of its interest in the land.

Mr Baragwanath argued that s 27 was directed and limited to cases where land susceptible to Treaty claims was mistakenly transferred to State-owned enterprises either as a result of a mistake by the Crown as to whether or not a transfer would be a breach of the principles of the Treaty or in consequence of a mistake by the Crown as to whether a particular piece of land was within a claim. This cannot be so. Subsection (1) applies where land is transferred "pursuant to this Act" and must be taken to contemplate the transfer of interests in Crown land under s 23(1) while the claim is pending before the Waitangi Tribunal. So too under subs (2) in relation to land which at the time of transfer is the subject of a claim actually submitted to the Tribunal after the Act came into force or is the subject of a possible future claim.

The Crown argument is in my view equally untenable. It gives no effect to s 9 and fails adequately to recognise that Ministers may pass over assets to State-owned enterprises in various ways and even an outright transfer may be made on terms and conditions. And it is implicit in s 27(3)(b) in its reference to "the interest of the State enterprise in the land" that the legislature recognised that State-owned enterprises might receive lesser restricted interests in land from the Crown. Depending on the nature of the grievances and when the claim might be expected to be resolved by the Tribunal, a transfer with strings or a disposition of a limited interest might be a perfectly sensible interim measure. In other circumstances the Ministers might conclude that retention by the Crown or entry

into a management contract with a State-owned enterprise might be an appropriate means of meeting their responsibilities under s 9. As I read the provisions there is no necessary inconsistency with s 27 in requiring Ministers to comply with s 9 when exercising their powers under s 23.

It follows from what has been said that I am not persuaded that an interpretation harmonising ss 9 and 27 in relation to land would produce an unworkable result. That is a matter to which I shall return. And I am satisfied there is nothing in the legislative history to require a different conclusion. The legislature did not adopt in full the recommendations of the Waitangi Tribunal and in addition to enacting s 27 it enacted s 9.

There are 3 further reasons why s 9 must be given full effect and must not be shorn of any possible application to land. First, the importance the legislature attached to compliance with the principles of the Treaty is reflected in the enactment of s 9 as a governing principle of the legislation.

Second, land is a primary concern to Maoris under the Treaty of Waitangi and the efficient utilisation and disposition of Crown land is a primary concern under the SOE Act. Certainly there were other trading assets of the Crown in contemplation for transfer to State-owned enterprises, but land was of central significance. Indeed, the Solicitor-General was unable to suggest any assets other than land which would come within s 9 in this Act. To exclude land from s 9 would defeat rather than

give effect to a clear intention to protect the application of the principles of the Treaty.

Third, rather than viewing s 9 as a provision outwardly raising expectations then dashing them by a process of inference from other provisions its true function in the Act should be recognised as constituting a general proscription of any conduct in breach of the principles of the Treaty and as such being a governing consideration in the exercise of the powers under s 23, with s 27 then being seen as specific machinery for dealing in due time with such land held by State-owned enterprises. In this regard s 27 does not require retention by State-owned enterprises of land known to be subject to a claim to the Waitangi Tribunal made after the Act came into force. There is nothing to stop the State-owned enterprise from selling off such land and if s 9 has no application to land Ministers would be justified in disregarding any such pending claims or known future claims in exercising their powers under s 23.

The application of s 9

The second and alternative submission for the Crown was that if s 9 does apply in relation to land there is nothing in the principles of the Treaty inhibiting the transfer by the Crown of Crown land. This takes far too narrow a view of the Treaty. Simply to assert that all land involved is Crown land and that the Crown is always free to transfer Crown land under its general statutory powers begs the question. If the original Crown title is seen to be flawed or tainted when viewed in terms of the

Treaty, then certain dealings by the Crown with that land may themselves be in breach of the principles of the Treaty. What is required is to identify those principles which in the context of the SOE Act are the relevant principles of the Treaty and to do so against the historical background including, importantly for these purposes, the status accorded to the Treaty by s 9 through the Treaty of Waitangi Act and the role of the Waitangi Tribunal under that legislation.

Turning then to 1840 there can be no doubt that there were various motives, concerns and aspirations on the part of those involved on both sides. No doubt there were differences in the understandings of the participants as to precisely what the Treaty and its different provisions meant - both for the immediate future and in the longer term. And in 1840 no one could have foreseen the changed New Zealand of the 1980s in the changed world of the 1980s. New Zealand is vastly different from the New Zealand of 1840 or the New Zealand that could reasonably have been in contemplation at that time - economically, socially, politically and even in some respects physically. Against that background the identification and application of the principles of the Treaty in today's world have to take account of the nation we have become and of the gains as well as the disadvantages that have accrued to all of us over the last 147 years.

There is, however, one paramount principle which I have suggested emerges from consideration of the Treaty in its

historical setting: that the compact between the Crown and the Maori through which the peaceful settlement of New Zealand was contemplated called for the protection by the Crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the Treaty and in its terms.

It was a compact through which the Crown sought from the indigenous people legitimacy for its acquisition of government over New Zealand. Inevitably there would be some conflicts of interest. There would be circumstances where satisfying the concerns and aspirations of one party could injure the other. If the Treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards the other.

The preamble of the English language text expresses with some clarity what was in contemplation and the role adopted by the Crown. The Crown was "anxious to protect" the "just Rights and Property" of the Maoris and was "anxious ... to secure" their "enjoyment of Peace and Good Order". The immediate need for the Treaty was the British settlement which had already taken place and "the rapid extension of Emigration both from Europe and Australia" which was still in progress. Those obligations were to be achieved through establishing "a settled form of Civil Government" with a view to averting the evil consequences resulting from the absence of necessary laws and institutions "alike to the native population and to Her subjects". Hobson

was empowered to act on behalf of the Crown and to invite the Chiefs of New Zealand to "concur in the following Articles and Conditions".

Those same concerns to protect the chiefs and subtribes and to maintain peace and good order through the establishment of the Queen's government over all parts of the land are reflected in Professor Kawharu's reconstruction of the literal translation of the Maori text which was accepted by the New Zealand Maori Council and the Crown for the purposes of this case.

Moving to the Articles, what is important for present purposes is the approach and the emphasis rather than the differences. In Article I in the English text it is the cession to Her Majesty "absolutely and without reservation" of "all rights and powers of Sovereignty": in the Maori text the giving up by the chiefs "absolutely to the Queen of England forever the complete government over their land". In Article II the English text uses the emphatic words of recognition and obligation "confirms and guarantees" - by the Queen to the Maori of "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties" so long as they wish to retain them - and the emphatic expression "yield" - by the Maori to the Crown of "the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate". The Maori text employs somewhat different language but in relation to land the same 2 concepts are present: the

agreement by the Crown to protect Maori rights and by the Maori to "give to the Queen" the land "the person owning" it is "willing to sell".

In Article III the same theme of protection is present. In the English text the Queen extends to the Natives of New Zealand "Her royal protection" and confers on them "all the Rights and Privileges of British Subjects": in the Maori text the Queen's protection is to all of the ordinary people of New Zealand and the undertaking is to give them "the rights and duties" applying "under Her constitution to the people of England".

Finally, the last paragraph of the Treaty contains in the English text the significant statement that those subscribing "accept and enter into the same in the full spirit and meaning thereof" which, in the Maori text, becomes "the shape of these words being accepted and agreed".

I think it is clear from this analysis that the Treaty was presented and accepted as providing a path for the orderly colonisation of New Zealand under British Government protection for Maori and British interests alike. It was a goal which could be realised only if each acted reasonably and in good faith within their respective spheres. That these obligations were and are reciprocal is clear from the preamble and from the terms of the articles. Thus as Professor Kawharu has noted in his paper "Sovereignty and Rangatiratanga" tendered in evidence by the New Zealand Maori Council:

> " Clumsy translation or not, Maori acceptance of the first article in the Treaty gave the Crown sufficient authority to set about making and administering laws and regulations and eventually to establish constitutional government in New Zealand. "

Again it is no doubt because the Treaty itself clearly envisages sales of Maori land for orderly settlement that Mr Baragwanath readily submitted that it would not be consistent with the principles of the Treaty for any challenges to be made in respect of unpressured sales of Maori land.

The honour of the Crown

Mr Baragwanath also emphasised that the concept of "the honour of the Crown" lies at the heart of the Maori perception of the Treaty and that Lord Normanby's Instructions of 14 August 1839 to Hobson engaging "the faith of the British Crown" reflected the approach of the British authorities to the proposal for a treaty. Those Instructions also emphasised that "All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands". And the Instructions from Lord Stanley issued on 13 June 1845 after questions had been raised about the significance of the Treaty directed Captain Grey as Lieutenant Governor to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi".

The concept of the honour of the Crown also has continuing expression in Canadian cases on treaty rights in which

as Cartwright J put it in R v George (1966) 55 DLR (2nd) 386, 396-397: "We should, I think, endeavour to construe the Treaty of 1827 and those Acts of Parliament which bear upon the question before us, in such manner that the honour of the Sovereign may be upheld" and in the international law doctrine of good faith (for example Article 2 of the United Nations Charter - "All Members ... shall fulfil in good faith the obligations assumed by them in accordance with the present Charter"; Article 26 of the Vienna Convention on the Law of Treaties 1969 - "Every treaty in force ... must be performed by them [the parties to it] in good faith", and Article 31(1) - "A treaty shall be interpreted in good faith ..."; and see Virally, "Review Essay: Good Faith in Public International Law" (1983) 77 AJIL 130).

Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the SOE Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity

as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.

Consultation

What is involved in the application of that fundamental good faith principle of the Treaty must depend upon the circumstances of the case. Mr Baragwanath submitted that an obligation to consult the other treaty partner and the correlative right to be consulted was itself an implied principle of the Treaty stemming from the obligation of good faith and on the Crown's part from the protective guarantees of Maori interests which come under the Treaty. There are difficulties with that submission when expressed in that way as an absolute duty of universal application superimposed on the consultation which takes place as part of the ordinary political and governmental processes. What matters affecting Maoris are within the scope of the duty and how is the line to be drawn in the conduct of government? With whom is the consultation to occur? The undertakings in Article II relate to "the chiefs and subtribes" in the Maori text and to "the chiefs, tribes, families and individuals" in the English text. And inasmuch as any Maori may apply to the Waitangi Tribunal, it is not obvious that a tribal affiliation or other Maori organisation could necessarily speak for all Maoris interested. There is, too, the further

question as to the form and content of the consultation. In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

The Treaty of Waitangi Act and the SOE Act

It is against that background that I now turn to the Treaty of Waitangi Act and the SOE Act. I refer to both statutes together because the SOE Act by necessary implication from its employment of the same expression "principles of the Treaty of Waitangi" as is basic to the Treaty of Waitangi Act, and through express references to that Act in s 27, has

recognised that the approach to Treaty grievances under the Treaty of Waitangi Act is directly relevant to the discharge by the Crown of its responsibility not to breach s 9 of the SOE Act. And the clawback provisions of s 27(2) proceed on the footing that the earlier acquisition and retention of Maori land by the Crown or dealings by the Crown in relation to land in the particular case were inconsistent with the principles of the Treaty.

The enactment of the Treaty of Waitangi Act pointed to the existence of a body of unmet grievances. Its extension with effect from 6 January 1986 to Crown conduct and events extending back to 6 February 1840 must have reflected a legislative intention that long felt Maori grievances should and would be aired and findings made in a judicial forum. The Waitangi Tribunal does not itself order reparation. It is a recommending body. But the Treaty of Waitangi Act clearly envisages that reparation may be made by the Crown in the form of land or other compensation where the Tribunal has held the claim to be well-founded.

