

IN THE COURT OF APPEAL OF NEW ZEALAND

CA644/2009
[2009] NZCA 625

BETWEEN ATTORNEY-GENERAL
 Appellant

AND TE KENEHI MAIR
 First Respondent

AND NGĀHINA MATTHEWS
 Second Respondent

AND THE WAITANGI TRIBUNAL
 Third Respondent

Hearing: 11 November 2009

Court: Chambers, O'Regan and Baragwanath JJ

Counsel: C R Gwyn and H M Carrad for Appellant
 R E Harrison QC, S T Webster and C Hirschfeld for First and Second
 Respondents
 D M Consedine for Third Respondent (Given leave to withdraw)
 W L Aldred for Te Rūnanga o Ngāti Apa Soc Inc as Intervener

Judgment: 22 December 2009 at 4.15 pm

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The orders made in the High Court are quashed.**
- C Costs are reserved.**

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Waitangi Tribunal

22 Mar 2017

Ministry of Justice WELLINGTON

REASONS

CHAMBERS AND O'REGAN JJ	[1]
BARAGWANATH J	[84]

CHAMBERS AND O'REGAN JJ

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Introduction

[1] This is an appeal against a decision of MacKenzie J dealing with an application by the first and second respondents, Mr Te Kenehi Mair and Mr Ngahina Matthews (Mr Matthews Snr), for judicial review of a decision of the Waitangi Tribunal: *Mair v Waitangi Tribunal* HC WN CIV-2009-485-1499 2 October 2009. The Tribunal's decision, delivered on 15 May 2009, refused urgency for the hearing

of two claims, Wai 655 and Wai 1840. MacKenzie J found that the Tribunal had failed to take into account all aspects of the prejudice which would be suffered by Mr Matthews Snr as the Wai 655 claimant. The Judge decided that the question of urgency for both claims should be determined together. He made a declaration that the Tribunal had erred in law in its decision refusing the applications for urgency, quashed the Tribunal's decision and directed the Tribunal to reconsider the applications.

[2] The Attorney-General appeals against that decision. The Tribunal abides the decision of the Court. Te Rūnanga o Ngāti Apa Society Inc (Te Rūnanga), which had not taken part in the High Court hearing, was given leave to make written submissions and brief oral submissions as an intervener. The first and second respondents sought and were given leave to file out of time a notice supporting the High Court judgment on a ground other than the one upon which the judgment was based.

Issues

[3] The issues for determination are:

- (a) Was MacKenzie J right to find the Tribunal acted unlawfully in refusing urgency to the Wai 655 claim?
- (b) Was MacKenzie J right to find the Tribunal acted unlawfully in refusing urgency to the Wai 1840 claim?
- (c) If the answer to (a) and/or (b) is yes, should the High Court have declined to grant relief?

Context

[4] In order to provide the context for the evaluation of the issues, it is necessary first to discuss:

- (a) Alternative paths to Treaty of Waitangi settlements;
- (b) The factual background to the urgency applications;
- (c) The Tribunal's consideration of the urgency applications;
- (d) The events after the Tribunal's decision but before the High Court hearing;
- (e) The High Court decision;
- (f) The events following the High Court decision.

Alternative paths to Treaty of Waitangi settlements

[5] There are two procedures available for the disposal of claims of historical breaches of the Treaty. One option is for the Crown, through the Office of Treaty Settlements, to negotiate directly with claimant groups. There is no statutory framework for these negotiations, the process being guided by a Government policy statement (*Ka tika ā muri: ka tika ā mua: Healing the past, building a future* (Office of Treaty Settlements 2004) (the Red Book)). This process is essentially political: see *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 307 – 309 (CA). The normal outcome of the process (as happened in this case) is a deed of settlement under which the Crown agrees to introduce legislation to effect the settlement. The settlement comes into effect only once that legislation is passed.