With that prospect of reparation for redress of grievances under the Treaty of Waitangi Act before Parliament when it enacted the SOE Act the legislature must be taken to have intended that in exercising the powers under s 23 and in complying for that purpose with s 9 Ministers would not impede that prospect. In practice and in purported discharge of its responsibilities under that legislation the Crown proposed that

Ministers would exercise their powers under s 23 without taking any steps to assess whether any of the lands concerned were the subject of claims that had been made or might be made to the Waitangi Tribunal. If left unchallenged that stance would inevitably it seems have led to the permanent loss from Crown control of vast areas of land some of which are the subject of claims made to the Tribunal since 18 December 1986 or to be made in the future to the extent that there would have been nothing to inhibit the State-owned enterprises from selling off any of those lands. If sold off the Crown could not later simply retrieve the land so as to make reparation following any findings of the Waitangi Tribunal because it lacks powers of compulsory acquisition in such a case. In my opinion to act as the Crown proposes without any assessment of the impact of the Treaty claims pending or in reasonable contemplation must be regarded as prejudicing the prospects of proper reparation for well-founded grievances.

I am satisfied that the exercise of statutory power in the manner proposed by the Crown fails on the 2 counts referred to earlier. First, as a matter of proper process when considering the exercise of their powers under s 23 they have failed and will fail to comply with s 9 for the practical reasons just given; and second, in terms of the outcome the wholesale transfer of so much land would not only preclude reparation from that land to satisfy any recommendation of the Waitangi Tribunal directed to that land if the receiving State-owned enterprise had in the meantime parted with the land but would also preclude or

impede making reparation from other land in lieu of land previously disposed of by the Crown.

The proper exercise of the powers under s 23

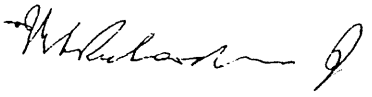
In the exercise of the options available to them under s 23 Ministers are required to satisfy themselves that any disposition of any land to a State-owned enterprise would not breach s 9. That does not mean that the orderly transfer of Crown lands to State-owned enterprises has to be suspended indefinitely in case at some time in the future a claim may be made to the Waitangi Tribunal or that the Crown must engage in extensive and protracted consultation with Maori interests in respect of each parcel of land it is contemplating transferring to a State-owned enterprise. On the contrary, if that were the inevitable consequence of any application of s 9 - which the Solicitor-General urged would produce an unworkable result - it would put in question the meaning which I have accorded to s 9 in the statutory scheme.

The answer lies in the application in the circumstances of this case of the principle of the Treaty that the Crown will act in good faith and fairly and reasonably towards the Maori people in considering the exercise of the powers under s 23. The Crown must be satisfied that any disposition to a State-owned enterprise would not preclude or unreasonably impede giving effect to any recommendation of the Waitangi Tribunal for the return of Crown land or for land in lieu where land has already gone out of Crown hands. From its own records of claims now

pending before the Waitangi Tribunal and of grievances made known to the Crown over the years which could reasonably lead to future claims to the Waitangi Tribunal it might be able to decide in an informed way what Crown lands could fairly in that Treaty sense be transferred outright to State-owned enterprises and what lands would need to be held or dealt with differently, or be the subject of continuing consultation with Maori interests. The first step is for the Crown to develop a scheme for the systematic consideration of the potential impact of the principles of the Treaty on various categories of Crown land in the light of our present judgments. At this stage of events and in the circumstances as they now are I consider it proper to expect the Crown acting reasonably and in good faith to offer the New Zealand Maori Council the opportunity to comment on what is proposed. Accordingly I concur in the orders proposed by the President which provide a timetable for that to be done.

As this case demonstrates, the enactment of the SOE legislation and the response of the New Zealand Maori Council in terms of the Treaty of Waitangi have brought out in a very direct way the depth of concern over longstanding grievances in relation to land. These events have also triggered off a huge increase in claims lodged with the Waitangi Tribunal, from 41 on 30 September 1986 when the SOE Bill was introduced to 77 on 18 December 1986 when the Act came into force to 87 as of 22 June 1987. There is both the opportunity and the need to respond to these circumstances and to address these grievances through the forum provided by statute for that purpose - the

Waitangi Tribunal - recognising that the Tribunal will require the resources to carry out its statutory responsibility and deal with claims expeditiously. As in the discharge of the responsibilies under this judgment, this will call for a constant application of the basic principle of the Treaty that each Treaty partner act in good faith fairly and reasonably within its sphere of responsibility.



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Perry Castle, Wellington, for New Zealand Coal Corporation Limited

Set 2

IN THE COURT OF APPEAL OF NEW ZEALAND CA 54/87

BETWEEN NEW ZEALAND MAORI COUNCIL

First Applicant

A N D GRAHAM STANLEY LATIMER

Second Applicant

A N D HER MAJESTY'S ATTORNEY-GENERAL

First Respondent

A N D THE HONOURABLE THE MINISTER OF FINANCE AND OTHERS

Second Respondents

A N D HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Third Respondent

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

Hearing: 4, 5, 6, 8 May 1987

Counsel: W D Baragwanath QC, Ms S Elias and J M Dawson for First and Second Applicants
D P Neazor QC, D A R Williams QC, R B Squire and Miss K McDonald for First, Second and Third Respondents
M F Quigg and Mrs R A Dewar for Coal Corporation of New Zealand Limited

Judgment: 29 June 1987

JUDGMENT OF SOMERS J

Introduction

By s.23(1) of the State-Owned Enterprises Act 1986,

it is provided that notwithstanding any Act, rule of law, or agreement, the Minister of Finance and the Minister for the time being responsible for a State enterprise may, on behalf of the Crown, transfer to one or other of the nine State enterprises named in the Second Schedule to the Act, assets and liabilities of the Crown relating to the activities to be carried on by that enterprise. Such assets include Crown land. By s.9 it is provided that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

The New Zealand Maori Council, established by s.17 of the Maori Community Development Act 1962, and Sir Graham Latimer, its chairman, who sues on his own behalf and on behalf of all persons entitled to the protection of Article II of the Treaty of Waitangi, have applied under Part I of the Judicature Amendment Act 1972 for a review of the proposed exercise of the statutory power to transfer all or any Crown land to a state owned enterprise. The application also referred to waters; but as no transfer of waters is proposed I shall refer only to Crown land. The claim is made against the Attorney-General on behalf of the Crown and 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. The Ministers of Finance, Energy, Lands and Forests and the Governor-General are also joined as respondents. The proceedings were removed into this Court by order of Heron J. made in the High Court on 1 April 1987.

The applicants are fearful that if transfers of lands, at present administered by the departments mentioned, are made to the State enterprises who are to carry on all or part of the commercial activities of those departments, claims pending before, and potential claims not yet made to, the Waitangi Tribunal for the restoration of some at least of such lands will be defeated or at least prejudiced. That is because the Tribunal has power under s.6(3) of the Treaty of Waitangi Act 1975 to make recommendations to the Crown and not to a State enterprise, and because an enterprise which is a transferee of Crown land may, where a claim was not submitted to the Tribunal before 18 December 1986, sell or otherwise dispose of the same with the consequence that it may be impossible to implement a recommendation for the return of land to former Maori owners.

The applicants seek declarations that the exercise of the power to transfer prior to giving them, and those they represent, reasonable opportunity for submission to and investigation by the Waitangi Tribunal of existing and potential claims would be unlawful; and, by amendment, that the transfer of assets en bloc to State enterprises without establishing any system to consider in relation to each asset whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful. It is admitted by the respondents in answer to an interrogatory that the Crown has established no system to consider in relation to each asset to pass to a State enterprise whether

any claim by Maori claimants of breach of the principles of the Treaty of Waitangi existed.

The claims are opposed on two grounds; first, that s.27 of the State-Owned Enterprises Act authorises the transfer of Crown land to State enterprises whether or not claims have been made to the Waitangi Tribunal about any such land, and secondly, that proposed transfers of Crown land to State enterprises are not inconsistent with the principles of the Treaty of Waitangi.

The case then not only involves the familiar function of interpreting a statute, but wider and more important questions about the Treaty of Waitangi and the ascertainment of those principles of it to which Parliament has given statutory recognition. I do not intend to say more on these matters than is necessary for the disposal of the case. But even within that limitation the case has included consideration of the social and political history of New Zealand and is one of great importance not only to the parties to it but also for the impact it may have on the social future of the country.

Examples

In accordance with the minute of this Court of 15 April 1987 the applicants proffered three examples to illustrate their contention that transfers of Crown land to State enterprises will be inconsistent with the principles

of the Treaty of Waitangi together with particulars specifying how, in the contention of the applicants, those principles will be contravened by the proposed transfers. I set out those examples and particulars shortly, as they were explained to us by Mr. Baragwanath. It is not the function of this Court to make any findings of fact or to evaluate the substance of the claims put forward and the following narrative is not to be taken as expressing any opinion upon the merits of the three cases.

The first example concerns a strip of land bounded on the East by the sea and lying between the mouth of the Otago Harbour and Nugget Point. It originally comprised nearly 250,000 hectares and was called the Otakou Block. According to the evidence some part of this area is still unalienated Crown land. The whole block was acquired from the Ngai Tahu in the 1840's by the New Zealand Company. We were told that the Crown waived its right of pre-emption so as to permit the Company to buy the land. A Government agent who assisted with, and oversaw, the negotiations for purchase assured the Maori owners that one-tenth of the total purchase would be reserved for their benefit, and so informed the Crown. The Company's charter was subsequently surrendered to the Crown but no reservation of land or compensation in lieu of reservation was ever made. The failure of the Crown to honour the promise made by its agent when the land was acquired by the Company was said to be a breach of the duty of the Crown under the Treaty of Waitangi to protect the Maori interests.

The Ngai Tahu made a claim about this matter and about other South Island lands to the Waitangi Tribunal on 16 December 1986, that is to say, before the date of the assent to the State-Owned Enterprises Act on 18 December 1986. Mr. Baragwanath submitted that if a transfer of the land still in Crown ownership was now made to a State enterprise the prospect of a recommendation by the Tribunal for its return to the Ngai Tahu would be diminished and if made the Crown would be less likely to accept it. He also submitted that the transfer of other Crown lands unaffected by claims would prevent the acceptance of a recommendation that other land should be provided by way of compensation.

The second example concerned some 1,600 hectares of Crown land which is part of the former ancestral lands of the Ngati Tama in Northern Taranaki. Following the Taranaki wars of the 1860's much Maori land was confiscated under the provisions of the New Zealand Settlements Act 1863, including, we were told, the lands the subject of this example. In 1927 a Commission under the chairmanship of Sir William Sim was established to consider whether the confiscations exceeded in quantity what was fair and just. The Commission went further and considered the justice of the confiscations. Paras. 14, 15 and 16 of the Commission's report are as follows -

> 14. Both the Taranaki wars ought to be treated, we think, as having arisen out of the Waitara purchase, and judged accordingly. The Government was wrong in declaring war against the Natives for the purpose of establishing the supposed rights of the Crown under that

purchase. It was, as Dr. Featherston called it, an unjust and unholy war, and the second war was only a resumption of the original conflict. Although the Natives who took part in the second Taranaki war were engaged in rebellion within the meaning of the New Zealand Settlements Act, 1863, we think that, in the circumstances, they ought not to have been punished by the confiscation of any of their lands.

15. The figures given by Mr. Moverley, of the Land Office, New Plymouth, show that the total area originally confiscated was 1,275,000 acres. Of this, 557,000 acres were purchased from the Natives and paid for by the Government, 256,000 acres were returned to the Natives, thus leaving 462,000 acres as the total area finally confiscated.

16. It is difficult, if not impossible, to arrive at any satisfactory conclusion as to the value of the land at the date of its confiscation, and our recommendation is that the wrong done by the confiscations should be compensated for by making a yearly payment of £5,000, to be applied by a Board for the Benefit of the Natives of the tribes whose lands were confiscated.

The Government paid and has continued to pay the annual sum recommended by the Commission (it was later increased) to a Trust Board established for the benefit of the tribes whose land had been taken. There is evidence however that this compensation was never regarded by those dispossessed as either satisfactory in form or sufficient in amount. Inconsistency with the Treaty principles was particularised as being the failure of the Crown to honour its obligations to guarantee to the Maori their undisturbed possession of their land.

We have been told that a claim has been made to the Waitangi Tribunal seeking a recommendation for the return of the land or adequate compensation in the form of land or money. As in the case of the Otakou claim it is said that a transfer of the land to a State enterprise will prejudice the result of a successful claim and a transfer of other

lands may prevent implementation of a recommendation that other land should be provided as a just compensation.

The third example concerns certain lands alongside the Muriwai Beach which were ancestral lands of the Ngati Whetua and include wahi tapu of great spiritual significance to that tribe.

By a proclamation made on 25 October 1934 under the Public Works Act 1828, lands of the Ngati Whetua, in total approximately 9,800 acres, were taken for sand dune reclamation purposes. Records produced suggest that compensation of £754.10.0 was paid. By a declaration made on 27 February 1957 under s.35 of the Public Works Act 1927, the land, save for a small area of just over two and a half acres, was declared to be Crown land under the Land Act 1948. In 1959 the lands were set apart as State Forest. They are now known as the Woodhill State Forest.

Section 11 of the Reserves and Other Lands Disposal Act 1934 vested four Maori tribal burial grounds in the Crown for sand dune reclamation purposes 'subject to the right of aboriginal Natives interested in such lands to bury deceased Natives therein'. The section recited that it was necessary to vest the lands in the Crown for sand dune reclamation purposes and the agreement of the Maoris, through their representatives, to such vesting for such purposes subject to the rights mentioned. By a declaration made on 16 September 1955 under the Public Works Act 1928

these four pieces of land were declared Crown land subject to the Land Act 1948 and subject to the burial rights mentioned in the 1934 Act. It seems that these four areas are now also part of the State Forest.

These transactions are said to be in breach of the principles of the Treaty as being cases of a failure to protect the Maori owners and to deal fairly with them.

No claim has yet been made to the Waitangi Tribunal in respect of the lands referred to in this example. We were told however that a claim would be made, and would include the proposition that there was a breach of a Treaty obligation owed by the Crown to offer to return the lands to the dispossessed owners when the same were no longer needed for the purposes for which they were taken, and a further breach of an obligation to protect the areas of wahi tapu from forestry development.

The State-Owned Enterprises Act 1986

The object of the State-Owned Enterprises Act is to authorise the formation of companies whose shares are held on behalf of the Crown and whose principal objective is to operate as successful businesses carrying on certain government activities. Section 23(1) of the Act provides that the Minister of Finance and the Minister for the time being responsible for the State enterprise 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.

These provisions patently confer a power only and the Ministers may decide, in respect of any particular asset, not to exercise any of the powers given to them.

Section 23(4) provides that an asset or liability may be transferred to a State enterprise whether or not any Act or agreement relating to the asset or liability permits such transfer or requires any consent to such a transfer. Thus the consent of a lessor to the transfer of a lease is not necessary save in the case excepted by s.23(10) which provides that Maori land leased to the Crown under a lease administered by the Minister of Forests shall not be transferred except with the consent of the lessor or where the lease so permits; in such a case the Minister may enter into a management agreement under s.23(1)(b).

Section 25 provides that a State enterprise receiving a transfer of Crown land will ultimately receive a certificate of title and will be deemed to be seised of an

estate in fee simple in possession. Section 27 of the Act provides as follows -

> (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.

It is around this provision and s.9, already mentioned, both of which were inserted in the Act at a late stage, that the case largely turns.

Section 9

Section 9 of the State-Owned Enterprises Act 1986 provides -

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

Two points, accepted by both sides, can be stated at once. First, the texts of the Treaty set out in the Treaty of Waitangi Act 1975 (as amended in 1985) are to be taken as authoritative. This seems self-evident; they have been settled by Parliament in a public statute devoted to the Treaty. The second is that the principles of the Treaty referred to in s.9 cannot be different from those referred to in s.6 of the Treaty of Waitangi Act. This too seems plain enough for like reasons. It carries with it a corollary. While the Waitangi Tribunal has, under s.5(2) of the Treaty of Waitangi Act, 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 for the purposes of that Act, this Court has the function and duty to decide whether any act taken or proposed to be taken under the State-Owned Enterprises Act is inconsistent with the principles of the Treaty and hence

to decide, so far as is necessary for the case in hand, what those principles are. Such a finding by this Court will of course be binding and to the extent that it is material in any case should be followed by the Waitangi Tribunal as a declaration of the highest judicial tribunal in New Zealand.

The formation of State enterprises is not, and was not suggested to be, in any way contrary to the Treaty principles. Under s.13 of the State-Owned Enterprises Act the shareholding Ministers may give certain directions to the board of any of the nine enterprises to whom Maori land may be transferred about the statement of corporate intent required by s.14 to be made by the enterprise annually. Before doing so the shareholding Ministers are to have regard to Part I of the Act which includes s.9. That aside, the only acts of the Crown contemplated by the State-Owned Enterprises Act are those which may be undertaken by Ministers, on behalf of the Crown, under s.23, that is to say the transfers, leases etc., or authorities empowered by that section. It follows that in its relation to s.23, s.9 must be concerned primarily with principles of the Treaty of Waitangi derived from Article II which relates (in the English text) to lands and other property. If on its true construction however the State-Owned Enterprises Act evinces an intention that a particular transaction is not inconsistent with the Treaty principles then s.9 will not prevent its being carried out.

The Treaty of Waitangi

The Treaty of Waitangi was signed on 6 February 1840 by Captain Hobson on behalf of the Crown and assented to by the mark of a number of Maori Chiefs, according to Hobson 46 in all, although later writers give different figures. Subsequently other chiefs adhered to it so that in the end it bore the approval of about 500 in all.

The Treaty comprises a preamble, three short Articles and a declaration by the chiefs of their acceptance and entry into it 'in the full spirit and meaning thereof'. The Preamble recites the anxiety of the Crown to protect the just rights and property of the Native Chiefs and Tribes and to secure to them the enjoyment of Peace and Good Order and the Crown's desire to establish a settled form of Government. By the first Article (English text) the signatory Chiefs 'cede to Her Majesty The Queen of England absolutely and without reservation all the rights and powers of Sovereignty' which the Chiefs respectively 'exercise or possess or may be supposed to exercise or possess over the respective Territories as the sole sovereign thereof'. Where the word 'Sovereignty' is used in the English text the word 'Kawanatanga' is used in the Maori version. This has the connotation of government or governance. The concept of sovereignty as understood in English law was unknown to the Maori.

We were referred to a number of valuable commentaries on this part of the Treaty and to the several

determinations of the Waitangi Tribunal. They provide grounds for thinking that there were important differences between the understanding of the signatories as to true intent and meaning of Article I of the Treaty. But notwithstanding that feature I am of opinion that the question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the 'full sovereignty of the Queen over the whole of the North Island' by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery. These proclamations were approved in London and published in the London Gazette of 2 October 1840. The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament.

The second and third Articles of the Treaty (English version), are as follows -

Article the Second

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tributes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tributes and the individual Chiefs yield to Her Majesty the exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

There are differences between the English and the Maori texts of Article II. Thus there is no specific reference in the Maori text to fisheries. 'Full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties' in the English text are rendered by the words 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' in the Maori text. The words, 'te tino rangatiratanga', according to material put before us, has reference to the unqualified exercise of chieftainship and the subject matter can be translated (from Maori to English) as being over their lands, over their villages and over their treasures', this last word being the universal sense of 'taonga'.

I do not think it necessary to discuss the differences between the two texts and the possible different understandings of the Crown and the Maori in 1840 as to the meaning of the Treaty. They are issues best determined by the Waitangi Tribunal to whom they have been committed by Parliament. The instant case is about land and for present purposes the undisputed tenor of each text is agreement that indigenous possession or control of land was guaranteed by the Crown.

The received view of the law is that the Treaty of Waitangi does not form a part of the municipal law of New Zealand as administered by its Courts except to the extent it is made so by statute. This proposition is referred to by the Privy Council in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] A.C. 308, where Viscount Simon L.C. delivering the judgment of the Board said -

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law...So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him...even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactment (pp.324, 325, 327).

To the same effect is the statement by Turner J. in In re The Bed of the Wanganui River [1962] N.Z.L.R. 600, at 623 when he observed that the obligation of the Crown under the Treaty of Waitangi 'was akin to a treaty obligation, and was not a right enforceable at the suit of any private person as a matter of municipal law by virtue of the Treaty of Waitangi itself.'

Notwithstanding some criticisms of these opinions, I am of opinion that they correctly set out the law. Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament.

This is not to suggest that the courts have ever supposed that the Crown was not under an obligation to have regard to the Treaty although that duty was not justiciable in this country, at least when the dispute was not with the Crown in respect of its prerogative or royal rights. In re Lundon and Whitaker Claims Act 1871 (1872) 2 N.Z.C.A. 41 Arney C.J., delivering the judgment of the Court of Appeal said, at p.49, 'The Crown is bound both by the common law of England and by its own solemn engagements to a full recognition of Native proprietary right'; in Nireaha Tamaki v. Baker (1894) 12 N.Z.L.R. 483 (not affected on this point by the appeal reported [1901] A.C. 561) Richmond J. for the Court of Appeal said, at p.488, 'The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice'; Baldick v. Jackson (1911) G.L.R. 398 Stout C.J. observed of a claim that a whale was a royal fish under a statute of Edward II that it 'would have been impossible to claim without claiming it against the Maoris for they were accustomed to engage in whaling, and the Treaty of Waitangi assumed that their fishing was not to be interfered with'; and in Re Bed of Wanganui River [1962] N.Z.L.R. 600, Turner J. at p.623 said, 'Upon the signing of the Treaty of Waitangi, the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and

undisturbed possession of all customary lands to those entitled by Maori custom'.

In the instant case, however, no difficulty of the kind mentioned in Te Heuheu's case arises. Municipal law, that is to say, s.9 of the State-Owned Enterprises Act 1986, recognises the Treaty of Waitangi by expressly limiting the Crown's power to act under the 1986 Act by reference to the Treaty principles.

The difficulty that does arise is that s.9 does not refer to acts of the Crown inconsistent with the Treaty, but to acts inconsistent with its principles. The identification of those principles is not easy. Those advanced by each side in argument bear little similarity. The Crown suggested five: (1) that a settled form of Government was desirable and that the British Crown should exercise the power of government; (2) that the power to govern included the power to legislate for all actions relating to peace and good order; (3) that Maori chieftainship over land, forests, fisheries and other treasures were not extinguished and would be protected; (4) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of the sale of land to persons other than the Crown; (5) that the Crown should have the pre-emptive right to acquire land from the Maoris at agreed prices should they wish to dispose of it. Those principles advanced by the applicants were (1) a duty on the Crown to protect to the

fullest extent practicable; (2) a duty to consult in relation to acts which might effect taonga; (3) to maintain and uphold the honour of the Crown; (4) to make good past breaches; (5) to return land for land; (6) to protect the Maori way of life; (7) that the parties would be of equal status; (8) that where the Maori interest in the taonga is adversely affected, the Treaty gives a priority to Maori values.

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen if, as has occurred, its terms were broken.

It is this feature which I think dominates most discussions about the Treaty and which is at the heart of s.9 of the State-Owned Enterprises Act. The primary provision of the Treaty relevant to the present case appears to me, as I have said, to be the guarantee of the full exclusive and undisturbed possession of the property of the Maori of whatever kind so long as they wish to retain it. Breaches of this undertaking have occurred.