[6] The other option is to use the statutory procedures provided by the Treaty of Waitangi Act 1975. Under this Act, the Waitangi Tribunal is required to inquire into every claim submitted to it, unless certain exceptions apply: s 6(2). If the Tribunal considers the claim well-founded, it may recommend the Crown take remedial action: s 6(3). Such recommendations are not ordinarily binding on the Crown. The exception is where a recommendation is made in relation to certain specific categories of land, including licensed Crown forest lands. These recommendations, which may include the return of land to Māori ownership, become final if, after the

expiration of 90 days, the parties have not settled the claim: ss 8B(6) and 8HC(6). A final recommendation must be implemented, so is similar in effect to an order that land be transferred to the successful claimant group: see, for example, s 36 of the Crown Forest Assets Act 1989. A successful claimant in relation to Crown forest land is also entitled to accumulated rentals collected from licensees of the land, which are held by the Crown Forestry Rental Trust.

[7] Where a claimant group opts to seek a Tribunal inquiry it may of course subsequently enter direct negotiations with the Crown, in a process similar to that described at [5].

The factual background to the urgency application

[8] The factual background is best described by reference to the position of the various claimant groups.

Ngāti Apa

[9] The Wai 265 claim was filed by the son of the second respondent, Mr George Matthews (Mr Matthews Jnr), on behalf of Ngāti Apa (North Island) (future references to Ngāti Apa will omit the geographical qualifier) in December 1991. Mr Matthews Jnr was replaced by another representative claimant in 1999, and now manages the Wai 655 claim filed by his father. In 2003, Te Rūnanga sought a mandate to enter into direct negotiations with the Crown in relation to all historical claims of Ngāti Apa. Included in the scope of that mandate process were the historical claims of Ngā Wairiki.

[10] In 2004, the Crown advertised the fact that Te Rūnanga had sought recognition of its mandate to negotiate a settlement of Ngāti Apa's historic claims. Of the 167 submissions received in response, only those of Mr Matthews Snr and Mr Matthews Jnr were in opposition. The Crown recognised the deed of mandate in November 2004 and entered into negotiations with Te Rūnanga. Terms of negotiations were signed on 25 July 2005, an agreement in principle was signed on

12 July 2007 and a deed of settlement was initialled on 3 September 2008. After ratification of that deed by the Ngāti Apa claimant community, including Ngā Wairiki, it was signed on 8 October 2008. The definition of the groups constituting Ngāti Apa in the deed includes “Ngā Wairiki ki Uta”.

[11] The deed of settlement provides for the final settlement of the Ngāti Apa claims. It contains a “historical account” of events from 1840 to the second half of the twentieth century involving Crown interaction with Ngāti Apa and breaches of the Treaty and an apology by the Crown for those breaches. It provides for cultural and commercial redress to be provided to the Ngāti Apa “governance entity” (Te Rūnanga) pursuant to the settlement legislation. The operative provisions are conditional on the Settlement Bill being passed.

Wai 655

[12] The Wai 655 claim was filed by Mr Matthews Snr in December 1996. It relates to historical Treaty breaches affecting Ngā Wairiki. In August 2007, the Tribunal heard evidence relating to the historical aspects of Wai 655 as part of its process of hearing a number of historic claims relating to the Whanganui District. The Wai 265 claim was not part of that process because Ngāti Apa had decided to seek redress in relation to its historical grievances through the process of direct negotiation with the Crown.

[13] On 31 August 2008, Mr Matthews Snr sought an urgent hearing of contemporary aspects of Wai 655. An amended claim, incorporating alleged contemporary breaches arising from the Crown’s settlement negotiations with Te Rūnanga, was filed on 3 September 2008. In particular, the amended claim objected to the inclusion of Ngā Wairiki’s historic claims within the Ngāti Apa settlement. The application for urgency was declined, leading to the present proceedings.