When on 14 August 1839 the Marquis of Normanby, on behalf of the Government of Great Britain, wrote his

instructions to Captain Hobson he postulated that 'All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the islands'. This was a reference to the admission by the Government of native rights binding on the faith of the British Crown and the need for the 'free and intelligent consent of the natives expressed according to their established usages first being obtained'. It was upon those principles that the Crown entered into the Treaty and upon which it must be supposed the Maoris also adhered to it. Each party in my view owed to the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other.

A breach of a Treaty provision must in my view be a breach of the principles of the Treaty. It is hardly to be supposed, however, that in enacting s.9 of the State-Owned Enterprises Act Parliament contemplated that any breach of an actual provision of the Treaty would be likely to occur in the exercise of the powers conferred on the Crown. What must have been in contemplation was that proper redress for past breaches, the possible existence of which is postulated in the Treaty of Waitangi Act, must be prevented. That is indicated by the provisions of s.27 of the Act and by the provisions of the Treaty of Waitangi Act to which I shall presently refer. The obligation of the parties to the

Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s.9. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other - a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the courts but the claim to it can be submitted to the Waitangi Tribunal.

If, as I think is the case, Parliament did not envisage a direct breach of a provision of the Treaty by the exercise of powers to transfer Crown land, but did recognise that it would be contrary to the principles of the Treaty to allow a situation to arise in which proper redress or proper consideration could not be given to past breaches, it follows, subject to any other provision of the Act which shows how those principles are to be observed, that the transfer of land to a State enterprise when Treaty claims, capable of determination by the Waitangi Tribunal, are pending or known to exist would be inconsistent with the principles of the Treaty.

But while each side is entitled to the fullest good faith by the other I would not go so far as to hold that

each must consult with the other. Good faith does not require consultation although it is an obvious way of demonstrating its existence.

The Treaty of Waitangi Act

The object of the Treaty of Waitangi Act 1975 is explained in its Long Title and Preamble -

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.
>
> WHEREAS on the 6th day of February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand: And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

As mentioned the two versions of the Treaty, English and Maori are set out in the First Schedule. In exercising its functions the Tribunal is to have regard to both texts, and, for the purposes of the Act, has the exclusive authority to determine the meaning and effect of the Treaty as so embodied and to decide issues raised by the differences between them.

The Waitangi Tribunal is established by s.4 and by s.6 has the duty to inquire into claims submitted to it under that section. Section 6 (as amended in 1985) provides that where any Maori claims that he or she, or any group of which he or she is a member, is likely to be prejudically affected by any ordinance, act, regulations or other statutory instrument passed or made on or after 6 February 1840, or by any policy or practice (whether or not still in force) adopted or proposed to be adopted on behalf of the Crown, or by any act done or omitted on or after 6 February 1840 or proposed to be done or omitted, by the Crown and that the matter complained of was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Waitangi Tribunal. If the Tribunal finds the claim well founded it may 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.

The Act thus gives to those entitled to submit a claim an opportunity to persuade the Tribunal not only that Crown policy or practice is or has been inconsistent with the principles of the Treaty, but also that the passing of statutes or delegated legislation can be so described. In that part of its function the Tribunal has to ascertain the relevant principles and then make a value judgment in relation to the facts which it finds.

For present purposes the important feature is the establishment of a Tribunal having the jurisdiction described and the power to recommend compensatory and preventive action to the Crown. The Act provides a forum, where none existed before, for the ventilation of individual and tribal complaints, although it gives no guarantee of relief. In the case of well-founded claims it provids the only available means of securing compensation or redress for breaches of the Treaty or its principles.

The existence of claims already made and claims which may be made in the future is recognised in s.27 of the State-Owned Enterprises Act and that recognition points to at least one area Parliament had in mind when it enacted s.9 which limits the powers of the Crown.

Section 27

It is now necessary to consider s.27 of the State-Owned Enterprises Act in more detail for it was the primary submission of the Crown that s.27 dealt exhaustively with the transfer of land to a State enterprise - that it covered both cases where a claim about land had been made to the Waitangi Tribunal before 18 December 1986, and cases where a claim about land was made on or after that date. In short it was submitted that s.9 has no application to, and does not control, such transfers of Crown land further than is expressed in s.27. This is another way of saying

that Parliament has made its own dictionary. By making provision about claims to the Waitangi Tribunal, it has in effect said that transfers of land cannot be inconsistent with the principles of the Treaty.

No difficulty appears to me to arise in the case of the proposed transfer of Crown land to a State enterprise where a claim concerning that land was made to the Waitangi Tribunal before 18 December 1986. Section 27(1) provides that where land is transferred to a State enterprise, and before that date a claim has been submitted to the Tribunal, the land shall continue subject to that claim; the State enterprise shall not transfer the land or any interest therein to any person other than the Crown; and 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. The consequence of a finding by the Waitangi Tribunal under s.6 of the Treaty of Waitangi Act is set out in s.27(2) the provisions of which I set out again -

> (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.

The effect of this provision, is to leave the Crown in a position where it can give effect to any recommended action about the future of the land which may be made by the Waitangi Tribunal.

It was submitted by Mr Baragwanath that s.27(1) did not apply to cases of the proposed transfer of Crown land where it was known that a claim had been made to the Waitangi Tribunal about that land before 18 December 1986; it applied only to cases of transfers made to a State enterprise by mistake - that is, transfers made in ignorance of the existence of such a claim.

I do not think s.27(1) can be so confined. Section 27(1)(a) provides that land subject to a claim made before 18 December 1986 'shall continue to be subject to that claim'. These are perfectly general words and there is no apparent reason to read them down. Once a finding is made by the Waitangi Tribunal the land may be declared to be resumed by the Crown, or there may be a waiver of the restrictions imposed by s.27(1)(a) and (b) on transfer of the land by the State enterprise and on the prohibition of the issue of a title. The combined effect of s.27(1) and (2) is to permit a transfer although a claim has been made and, in effect, to revoke or confirm it depending on the recommendation of the Tribunal and the response made to it.

These provisions are, in effect, a direct statement that a transfer of land, against which a claim has been

made, is not contrary to s.9. That is the only way the two sections can be sensibly read together.

This is reinforced by other considerations arising from s.27(1). Where a claim has been made about a piece of land before the date mentioned the State enterprise 'shall not transfer that land or any interest therein to any person other than the Crown' and no District Land Registrar shall register the State enterprise as proprietor of the land or issue a certificate of title for it. For these restrictions to be effective both the State enterprise to whom the land is transferred by the Crown, and the District Land Registrar need to know that a claim has been made before 18 December 1986. This must mean that the Crown is to make enquiry as to the existence of a relevant claim and notify the State enterprise to whom the land is transferred and the District Land Registrar of the fact. Such information must be readily obtainable from the Waitangi Tribunal. The possibility of mistake of the kind suggested by Mr Baragwanath cannot have been reasonably in the contemplation of Parliament.

I am accordingly of opinion that a transfer of Crown land under s.23 is lawful and not contrary to s.9 where a claim about land was made to the Waitangi Tribunal before 18 December 1986.

Section 27, however, says little about the case of claims to the Waitangi Tribunal which might be made after

18 December 1986. We were told that 32 claims have been submitted since that date and many more may yet be made. It will obviously be a long time before these are determined, for there are presently four claims part heard by the Tribunal, and 56 others which were submitted before the passing of the 1986 Act whose hearings have not yet commenced.

It was submitted by the Solicitor-General that Parliament intended to give particular protection to claims made before 18 December 1986, but in the case of claims made after that date no greater protection than is afforded by s.27(2), that is to say, the prospect, following a recommendation of the Waitangi Tribunal, of a declaration that the land transferred be resumed by the Crown. In so legislating, it was submitted, Parliament had made it clear that it assented to the transfer to a State enterprise of land to which a claim had not been submitted to the Waitangi Tribunal before 18 December 1986; that assent must be construed as indicating that such a transfer would not be contrary to s.9 of the Act.

This is a powerful submission. I am of opinion however that it faces an insuperable objection. Section 9 is contained in Part I of the Act under the heading 'Principles' and in a part of the Act which manifestly deals with principles. It is effectively a paramount provision - 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the

Treaty of Waitangi'. Its importance is emphasised by s.29(3) of the Act which provides that s.29 and ss.23 to 28 shall have effect, and assets and liabilities may be transferred pursuant to the Act, notwithstanding any restriction, prohibition, or other provision contained in any Act, rule of law of agreement that would otherwise apply. The words 'any Act' plainly refer to any Act other than the State-Owned Enterprises Act. All restraints are put to one side - only that in s.9 provides a general fetter on the exercise of the powers of transfer of Crown land to a State enterprise.

The great bulk of Maori grievances relate to land. The Crown was unable to suggest any others relating to transfer of assets or liabilities of the Crown to a State enterprise under the Act. If, as I would hold, the principles of the Treaty include an obligation to redress past breaches of the Treaty and if, as the Crown contends, s.27 authorises a transfer of land even though there are grievances known to the Crown but not the subject of a claim to the Tribunal made before 18 December 1986, s.9 would be virtually bereft of any real application despite the apparent predominance of its provisions.

For that simple reason I would reject the Solicitor-General's submission that s.27 authorises transfer without regard to claims not made by 18 December 1986 or that in some way s.9 should be read down so as not to inhibit such transactions.

I have already discussed the alternative contention of the Crown, advanced by Mr. Williams, that immediate transfer of Crown land which may later be the subject of claims to the Waitangi Tribunal is not contrary to the principles of the Treaty of Waitangi. For the reasons already given I am unable to accept the proposition that the Treaty places no restriction on the Crown's use or its alienation of Crown land where the acquisition of that land was, or was arguably, in breach of the Treaty and was not the subject of a claim to the Waitangi Tribunal made before 18 December 1986.

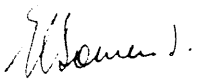
Conclusion

I think the case of each party has been put too high; the Crown in asserting that transfers may be made of land against which no claim to the Tribunal was timeously made without any consideration of the likelihood that claims will be made; the applicants in asserting a right and corresponding duty of consultation before transfers of land are made.

Section 23 confers a statutory power on the shareholding ministers, exercisable on behalf of the Crown, to transfer to, or otherwise involve, State enterprises in the administration of Crown land on such terms and conditions as may be agreed between the Crown and the enterprise. I do not think that, consistently with s.9, the Crown may deal with Crown land without regard to the

possibility of claims being made on or after 18 December 1986. It seems to me quite unlikely that claims about Crown land which have been made, or which may be made, after that date, have not been the subject of some claim or stated grievance about a breach of the Treaty of Waitangi or its principles in the past. I am of opinion that before exercising the statutory power in s.23 in cases in which a claim has not been submitted to the Waitangi Tribunal before 18 December 1986 the Crown must examine its records concerning each particular piece of land. Where it is found that a claim or grievance of such a kind has been made the land ought not to be transferred to a State enterprise unless it is plain that the claim is not well founded or satisfactory safeguards are provided. The applicants are entitled to some security about these matters.

For these reasons I concur in the orders proposed by the President.



IN THE COURT OF APPEAL OF NEW ZEALAND CA 54/87

BETWEEN NEW ZEALAND MAORI COUNCIL

First Applicant

A N D GRAHAM STANLEY LATIMER

Second Applicant

A N D HER MAJESTY'S ATTORNEY-GENERAL

First Respondent

A N D THE HONOURABLE THE MINISTER OF FINANCE AND OTHERS

Second Respondents

A N D HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Third Respondent

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

Hearing: 4, 5, 6, 8 May 1987

Counsel: W D Baragwanath QC, Ms S Elias and J M Dawson for First and Second Applicants
D P Neazor QC, D A R Williams QC, R B Squire and Miss K McDonald for First, Second and Third Respondents
M F Quigg and Mrs R A Dewar for Coal Corporation of New Zealand Limited

Judgment: 29 June 1987

JUDGMENT OF CASEY J

Background and Pleadings

The New Zealand Maori Council established under the

Maori Community Development Act 1962 has among its functions the conservation and advancement of virtually every aspect of Maori life. It claims to represent and speak for a large proportion of Maori people and its standing (along with that of its Chairman in his own right) to bring these proceedings could not be challenged. The implementation of the State-Owned Enterprises Act 1986 will involve the transfer of large areas of Crown assets to the new Corporations and the Applicants fear that this will prejudice the ability of claimants to the Waitangi Tribunal to recover compensation in respect of past conduct by the Crown found to be in breach of the principles of the Treaty of Waitangi. By the Treaty of Waitangi Act 1975 that Tribunal was set up to consider such claims and, if established, to make recommendations to the Government either for the return of land or for compensation. It is also empowered to consider and report on the effect of prospective legislation in relation to the Treaty.

The State-Owned Enterprises Act provides for the setting up of independent Corporations under the management of Boards with shares held by an appropriate Minister of the Crown, who has under s.13 a very general power of control in respect of the provisions of corporate intent set out in s.14, and of dividend payments. Under s.23 he is empowered, notwithstanding any Act, rule or law or agreement, to transfer Crown assets and liabilities to the Corporation, or grant it leases, licenses and other rights or permits.

These transactions are to be for such consideration and on such terms and conditions as the Minister may agree with the Corporation. Sec.28 allows the Governor-General, by Order in Council, to vest land for the purpose of facilitating the transfer of assets and liabilities pursuant to the Act.

From the affidavit of Mr D K Hunn (Deputy Chairman of the State Services Commission) it appears that a very large proportion of land - about 10 million hectares out of a total of 14 million - presently owned by the Crown will pass to the various Corporations established under the Act. There was concern by Maori that this could happen without any account being taken of land or water that was or could be the subject of claims before the Tribunal. That body issued an Interim Report to the Minister of Maori Affairs on 8 December 1986 in the course of its hearing of the Muriwhenua claims. This, along with other representations, led to a last-minute amendment of the State-Owned Enterprises Bill by the introduction of ss. 9 and 27. We were invited to refer to Hansard from which it appears that the Bill's sponsors thought these sections resolved the problem.

The Act binds the Crown (s.3), and s.9 (appearing in Part I headed "Principles") reads :

> "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."

Under Part IV ("Miscellaneous Provisons") s.27 provides :

"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."

Under s.29(1) various expressions are defined and "Assets" and "Transfer" are given very wide meansings, while subsection (3) provides that ss.23 to 28 (generally relating to the transfer of assets) are to have effect, and assets and liabilities may be transferred pursuant to the Act, notwithstanding any restriction, prohibition or other provision contained in any Act, rule of law, or agreement that would otherwise apply. Contrary to a suggestion from the Solicitor-General I do not read this as affecting the provisions of s.9 which, for reasons I discuss later, I regard as of general application to the whole Act.

The Applicants issued proceedings in the High Court against the Crown, appropriate Ministers and the Governor-General as Respondents, seeking review of the proposed exercise of the statutory power to transfer any of the Crown assets comprising lands or waters to the Enterprises; and they ask for the following declarations (the second being added without objection during the hearing in this Court) :

> "(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."

The Statement of Claim alleges numerous breaches of the principles of the Treaty of Waitangi by the Crown over the years since it was signed in 1840, and that until the enactment of the Treaty of Waitangi Act 1975 and its retrospective extension by Amendment in 1985 to 6 February 1840, there was no effective forum for resolving Maori claims in respect of such breaches. Many claims have now been made and Mr Verrity (an officer of the Tribunals Divison) deposed on 29 April 1987 that there are presently 88 lodged, 55 of them since the 1985 Amendment. It is further alleged that since 1840 there have been numerous petitions to Parliament, claims in Court and representations to State Departments concerning breaches of the Treaty, in relation to which claims have yet to be filed with the Tribunal, and many of them (actual and potential) relate to land and water presently in Crown ownership. The latter has failed or refused to give any assurance in response to representations that no assets be transferred until appropriate enquiry has been made to ensure that the transfer would not be inconsistent with the principles of the Treaty. Such conduct is said to be inconsistent with Article II of that Document. The English language version

(which can be taken as appropriate for this purpose) is pleaded as follows :-

> "Her Majesty the Queen .... confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ...."

This is alleged to be an undertaking by the Crown to protect the interests of the Maori people of New Zealand.

The State-Owned Enterprises Act stipulates that the principal objectives of every Enterprise are to operate as a successful business and to be as profitable and efficient as comparable busineses. The Applicants say that because of such purposes, those bodies (which are not subject to s.9) would lack the Crown's capacity to give effect to the principles of the Treaty. If assets are transferred to them, and if their return to the claimants be recommended by the Tribunal, it would be necessary for the procedures described in ss.27(2) and (3) to be gone through. Such a change of ownershipship could therefore create a substantial impediment to the performance of the Crown's treaty obligations. It was also submitted that an unrestricted transfer to an Enterprise would not prevent that body disposing of the asset to a third party. In the case of succesful claims to it made after such disposal, any real

prospect that asset being available for return to the claimant would be eliminated. Nor would it be available as compensation in substitution for other land should that course be recommended by the Tribunal. Sec.27 applies only to assets still held by the Enterprise at the time its finding is made.

The Respondents reply in their Statement of Defence that the Crown is not by law required to give or act upon such an asurance as that sought, and that any transfers to Enterprises of assets the subject of existing or future claims will be authorised by and not in breach of the provision of the Act.

The proceedings were removed from the High Court to this Court by Heron J, and an order he made preventing any dealings with the assets was extended pending disposal of the case. Particulars were ordered to be given of three examples of alleged breaches of the Treaty which are or could be the subject of claims before the Tribunal. These were introduced at the hearing, at which the Coal Corporation was also represented. It asked to be excluded from any order this Court might make affecting the transfer of Crown assets other than land, because its concern is principally in the acquisition of mining rights. Its position therefore differs from that of other State-Owned Enterprises. We were informed by Mr Baragwanath at the end of the hearing that the Tainui interests in the Waikato

likely to be concerned with this question were not represented, and it was accepted that if any order was likely to affect the Corporation's position there would be an opportunity for written submissions. In the meantime it was able to operate satisfactorily under an authorisation from the Minister of Energy.

The Applicants brought to the hearing a mass of affidavit evidence, and the Respondents raised a preliminary objection to its introduction. The bulk of it was historical material and we accepted it as providing within limits a useful background to the relatively narrow issues involved in this application. The three examples of potential Tribunal claims illustrated different breaches of the Treaty alleged - Taranaki, unjustified land confiscation; Otakou, the Crown's failure to honour undertakings on voluntary land purchase; and Woodhill, its action in keeping land for purposes other than those agreed with the Maori owners when it was first acquired.

Mr Baragwanath stressed at the outset that this material was not introduced with a view to the Court making a pronouncement about the existence of Treaty breaches. Those are matters for the Tribunal. We were referred to a number of its decisions and although they cannot bind us, some of them deserve attention for their careful analysis of the Treaty and its principles. Much of the academic and historical material they refer to has also been made available to us.

Effect of Section 9

From the outset the Applicants took the simple stand that s.9 means what it says - nothing in the Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty. Therefore it applies to every power the Crown or its Ministers are given under the Act, and restricts their use only to those actions which can be effected without such inconsistency. The Solicitor-General in his primary submission emphasised what he called "the enormous practical fetter" such a reading of the section places on the administration of the Act. If it is interpreted as dominating the entire statute then he said the result would be "clearly at variance with the purpose of the legislation" to adopt the words used by Woodhouse J in Reid v Reid [1979] 1 NZLR 572, 579. In that situation, the general words of the section should be read down to take out of its ambit Maori land grievances, for which s.27 can be seen as providing security in the nature of an exclusive code.

He submitted that if all transfers must be deferred pending enquiry into the assets as the subjects of possible Tribunal claims, the effect would be to stultify the whole purpose of the Act. This much can be deduced from the affidavits of Mesrs Hunn and Verrity dealing respectively with the huge area of land involved and the pending work before the Tribunal, which to date had determined only six claims. But from the same material (i.e. Mr Hunn's

affidavit) it can also be deduced that if land is removed from the ambit of s.9 it would be left with no appreciable relevance. Very little else in the Act would impinge on the Treaty principles. The whole thrust of Article II was the protection of Maori land and the uses and privileges associated with it.

The Tribunal's concern in its interim report of 8 December 1986 was with actual and potential land claims. To a considerable extent these have been taken care of by the inclusion of s.27, covering land subject to claims while still held by the Crown or the Enterprise but, as mentioned above, the Applicants fear that once it has gone to the latter, it is less likely to be available as compensation than if it remained in Crown ownership. And former Crown land transferred to others by the Enterprise will, for all practical purposes, never be available. Throughout, they have stressed the special value of land to Maori people - economic, social and spiritual - and this clearly emerges from the Tribunal decisions. Accordingly, monetary compensation is often not a satisfactory alternative. Indeed, even in purely economic terms it has been unsatisfactory, if the examples we were given are any guide. What may have been adequate payment at the time is seen as derisory today, adding to the sense of grievance displayed in some of the affidavits.

Mr Baragwanath also emphasised that effectively the Maori people had a scant five months to consider and bring forward claims going back to 1840 before the State-Owned Enterprises Act was passed. It was not until rather late that its full impact was realised on this newly-granted ability to bring claims for past breaches to the Tribunal. As he put it, Maori had to wait 140 years to get an effective forum for the resolution of their grievances, so it is not unreasonable to ask the Crown to defer transferring assets until enquiries into likely claims could be completed. Indeed, he thought that with full co-operation from the appropriate departments, no more than three months would be needed for that purpose. This might be optimistic having regard to the depth of consultation customarily required, the absence of a single body able to speak for all Maoridom and, indeed, the very elastic concept of "Maori", now defined simply as a person of the Maori race or descent.

If s.9 has no effect on Maori land claims it is reduced to a token gesture of goodwill, because I have already remarked that in real terms there seems to be little else on which it can have any practical effect. Nor is it simply an exhortation to Ministers. Its terms are peremptory, going well beyond a requirement that they merely take the treaty principles into account when reaching a decision. For s.27 to have the exclusive effect asserted by the Solicitor-General,

I would have expected Maori land claims to be excepted from the operation of s.9 either by a specific statement there, or by an appropriate reference in s.27.

He also referred to similar provisions in other legislation, citing s.4 of the Conservation Act which provides that it is to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. He regarded that as wide-ranging in its impact. It may well be so, but s.9 of the present Act is far more specific in its prohibition. It is the use of such strong and unambiguous language which leads me to conclude that it does have the overriding result on the rest of the Act contended for by the Applicants. In the absence of persuasive evidence that this will stultify the legislation, I am not prepared to read this section down by treating s.27 as the only one applicable to the transfer of land which is or might be affected by present or future claims to the Tribunal. It is not self-evident that the application of appropriate Treaty principles will have such an adverse effect. Apart from submissions based on the statistical information in the affidavits of Messrs Hunn and Verrity, and the information supplied by the Coal Corporation, we were given little evidence of the impact the ordinary meaning of this section could have on the working of the Act. Indeed, up to the present there appear to be no serious problems with the management arrangements adopted to

hold the position, although obviously they cannot continue indefinitely.

The real cause of the difficulty perceived by the Applicants is the decision to transfer all the assets "en bloc" (to use Mr Baragwanath's expression, for want of a better) so soon after the effect of this new legislation became known to those Maori people interested. I could see no objection being taken to the operation of s.9 in other circumstances, to cover what may well be an exceptional or unforseen situation falling outside the provision of s.27. The Respondents' fears at this stage over the implementation of the Act may be averted by use of the Crown's ability to impose acceptable conditions on the transfer of assets to the Enterprises, such as a restriction on their further disposal or on increasing their value pending the ascertainment of potential claims. The Applicants made it clear they are not seeking a blank cheque entitling every conceivable claim to be considered, regardless of its likelihood of success, before transfers may take place. They want a speedy resolution also.