[14] Mr Matthews Snr filed the Wai 655 claim as a representative of Ngā Wairiki. It is unclear whom he now represents. When asked to advise us of this, his counsel, Dr Harrison QC, pointed to evidence that perhaps three or four others (including Mr Matthews Jnr) were in Mr Matthews Snr’s group, but warned us against “playing

the numbers game” and against relying on the large majority which ratified the Ngāti Apa settlement, including those of Ngā Wairiki. He called this “the mandating fallacy” and was critical of the mandating methodology. We will return to this aspect of the Wai 655 application for urgency later.

Wai 1840 claimants

[15] The Wai 1840 claim is, like the amendment to the Wai 655 claim, a contemporary claim based on the actions of the Crown in relation to the Ngāti Apa settlement. It was brought by Mr Mair on behalf of the Whanganui Southern Cluster, a group of claimants whose claims were being dealt with by the Tribunal together and have been the subject of hearings (and those hearings have also dealt with aspects of the Wai 655 claim, as noted above). The essence of the contemporary grievance is that certain forest lands, in respect of which both Ngāti Apa and some Whanganui Southern Cluster claimants claim an interest, have been too generously applied to Ngāti Apa in the deed of settlement. In particular, 65 per cent of the Lismore Hills Forest has been allocated to Ngāti Apa, despite the Whanganui Southern Cluster claim to at least 50 per cent of that forest.

[16] Mr Mair also sought an urgent hearing of the Wai 1840 claim. This was dealt with at the same time as the Wai 655 urgency application.

The Tribunal’s consideration of the urgency application

[17] At the heart of the grievances of the Wai 655 and Wai 1840 claimants are two aspects of the Crown’s policy of engaging in direct negotiations with treaty claimants without the historical claims having first been the subject of a Tribunal inquiry resulting in recommendations to the Crown. The two policies, described by Mr Peter Galvin, the deputy director of the Office of Treaty Settlements, in an affidavit before the High Court, are:

- (a) The policy of the Crown to negotiate the settlement of historical claims with large natural groups with tribal interests at an iwi level,

rather than at an individual hapū, individual whanau or individual claimant level. The objective of this policy is said to be to reduce overlapping claims and fragmentation, and thus the costs of the settlement process, to assist the claimant groups to achieve an economic base and to allow for a wide range of potential redress for claimants.

- (b) The policy requiring those proposing to represent claimant groups to obtain a mandate from the group before negotiations can commence. The process must lead to a deed of mandate recording the basis of the representative's mandate to negotiate a settlement. The deed of settlement must then be subject to ratification by the claimant group or groups.

[18] The concern of the Wai 655 and Wai 1840 claimants is that the Crown, by accepting the mandate of Te Rūnanga in negotiating the Ngāti Apa settlement, is foreclosing the ability of the Wai 655 and Wai 1840 claimants to pursue their claims through the Tribunal process. In particular, the Wai 655 claimants argue that their claims will be extinguished if the terms of the deed of settlement are embodied in an Act of Parliament, while the Wai 1840 claimants argue that they will be unable to pursue their claim for a binding recommendation for resumption of the Lismore Hills Forest to the extent that they wish to do so. Similar issues have arisen in relation to other directly negotiated settlements (see the following Tribunal reports: *The Ngāti Awa Settlement Cross-Claims Report: Wai 958*, 2002; *The Te Arawa Mandate Report: Wai 1150*, 2004; *The Te Arawa Mandate Report: Te Wahanga Tuarua: Wai 1150*, 2005; and *The Tamaki Makaurau Settlement Process Report: Wai 1362*, 2007). Similar issues have also arisen in Court proceedings: see, for example, *Hayes v Waitangi Tribunal* HC WN CP 111/01 10 May 2001, *Waitaha Taiwhenua o Waitaki Trust v Te Rūnanga o Ngai Tahu* HC WN CP 41/98 17 June 1998, *Milroy v Attorney-General* [2005] NZAR 562 (CA) and *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 (CA).

Delegation of decision

[19] The Tribunal's consideration of the applications for urgency in relation to Wai 655 and Wai 1840 was delegated by the acting chair of the Tribunal to Judge Coxhead. He attempted a conciliation/mediation process designed to reconcile the interests of Ngāti Apa and the Wai 655 and Wai 1840 claimants. Ultimately that process did not result in agreement. Because Judge Coxhead had been involved in that process, he considered it was not appropriate for him to deal with the contested urgency application. The matter was then delegated to Judge Milroy. Although the application had been filed in September 2008, delays associated with the conciliation/mediation process meant it was not considered until May 2009.

Practice note

[20] The Tribunal has published a practice note, "Guide to the Practice and Procedure of the Waitangi Tribunal", as authorised by cl 5(1) of Schedule 2 to the Treaty of Waitangi Act. In relation to urgent inquiries, the practice note relevantly provides:

2.5 Urgent inquiries

Claimants or the Crown may apply to the Tribunal for an urgent inquiry and report into a claim or a group of claims, or into an aspect of a claim or a group of claims. The Tribunal will grant urgency only in exceptional cases and only after satisfying itself that adequate grounds have been made out.

(1) *Grounds for urgency*

In deciding an application for urgency, the Tribunal has regard to a number of factors. Of particular importance are whether:

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- there is no alternative remedy that, in the circumstances, it would be reasonable for the complainants to exercise; and
- the claimants are ready to proceed urgently to a hearing.

Other factors that will be considered by the Tribunal include whether:

- the claim or claims challenge an important current or pending Crown action or policy;
- an injunction has been issued by the courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal; and
- any other grounds justifying urgency have been made out.

Judge Milroy's decision

[21] Judge Milroy began her decision by setting out the documents she had considered and summarising the parties' submissions. She noted that the Wai 655 claimants said that Ngā Wairiki was not exclusively part of Ngāti Apa and "that Ngā Wairiki, or some of them, affiliate to their Whanganui kin": at [5]. Including Ngā Wairiki in the Ngāti Apa settlement would prevent such affiliation to Whanganui kin. She also noted that the Wai 655 and Wai 1840 claimants said that Ngā Wairiki and the Whanganui Southern Cluster claimants claimed mana whenua interests in certain Lismore Hills Forest blocks. They were concerned that they would be excluded from pursuing entitlements to those forest blocks and from recovering the accumulated rentals held by the Crown Forestry Rental Trust. They also argued that the Ngāti Apa settlement would limit redress options available to the Crown in settling the claims of the Whanganui iwi and cause disharmony among iwi. Both the Wai 655 claimants and the Wai 1840 claimants said they could be prepared for a hearing at short notice. Both expressed concern about the Crown's large natural grouping policy, and complained of insufficient engagement with Whanganui iwi and failure to deal fairly with overlapping interests in the Lismore Hills Forest area.

[22] Judge Milroy recorded the Crown's response that there would not be irreversible prejudice to the Wai 655 claimants because the Crown had carried out an analysis prior to recognising Te Rūnanga's mandate and concluded that those who identify as Ngā Wairiki were properly included in the mandate. That process included an independent report by Te Puni Kōkiri which had specifically addressed the objections of the Wai 655 claimants. Ngā Wairiki (including the Wai 655 claimants) would be covered by the Ngāti Apa deed of settlement and would therefore benefit from the redress contained in it as well as be able to participate in the post-settlement governance entity established to receive the redress. The same

position would pertain to those of the Wai 1840 claimants who were affiliated to Ngā Wairiki.

[23] In relation to Wai 1840, the Crown submitted that the Whanganui Southern Cluster iwi would receive 35 per cent of the Lismore Hills Forest and that other forests and commercial redress would be available for any subsequent settlements. The Crown said that the Wai 1840 claimants had offered to settle for a 50 per cent share of the Lismore Hills Forest, so the amount at stake was a 15 per cent share.