Principles of the Treaty

Section 9 speaks of inconsistency with Treaty principles, not with its actual provisions or terms, but gives no indication of what they are, nor any guidelines for their determination. The same expression is found in the Treaty of Waitangi Act 1975, in s.4 of the Conservation Act

1987 and in the long title of the Environment Act 1986. I agree with Mr Williams' submission for the Respondents that in this enquiry questions of its precise meaning and of the place of the Treaty in municipal law do not assume the importance sometimes encountered in this area of litigation. The State-Owned Enterprises Act authoritatively recognises and invokes its principles. Accordingly, much of what was said to us about the canons of treaty construction is of little relevance. This dispute concerns land, and the appropriate provisions can be adequately understood from either the English or the Maori version of the document.

The word "principle" has a wide range of meanings in different contexts, mostly associated with the idea of fundamental or basic character. In the Shorter Oxford English Dictionary, the notion of a principle as "a fundamental motive or reason of action" seems an appropriate meaning to give the word in the context of s.9. It also conveys the meaning of a component part, ingredient or constituent element. It is in this sense that I think Mr Williams analysed and summed up the various provisions of the Treaty as "principles", to support the Respondents' alternative submission that if s.9 was of general application, the proposed transfers did not contravene them. I return to this later. I think the deliberate choice of the expression "inconsistent with the principles of the Treaty" in preference to one such as "inconsistent with its

terms or provisions" points to an adoption in the legislation of the Treaty's actual terms undrstood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create by and reflect in that Document, and an enquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship.

From the attitude of the Colonial Office and the transactions between its representatives and the Maori Chiefs, and from the terms of the Treaty itself, it is not difficult to infer the start in 1840 of something in the nature of a partnership between the Crown and the Maori people. The latter ceded rights of government in exchange for guarantees of possession and control of their lands and precious possessions for as long as they wanted to retain them. In its context Captain Hobson's famous announcement "Now we are one people" points to this concept rather than to the notion that with a stroke of the pen both races had become assimilated.

The Waitangi Tribunal has discussed those principles of the Treaty it saw as relevant to the particular claims it had under consideration. Some of its insights are valuable, and this concept of an on-going partnership can be detected in the Manukau claim in relation to that harbour, and in the Te Atiawa claim. At p.61 of that decision the Treaty was

described as "the foundation of a developing social contract." In both cases the Tribunal used this approach to modify exclusive rights to fisheries recognised in the Treaty. At p.95 of the Manukau decision, it drew a number of conclusions, the first being that the Treaty obliges the Crown not only to recognise the Maori interests specified in it, but actively to protect them.

I concur in thinking that this is a principle to be rightly drawn from a consideration of the Treaty provisions in the light of the surrounding circumstances. The preamble commences with the Crown's concern to protect the just rights and property of the Chiefs and tribes, having regard to the rapid extension of immigration, and the desire to establish a settled form of government. The second Article confirms and guarantees "full exclusive and undisturbed possession" of their lands and estates, forests, fisheries and other properties. The third Article extends the Crown's protection and imparts all the rights and privileges of British subjects.

I see such a principle as very relevant to this case, inherent in the concept of an on-going partnership founded on the Treaty. Implicit in that relationship is the expectation of good faith by each side in their dealings with the other, and in the way that the Crown exercises the rights of government ceded to it. To say this is to do no more than assert the maintenance of the "honour of the Crown" underlying all its treaty relationships.

For the Respondents, Mr Williams presented a closely-reasoned analysis of the Treaty in which he pointed out that s.9 directs attention to its fundamentals, involving a consideration of all the provisions which went to make up its essence in 1840. He identified five principles :-

(1) that a settled form of civil Government was desirable and that the British Crown should exercise the power of Government;

(2) that the power of the British Crown to govern included the power to legislate for all mtters relating to "peace and good order";

(3) that Maori chieftainship over their land, forests, fisheries and other treasures were not extinguished and would be protected and guaranteed;

(4) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown;

(5) the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.

He saw only principles (1), (2) and (5) as being of relevance to this case and argued that the proposed transfer of Crown land to the State-Owned Enterprises is entirely consistent with them. There was no room for the introduction of binding implied principles, such as a duty actively to protect Maori land interests, or to consult with the Maori people over proposed executive action affecting them. He based this proposition on International Law

Authorities concerned with the meaning and interpretation of Treaty documents in accordance with recognised canons of construction. Obviously it would not normally be right to subject the parties to further binding obligations by way of implied principles which they have not thought fit to express, unless they are so self evident as to be regarded as part of those undertaken. However, as I have already indicated earlier in this judgment, the deliberate choice of the expression "Principles of the Treaty" in s.9 indicates that a more fundamental approach must be taken in determining its impact on the workings of the State-Owned Enterprises Act in today's very changed conditions.

It may well be that the overall result of Mr Williams' five principles may not be very different from the approach I think is intended under s.9, but the three he thought relevant emphasise only the rights of government ceded to the Crown and its pre-emptive right of purchase. There is no room in them for any proposition that in the way it exercises those powers the Crown should be responsible for the protection and guarantees referred to in his third and fourth Principles. However, I see those two as fundamental to this case. Indeed, in its response to the concern felt by the Waitangi Tribunal, Parliament itself recognised such an obligation by enacting s.27.

Conclusions

I am therefore of the opinion that the Applicants'

concern is justified. They have made out their case that s.27 does not go far enough in fulfilling the Crown's responsibility to recognise and protect Maori land interests. However, I am satisfied that it was intended to and does provide adequate protection in accordance with the principles of the Treaty for land in respect of which claims were lodged with the Tribunal by 18 December 1986. Accordingly any transfers thereof to the Enterprises would not be inconsistent with those principles. But the transfer of so much other land could prejudice remedies available to those seeking redress through the Tribunal after that date. It would be inconsistent with its Treaty responsibility for the Crown to implement this sweeping series of transfers without any consideration being given to the possibility of such claims, or without a reasonable opportunity for those possibilities to be investigated. The immediacy of the planned transfers did not allow this.

The applicants are entitled to relief, but to grant declarations in the terms sought might result in consequences to the implementation of the State-Owned Enterprises Act out of all proportion to the Maori interests likely to be prejudiced. The solution may lie essentially in the fields of policy and administration, but the Court can exercise a supervisory role through its ability to make declarations about any contemplated action. It was indicated during the hearing that suitable arrangements could be explored if the Applicants made out their case.

This is a sensible approach, particularly as the Court would be handicapped in granting relief at this stage without a full appreciation of the practical questions involved.

Before concluding, there are some general observations I would like to make :-

(i) I have spoken of what I perceive to be a relationship akin to partnership between the Crown and Maori people, and of its obligation on each side to act in good faith. Whatever the shortcomings in the past, I think the Crown is now demonstrating this intention in legislation such as the Treaty of Waitangi Act and the provisions at the heart of these proceedings. For their part, the Applicants have shown in their affidavits and through their Counsel a responsible attitude, leading me to believe that all concerned recognise the need to act with reasonable regard for each side's expectations and obligations. It was no doubt this sense of moderation which prompted Mr Baragwanath's statement that on receipt of details of the land affected by the transfers, adequate information could be given within three months to enable the Crown to assess its position over potential Tribunal claims.

(ii) In the Statement of Claim matters yet to be filed with the Tribunal are saidto concern breaches of the Treaty since 1840, in respect of which there have been "numerous petitions to Parliament, claims in Court and representations to State departments." (para.15) This pleading indicates

that the Applicants' concern is with those breaches which have become matters of extensive public knowledge, and whose high profile in New Zealand history should enable relatively easy identification by the various Government Departments and Ministries. There is no suggestion in this pleading of a whole mass of nebulous or inchoate claims since 1840 about to surface now that the right to bring them to the Tribunal has been established.

(iii) In keeping with this approach is the need, recognised in every ordered society, for the settling or quieting of title to land. When there have been no adverse claims for many years, occupiers are entitled to assume that they may continue in undisturbed enjoyment of their property. This is also to be expected by the Crown, which has acquired so much land in the course of its duty to administer and maintain the orderly government of New Zealand in accordance with the right to do so ceded under the Treaty. Such a consideration ought especially to be taken into account in deciding the weight to be given to the contention that Crown land could still be affected by potential Tribunal rulings, even though it is not the subject of any direct claim for return, because its transfer to a State-owned enterprise may render it unavailable to be offered as alternative redress or compensation.

(iv) Finally, and perhaps most importantly, a value judgment is inevitably involved in determining whether Ministerial

conduct is or would be inconsistent with Treaty principles. The reasonableness of the conduct in all the circumstances will afford a useful guide and be a very relevant consideration.

I concur in the declarations and directions proposed by the President in his judgment.

M.E. Casey J.

IN THE COURT OF APPEAL OF NEW ZEALAND CA 54/87

BETWEEN: NEW ZEALAND MAORI COUNCIL

First Applicant

AND: GRAHAM STANLEY LATIMER

Second Applicant

AND: HER MAJESTY'S ATTORNEY-GENERAL

First Respondent

AND: THE HONOURABLE THE MINISTER OF FINANCE and others

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, 8 May 1987

Counsel: W D Baragwanath QC, Ms S Elias and J M Dawson for First and Second Applicants
D P Neazor QC, D A R Williams QC, R B Squire and Miss K McDonald for First, Second and Third Respondents
M F Quigg and Mrs R A Dewar for Coal Corporation of New Zealand Limited

Judgment: 29 June 1987

JUDGMENT OF BISSON J

The New Zealand Maori Council is established by the Maori Community Development Act 1962. Its functions in respect of all Maoris being, among other things, to conserve, improve, advance and maintain a physical, economic, industrial, educational, social, moral and spiritual well-being and to assume and maintain pride of race.

The second applicant, Sir Graham Latimer, is the Chairman of the Council and a member of the tribes who claim the protection of Article II of the Treaty of Waitangi. He sues on behalf of himself and others who claim that protection. The respondents formally denied his right to sue on behalf of others but did not press the matter making it clear they in no way intended to suggest that Sir Graham had anything but the highest personal standing.

The first respondent is sued on behalf of the Crown and on behalf 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.

The second respondents are respectively the Minister of Finance and "responsible ministers" within the meaning of the State Owned-Enterprises Act 1986 (the Act) who have powers pursuant to s.23 to transfer assets and liabilities of the Crown to State enterprises.

The third respondent is empowered by s.28 of the Act inter alia to vest land and other assets in State enterprises.

The Act was enacted on 18 December 1986. Its long title is as follows,

> "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"

Mr D K Hunn the then Deputy Chairman of the State Services Commission deposed in an affidavit dated 29 April 1987 as follows,

> "3. THE rationale behind corporatisation was the Government's view that the Crown owned huge resources which were inefficiently managed within the traditional Departmental framework. Those inefficiencies were seen to be a cause (but not the only cause) of economic and fiscal consequences which needed to be remedied."

The new State enterprises are listed in the Second Schedule to the Act as follows,

> "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
> Telecom Corporation of New Zealand Limited"

With the creation of these new State enterprises it is provided in 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."

It is provided by s.9 that,

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

It is alleged by the applicants in their statement of claim that on numerous occasions since the execution of the Treaty, there has occurred conduct by or on behalf of the Crown which has been in breach of the principles of the Treaty of Waitangi to the disadvantage of the Maori race. Until the enactment of the Treaty of Waitangi Act 1975 and its retrospective extension as from 6 January 1986 to 6 February 1840 there was no effective forum for resolution of Maori claims in respect of breaches of the principles of the Treaty of Waitangi.