[24] Ngāti Apa's response was focused on the mandate, which Te Rūnanga said continued to be supported by the Ngā Wairiki claimant community. There was 97 per cent support shown for the settlement during the ratification process. Te Rūnanga submitted that Mr Matthews Snr and Mr Matthews Jnr had had the opportunity to participate in hui and discussions amongst the Ngā Wairiki claimant community.

[25] In relation to Wai 1840, Te Rūnanga said that the matters which the claimants wished to raise had been the subject of without prejudice, good faith negotiations. This had led to the claimants negotiating an on-account settlement with the Crown. Thus, it was argued the claimants had already entered into a process for direct negotiation with the Crown over the issues forming the subject of their applications. Te Rūnanga argued that there was no evidence that a "substantial number" of Ngā Wairiki people did not identify themselves as Ngāti Apa.

[26] Judge Milroy dealt with the Wai 655 and Wai 1840 issues separately.

[27] In relation to Wai 655, she saw the prejudice as having two limbs, namely:

- (a) The Wai 655 claim would be extinguished if the Ngāti Apa settlement legislation were passed;
- (b) Those within the Whanganui inquiry who were of Ngā Wairiki, but did not have a connection with Ngāti Apa, would lose the opportunity

to re-establish mana whenua in respect of the Lismore Hills Forest blocks.

[28] The essential part of the Judge's reasoning appears in the following paragraphs:

[27] I therefore accept that the issue as between the Wai 655 claimants and the Crown is one relating to whether the Crown should or should not have accepted the mandate of the Rūnanga to negotiate for Ngā Wairiki. In terms of the criteria for urgency however, the question is whether the Wai 655 claimants would suffer significant, irreversible prejudice if the Ngāti Apa settlement legislation extinguished the Wai 655 claim. The Ngāti Apa settlement is intended to make redress for claims involving Ngā Wairiki. The Wai 655 claimants will be able to obtain redress through the Rūnanga in respect of their claims. The Rūnanga also advises that as beneficiaries of the Rūnanga, the Wai 655 claimants are entitled to participate in the post settlement governance entity by taking part in voting, standing for election and attending hui and participating in those community activities.

[28] The prejudice to the Wai 655 claimants is that they will be unable to pursue their claim against the Crown in the manner that they choose – that is through a Waitangi Tribunal inquiry. That avenue to confirm Ngā Wairiki as a separate and distinct entity from Ngāti Apa will therefore be closed to them. However, others claiming Ngā Wairiki whakapapa have chosen to mandate the Rūnanga to settle Ngā Wairiki grievances. I consider that in a material sense the Wai 655 claimants will not suffer significant or irreversible prejudice, as redress for their claim is available through the Ngāti Apa settlement.

[29] I also take into account that the Crown and the Rūnanga have convened a number of meetings with the Wai 655 claimants and have tried to include them and take account of their issues in the negotiation and settlement process. It is unfortunate that the issues could not be resolved, but there would be significant prejudice to Ngāti Apa, and those of Ngā Wairiki whakapapa who have given a mandate to the Rūnanga to settle, if that settlement were further delayed.

[29] In relation to the Wai 1840 claimants, Judge Milroy noted that the key issue was the amount of the Lismore Hills Forest to be retained by the Crown after the Ngāti Apa settlement. She accepted the Crown's argument that only a 15 per cent share in the forest was at stake. She also noted the availability of other Crown forestry lands within the Whanganui inquiry district and observed that any loss of access to forestry rentals could be the subject of monetary compensation.

[30] Judge Milroy also took into account the fact that there had been negotiations between the Crown, Ngāti Apa and the Wai 1840 claimants which had made

considerable progress, leaving only the dispute in relation to the Lismore Hills Forest unresolved. She determined that the prejudice to the Wai 1840 claimants would not be of such significance or of such an irreversible nature that an urgent inquiry should be held. She took into account in relation to both claims the substantial prejudice which those represented by Te Rūnanga would suffer if there was a delay in its settlement.