The Treaty of Waitangi Act 1975 does not spell out the principles of the Treaty but by its long title it is,

> "An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty."

Since the extension of the jurisdiction of the Waitangi Tribunal 55 claims have been lodged and of the 88 claims before the Tribunal 32 have been lodged since the passing of the Act on 18 December 1986. Many of the claims before the Waitangi Tribunal and others in prospect relate to land and waters which are at present in Crown ownership. The concern of the applicants is expressed in the following paragraphs of their statement of claim,

> "17. Representations have been made by inter alios the First Applicant to the Crown seeking an assurance that no assets will be transferred by the Crown to a State owned enterprise or enterprises until appropriate inquiry has been made to ensure that such transfer would not be inconsistent with the principles of the Treaty of Waitangi.
>
> 18. The Crown has failed or refused and continues to fail and refuse to give such assurance.
>
> 19. 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 transfer of the assets the subject of existing and likely future claims before the Waitangi Tribunal in breach of the provisions of section 9 of the Act.
>
> 20. Such action would perpetuate and intensify the results of the conduct referred to in paragraph 12 (conduct disadvantageous to the Maori race)."

The respondents in their statement of defence while admitting the allegations in paragraphs 17 and 18 of the statement of claim have pleaded that the Crown is not by law required to give or act upon such an assurance as sought in paragraph 18. In reply to paragraph 19 of the statement of claim the respondents plead,

> "... they admit 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 transfer of assets some of which could be the subject of existing or future claims before the Waitangi Tribunal, but say that any such transfers will be authorised by and not in breach of the provisions of the State Owned Enterprises Act 1986."

The grounds on which the applicants seek relief from the Court are set out in their statement of claim as follows,

> "1. By virtue of section 9 of the Act the Crown may not exercise its powers pursuant to the Act in manner inconsistent with the principles of the Treaty of Waitangi.
>
> 2. The transfer of all or any of the assets of the Crown the subject of existing and potential claims before the Waitangi Tribunal or any of them to a State owned enterprise would be inconsistent with such principles in all or any of the following respects:
>
> (a) By Article the Second of both the English and Maori language versions of the Treaty of Waitangi the Crown undertook to protect the interests of the Maori people of New Zealand..
>
> (b) By virtue of section 4 of the Act "the principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be - (a) as profitable and efficient as comparable businesses that are not owned by the Crown ..." Were the said assets or any of them to be transferred to a State owned enterprise such enterprise would lack the Crown's capacity to give effect to the principles of the Treaty, including the confirmation and guarantee of Article II.

3. If such assets were transferred to a State owned enterprise, in order to secure their return to the Claimants should that be recommended by the Tribunal it would be necessary for the procedures described in section 27(2) and (3) to be gone through. Having regard to the nature of State owned enterprises in terms of section 4 of the Act such change in the status quo would create a substantial impediment to the performance of the Crown's Treaty obligations.

4. In the circumstances it is necessary for the purpose of preserving the position of the Applicants and of the Maori parties to the Treaty of Waitangi that there be a declaration that the Crown ought not to take any further action in respect of such lands and waters that is or would be consequential on the exercise of the statutory powers without adequate safeguards to ensure compliance with section 9."

The relief sought is,

"(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.

Following an interim order made by Heron J in the High Court the motion for judicial review was removed into this Court. On 1 April 1987 the President sitting in Chambers made 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 State-Owned Enterprises Act 1986. This declaration is to operate until the commencement of the hearing in this Court of the substantive application that has been removed into this Court."

The operation of this declaration has been extended pending the judgment of this Court following the substantive hearing.

The Act contains the particular provisions of s.27 with reference to Maori land claims -

"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."

It is the relationship between ss.9 and 27 which is at the heart of this case. The applicants claim that s.9 is of overriding importance and application, being a principle to be observed by the Crown before parting with the ownership of Crown land to State enterprises. The respondents' primary submission is that the discretion of a Minister to transfer Crown land to a State enterprise under s.23 is not governed by s.9 in such a way that any transfer is unlawful unless and until all rights existing and possible under the Treaty of Waitangi Act have been exhausted. The Solicitor-General submitted that the interpretation of s.9 which the applicants would have the Court adopt would by a side-wind do what the legislature clearly elected not to do when it made the specific provisions for Maori land claims in s.27 and the Solicitor-General said it would make nonsense of the Act read as a whole to suggest Parliament had intended s.9 to strike down to a significant degree all else that the Act set out to achieve.

The significance of s.9 of the Act must be viewed in the light of the very extended jurisdiction which had been given by Parliament to the Waitangi Tribunal by s.3 of the Treaty

of Waitangi Amendment Act 1985. This jurisdiction is as follows,

> "(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected -
>
> (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
>
> (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or
>
> (c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown, -
>
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section."

At the same time that Parliament extended the Tribunal's jurisdiction it also reconstituted the Tribunal which formerly consisted of the Chief Judge of the Maori Land Court as Chairman, one person to be appointed by the Governor-General on the recommendation of the Minister of Justice and one person being a Maori to be appointed by the Governor-General on the recommendation of the Minister of Maori Affairs. The newly constituted Waitangi Tribunal consists of the Chief Judge of the Maori Land Court as Chairman

and six persons of whom at least four shall be Maori to be appointed by the Governor-General on the recommendation of the Minister of Maori Affairs made after consultation with the Minister of Justice and it is provided that in considering the suitability of any person for appointment to the Tribunal the Minister of Maori Affairs shall have regard not only to that person's personal attributes, but also to that person's knowledge of and experience in the different aspects of matters likely to come before the Tribunal.

The 1985 Amendment Act also provided for the Tribunal to commission research into any matter relating to a claim before it and for the preparation and submission of a report for its consideration and the Tribunal was also given power to appoint counsel to assist it or to assist the claimant in respect of any proceedings before it.

By s.6(3) of the Treaty of Waitangi Act it is provided that if the Tribunal finds that any claim submitted to it is well-founded it may, if it thinks fit, having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

It was provided by s.6(4) that a recommendation of the Tribunal may be in general terms or may indicate in specific terms the action which in the opinion of the Tribunal the Crown should take.

It is therefore open to the Waitangi Tribunal after finding that a claim submitted to it is well-founded to recommend to the Crown that certain land still in the ownership of the Crown be vested in the claimants whether this be the land in respect of which the grievance arose or other land in substitution for it.

It is inconceivable that Parliament, after passing the extended provisions of the Treaty of Waitangi Act on 9 December 1985 with the intention of putting an end to long outstanding and legitimate grievances which had simmered in the breasts of Maoris from generation to generation since 1840 without a special tribunal being available to consider such grievances would on 30 September 1986, only 10 months later, introduce in the form of the State-Owned Enterprises Bill legislation which might deprive some claimants with legitimate grievances from attaining the very thing which was at the heart of their grievances, namely the recovery of the land still owned by the Crown, land in respect of which they had wrongly been deprived. So it was that Parliament introduced into the State-Owned Enterprises Act s.9 as a safeguard so that the dramatic legislative change in the ownership of Crown land would not frustrate the aspirations of Maoris who looked to the extended jurisdiction of the Waitangi Tribunal for the redress of their grievances.

One task of the Waitangi Tribunal is to determine whether certain matters which come before it are inconsistent with the principles of the Treaty of Waitangi.

That Parliament was determined to ensure that the principles of the Treaty would in future be carried into effect is also demonstrated by the Environment Act 1986 which is an Act to provide for the establishment of the office of Parliamentary Commissioner for the Environment and for the establishment of the Ministry for the Environment to ensure among other things that in the management of natural and physical resources full and balanced account is taken of "the principles of the Treaty of Waitangi".

A more recent example of this Parliamentary respect for the Treaty of Waitangi is to be found in the Conservation Act 1987 which is an Act to promote the conservation of New Zealand's natural and historic resources and for that purpose to establish a Department of Conservation. Section 4 of the Act provides,

> "This Act shall so be interpreted and administered to give effect to the principles of the Treaty of Waitangi."

Although Parliament has referred to "the principles of the Treaty of Waitangi" and placed great weight on them it has not in any of the Acts mentioned spelt out what those principles are. It has been left to the Waitangi Tribunal to make its own determination of those principles and their practical application on claims which come before it. Although the Crown has not the right to make a claim to the Waitangi Tribunal it can look to findings of the Tribunal for guidance as to the principles with which it must not act inconsistently under s.9.

We have been referred to a great volume of research material and historical data and affidavit evidence which, with the submissions of counsel, have been of considerable assistance in considering what are the principles of the Treaty. The Treaty itself is quite brief. Its text in English is found in the First Schedule to the Treaty of Waitangi Act 1975 and is as follows,

> "Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.
>
> Article The First
>
> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article The Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article The Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]"

The text of the Treaty in Maori is also found in the first schedule as repealed and substituted by s.4 of the 1985 Amendment Act and is as follows,

"Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o No Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou

me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha a noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ke ana mea ki nga tangata o Ingarni.

(Signed) WILLIAM HOBSON
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

> Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.
>
> Ko nga Rangatira o te wakaminenga."

Much has been written and we heard extensive submissions concerning the meaning of certain expressions in the Maori text of the Treaty, in particular such words as kawangatanga rangatiratanga and taonga. It must be accepted that there are marked differences between the English and the Maori texts of the Treaty and it is important to appreciate that the Maori text is not a translation of the English text and conversely nor is the English version a translation of the Maori. This point was made by the Waitangi Tribunal at p.54 of the Te Atiawa claim. It is for this reason that in defining the functions of the Waitangi Tribunal it is provided in s.5(2) of the Treaty of Waitangi Act 1975 that,

> "... the Tribunal shall have regard to the 2 texts of the Treaty set out in the First Schedule to this Act and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them."

In the finding of the Waitangi Tribunal on the Kaituna claim the Tribunal refered to the evidence of Professor Hugh Kawharu who has a high reputation for his learning on Maori culture and traditions throughout the academic world. In referring to translations from one language to another which he described as a delicate art he referred to the translation of the Treaty by the Rev. Henry Williams as follows,

> "4.6 When the Rev. Williams sought to translate into Maori Article I of the Treaty by which the Confederation of Chiefs and the Individual Chiefs who were not members of that Confederation agreed to cede to Her Majesty the Queen of England "all the rights and powers of sovereignty" which they possessed over their territories, he sought a word in the Maori language that did not exist. There was no word for "sovereignty" as known to English law, a concept foreign to the Maori culture. So he reached into the recesses of missionary Maori and drew forth the word "kawanatanga" which is to be found in the Bible translation and in the Book of Common Prayer as meaning in the English version "governance".
>
> 4.7 In Article II, by which the Crown confirmed and guaranteed to the Maori signatories the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties, Mr Williams translated the guarantee as one of "... te tino Rangatatiratanga" and went on to specify the land (ratou whenua) the estates (ratau kainga) and included the English references to "forests fisheries and other properties" in the phrase "ratou taonga katoa" (all things highly prized.)"

In his opinion, in agreeing to cede kawanatanga to the Queen of England the Maori Chiefs would have known that by so doing they would be gaining "governance", especially law and order for which the missionaries had long been pressing and that sovereignty in the sense of a system of power and authority was wholly beyond the Maori experience and their view of the Treaty could only have been framed in terms of their own culture. He said,

> "It is totally against the run of evidence to imagine that they (the Chiefs) would wittingly have divested themselves of all their spiritually sanctioned powers most of which powers indeed they wanted protected. They would have believed they were retaining their rangatiratanga intact apart from a licence to kill or inflict material hurt on others, retaining all their customary rights and duties as trustees for their tribal groups ..."

> "... (it) is essential not to lose sight of the quid pro quo of the Treaty; that the collective surrender to the Crown of the power to govern was made primarily in return for the Crown's protection of each Chief's authority within his tribal domain ..."

The Waitangi Tribunal has considered that its wide powers enabled it to look beyond strict legalities so that it could in a proper case identify with the spirit of the Treaty.

In its Te Atiawa report the Tribunal said,

> "A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place."

The Tribunal received submissions from the Department of Maori Affairs as to the "English legal approach" to the meaning and effect of the Treaty and found there were several similarities between the Maori approach and the "European" legal approach to the interpretation of treaties.

This Court is not concerned with a strict or literal interpretation of the Treaty of Waitangi, nor to the application of such an interpretation to a given set of facts. This Court is called upon to consider what are the principles of the Treaty. The principles of the Treaty of Waitangi were the foundation for the future relationship between the Crown and the Maori race. In considering what the parties to the Treaty laid down as that foundation in the documents they signed it would be appropriate to adopt from

another context the words of Lord Wilberforce in James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd (1977) 3 All E.R. 1048, and determine the principles of the Treaty,

> "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation."

I think it must be accepted that there would have been a problem in the Maori Chiefs who signed the Treaty being able to have a full understanding of what was meant in the English version. Perhaps the Maori concept is best summed up by the words of Tamati Waka Nene when Captain Hobson presented the Treaty to the Chiefs at Waitangi for signature. According to the Authentic and Genuine History of the Signing of the Treaty of Waitangi by W. Colenso F.R.S. Tamati Nene, Chief of the Ngatihao Tribe said,

> "I shall speak first to us, to ourselves, Natives" (addressing them). "What do you say? The Governor to return? What, then, shall we do? Say here to me, O ye chiefs of the tribes of the northern part of New Zealand! what we, how we?" (Meaning, how, in such a case, are we henceforward to act?) "Is not the land already gone? is it not covered, all covered, with men, with strangers, foreigners - even as the grass and herbage - over whom we have no power? We, the chiefs and Natives of this land, are down low; they are up high, exalted. What, what do you say? The Governor to go back? I am sick, I am dead, killed by you. Had you spoken thus in the old time, when the traders and grog-sellers came - had you turned them away, then you could well say to the Governor, 'Go back,' and it would have been correct, straight; and I would also have said with you, 'Go back;' - yes, we together as one man, one voice. But now, as things are, no, no, no." Turning to His Excellency, he resumed, "O Governor! sit. I, Tamati Waka, say to thee, sit. Do not thou go away from us; remain for us - a father, a judge, a peacemaker.

> Yes, it is good, it is straight. Sit thou here; dwell in our midst. Remain; do not go away. Do not thou listen to what [the chiefs of] Ngapuhi say. Stay thou, our friend, our father, our Governor."

Eruera Maeha Patuone, the elder brother of Tamati Waka Nene said,

> "What shall I say on this great occasion, in the presence of all those great chiefs of both countries? Here, then, this is my word to thee, O Governor! Sit, stay - thou, and the missionaries, and the Word of God. Remain here with us, to be a father for us, that the French have us not, that Pikopo, that bad man, have us not. Remain, Governor. Sit, stay, our friend."

It is said that some Chiefs staged a mock protest at the Waitangi ceremony demanding the Governor leave, but the Treaty was signed and Captain Hobson in his letter to Sir George Gibbs, the Governor of New South Wales said,

> "I assured them in the most fervent manner that they might rely implicitly on the good faith of Her Majesty's Government in the transaction."

Accepting that there are differences between the English and Maori versions of the Treaty and accepting that there would be differences of understanding as to the significance of the Treaty by Captain Hobson on the one hand and by the Maori Chiefs on the other, its basic provisions are clear enough. The preamble in the English text of the Treaty refers to Queen Victoria being anxious to protect the just rights and property of the Native Chiefs and Tribes of New Zealand and to secure to them the enjoyment of peace and good order. To achieve this object in the face of the rapid growth of settlers in New Zealand it was necessary for the

chiefs to cede the right to govern in favour of Her Majesty who would then be responsible to establish a settled form of civil government for the benefit of both Her Majesty's subjects and the native population. However, in the establishment of such a form of civil government Her Majesty confirmed and guaranteed to the Chiefs and Tribes of New Zealand and to their respective families and individuals thereof,

> "The full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."

It can be accepted that the English expression, "and other properties" as translated in Maori included all things highly prized such as their own customs and culture. In return for the promise of security and retention of their lands the Chiefs yielded or granted to Her Majesty the exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate at such price as may be agreed upon. Finally, Her Majesty extended to the natives of New Zealand her royal protection and imparted to them all the rights and privileges of British subjects.

Just as Captain Hobson assured the Chiefs that they might rely implicitly on the good faith of Her Majesty's Government the Chiefs entered into the Treaty, "in the full spirit and meaning thereof".

The passages I have quoted from the speeches of two Maori Chiefs and from the letter of Governor Hobson enable the principles of the Treaty to be distilled from an analysis of the text of the Treaty. The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the manner in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.

With the advent of legislation invoking recognition of the principles of the Treaty no longer is it to be regarded as a "simple nullity" (as in Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur. R. (N.S.) S.C. 72) and the application of its principles does not involve the enforcement of the Treaty itself as if totally incorporated in municipal law (cf Hoani Te Heu Heu v Aotea District Maori Land Board AC 308 at p.324). The Waitangi Tribunal in its Te Atiawa report at p.61 said,

> "The Treaty was an acknowledgment of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected ... The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its

words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles."

Some indication of the Government view of the principles of the Treaty of Waitangi with relation to land may be gained from the following recital to the Maori Affairs Bill 1987 which reads,

"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 rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas rangatiratanga 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:"

Mr Williams for the respondents submitted that taking into account the articles of the Treaty and the Preamble, the following principles can be identified,

"(1) that a settled form of civil Government was desirable and that the British Crown should exercise the power of Government;

(2) that the power of the British Crown to govern included the power to legislate for all matters relating to "peace and good order".

(3) that Maori chieftainship over their land, forests, fisheries and other treasures were not extinguished and would be protected and guaranteed;

> (4) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown;
>
> (5) the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it."

Mr Williams then submitted that principles 1, 2 and 5 are of relevance to this case and submitted that the transfer of Crown land to the State enterprises is entirely consistent with those principles. He contended that s.27 exhaustively applied the principles of the Treaty in respect of Maori land claims so that s.9 was spent in that direction. To do less than transfer the fee simple estate in Crown land to the State enterprises would, he said, impede the purposes of the Act. I agree with Mr Williams that it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day, but I do not accept entirely his next submission that,

> "The law enacted in s.27 is, in itself, the embodiment of a principle of the Treaty relating to lawmaking powers. It exhaustively articulates the manner in which the principle of the Treaty relating to land should apply in the context of the transfer of Crown lands to State enterprises. It confers absolute protection in s.27(1) for existing claims. Not unreasonably it prescribes a lesser level of protection (s.27(2)) for claims not articulated at the time of enactment. But the fact is that the principle relating to land is exhaustively addressed and Parliament makes it clear beyond any doubt that transfer to State enterprises of Crown land subject to actual or possible claims is specifically contemplated and authorised."

I accept that s.27(1) has provided protection for claims submitted to the Waitangi Tribunal before 18 December 1986

but I do not accept that the lesser level of protection under s.27(2) for claims not articulated at the time of the enactment is intended by Parliament to deal exhaustively with the principles of the Treaty relating to land. If that were so, there would be no need for s.9, or if s.9 did not apply to Maori land claims, s.9 would have expressly excluded them from its application. Section 27 does not in respect of claims submitted after 18 December 1986 provide protection during the period from that date to the date when findings have been made by the Waitangi Tribunal on any such claim. In that interval of time if the land to which the claim relates has been transferred to a State enterprise which has in turn disposed of the land it is then too late for the Crown to resume that land from the State enterprise so the provisions of s.27(2)(a) are of no avail. For this reason the added protection of s.9 is provided requiring the existence of claims actual or in prospect which do not have the protection of s.27(1) to be taken into account by the Crown and steps taken if necessary to ensure that the Crown does not act in a manner inconsistent with the Treaty in respect of that land by transferring the ownership of that land to a State enterprise in such a way as to put it beyond the power of the Crown to resume that land from the State enterprise pursuant to s.27(2) should that be appropriate to meet the justice of the claim. The Waitangi Tribunal in its Manukau Harbour finding said,

> "The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests, but actively to protect them..."

and it said,

> "Past wrongs can be put right, in a practical way, and it is not too late to begin again."

Three unresolved Maori land claims were cited to us as examples of outstanding grievances needing redress. They were only samples, there are others. It might well be too late to put right past wrongs if vast holdings of Crown land are transferred to State enterprises "en bloc" without regard to the provisions of s.9. Regard must be had for the special relationship of the Maori people to their land, so that compensation in money terms is not a satisfactory recompense in the case of some grievances. The extent to which transfers of Crown land to State enterprises are contemplated was set out in Mr Hunn's affidavit of 29 April 1987,

> "13. THE largest proportion of lands of the Crown, the administration of which is to alter as a result of the restructuring exercise, will come under the administration of the Department of Conservation. Some 14 million hectares or about 52 per cent of the land surface of the country was previously under the administration of the Department of Lands and Survey and the NZ Forest Service. Of that figure some 6.5 million hectares, so far as can presently be ascertained, will come under the administration of the Department of Conservation. Of the balance of lands of the Crown proposed for transfer to the Corporations the principal holdings in approximate figures are:
>
> Landcorp:
>
> | | |
> |---|---|
> | farmland | 354,000 ha |
> | land under lease licence and miscellaneous tenancies | 2,655,000 ha |
> | unallocated Crown land | 72,000 ha |
> | | 3,081,000 ha |

Forestcorp:

exotic forests	600,000 ha
indigenous production forests	150,000 ha
roads, ancillary sites, etc	130,000 ha
	880,000 ha

The residual Department of Lands will administer amongst other lands some 2.5 million hectares in Pastoral Leases, which are to be retained by the Crown, with the remainder of lands of the Crown divided among the other Corporations and Departments. Government Property Services is expected to acquire from the Crown some 280 separate properties almost all of which are "mid-town" sites required for use by Corporations or Departments for office accommodation. The land to be transferred to the three Post Office Corporations is a mixture of city, suburban and rural retail sites and, particularly in the case of Telecoms, sites for transmission equipment, depots, and so on.

14 THE new Corporations will have the ability, and be expected to manage their resources to commercial advantage in the fulfilment of their functions and in producing a return on their assets. Of all the Corporations however only Landcorp and, to a lesser extent, G.P.S., have a specific function of purchasing, developing and trading in land. The others will hold land only to the extent commercially necessary to enable them to carry out their functions."

Pending the outcome of these proceedings interim management and licensing agreements have been operating enabling the State enterprises to carry on business since 1 April 1987.

The concern of the applicants prompted them to seek the answer of the respondents to an interrogatory in the following terms,

> "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?"

The answer was in the negative. The Crown has not established any such system because of its contention that s.27 provides the complete answer to its responsibility not to act in a manner inconsistent with the principles of the Treaty in respect of all Maori land claims. For the reasons which I have given I hold otherwise. Steps must be taken by the Crown to ensure that claims which do not have the benefit of s.27(1) and which may well be as meritorious as some which do have that benefit are not prejudiced by the transfer of assets to State enterprises. To act in a manner prejudicial to those claims would be, in the words of s.9, to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. Various options are open to the Crown as to how and when and what assets are transferred to State enterprises. By the application of s.9 the date, 18 December 1986, need not become an arbitrary dead-line giving rise to further injustice. Some practical and reasonable solution must be found enabling the Crown to fulfil its obligation not to act inconsistently with the principles of the Treaty and at the same time achieve its legislative intent and policy of improved Government trading activities by means of State enterprises. These two objectives are not irreconcilable and I believe a solution can be found with the same mutual confidence and trust that existed on 6 February 1840 at Waitangi.

I agree with the orders proposed in the judgment of Cooke P.

G. Gibson J.