[31] Judge Milroy therefore dismissed both applications for urgency.

The events after the Tribunal decision but before the High Court hearing

[32] On 16 July 2009, Judge Wainwright, the presiding officer of the Tribunal, issued a memorandum in which she indicated that the Tribunal would, if it was able to do so, issue a report on the evidence it had received in relation to the historical aspects of the Wai 655 claim. The report would have to be issued before 27 July 2009, the anticipated date on which the Bill to give effect to the Ngāti Apa settlement was to be introduced to the House. This appears to have been because she considered that, once the Bill was introduced, the Tribunal would be precluded by s 6(6) of the Treaty of Waitangi Act from issuing such a report.

[33] On 27 July 2009, the Tribunal's *Report on Aspects of the Wai 655 Claim* was issued. The letter of transmission to the Minister of Māori Affairs said:

The Tribunal is releasing this short report at the request of the of Wai 655 claimants. The Ngāti Apa Settlement Bill, soon to be before Parliament, will settle the WAI 655 claim. The claimants wanted the Tribunal to express its views on the evidence before the Bill enacting the settlement is introduced. We agreed that it was appropriate for us to recognise the Wai 655 claimants' involvement in the Whanganui District inquiry by reporting on the historical claims to the extent possible within the limited time available.

[34] The Tribunal found that Ngā Wairiki had been a separate iwi until the mid-19th century and into the late 19th century, but from the late 19th century and throughout most of the 20th century it had appeared in public records as a hapū of Ngāti Apa. There was no evidence presented to the Tribunal of Ngā Wairiki protesting against this perceived status. The Tribunal saw the cause of the decline of Ngā Wairiki's recognition as stemming from the actions of the Crown's agent,

Donald McLean, while negotiating the Whanganui purchase in 1848 and, especially, while negotiating the Rangitiki-Turakina deed of 1849. This was said to breach the Treaty principles of good faith and active protection.

[35] A few days later, the Settlement Bill was introduced: Ngāti Apa (North Island) Claims Settlement Bill 2009. Its provisions mirror those of the settlement deed. If passed, it will give effect to the settlement as provided for in the settlement deed.

The High Court decision

[36] The first and second respondents filed their statement of claim in the High Court on 3 August 2009, about a week after the introduction of the Settlement Bill. The hearing took place on 28 September 2009, and judgment was delivered on 2 October 2009.

[37] MacKenzie J found that Judge Milroy had erred in relation to the application for urgency by the Wai 655 claimants. He found that the reference at [28] of the decision (quoted at [28] above) to “a material sense” was to be construed as meaning “tangible or financial, to the exclusion of prejudice which is intangible”: at [14].

[38] He found that if the Settlement Bill were passed, the Wai 655 claimants would suffer intangible detriment in that extinguishment of their claim would leave them unable to pursue their assertion that Ngā Wairiki is an iwi in its own right, and not a hapū under the umbrella of Ngāti Apa. He said that the Wai 655 claimants would also be unable to pursue their argument that Ngā Wairiki lost mana and mana whenua through being treated as part of Ngāti Apa.

[39] The Judge found that the Tribunal ought (as a matter of law) to have considered those aspects of prejudice separately in determining whether the claimants were suffering, or likely to suffer, significant and irreversible prejudice. The Tribunal had been wrong to confine its consideration to prejudice in a material (ie financial) sense, which could be regarded as being met by the opportunities

available to the claimants and persons of Ngā Wairiki ancestry to participate in the Ngāti Apa settlement.

[40] MacKenzie J did not go on to consider the alternative argument that the Tribunal failed to have regard to the applicable principles of the Treaty of Waitangi.

[41] In relation to the Wai 1840 claim, MacKenzie J noted the claimants' contention that the Ngāti Apa settlement would not leave enough of the Lismore Hills Forest available for redress under a settlement or through binding recommendations by the Tribunal. MacKenzie J did not make a finding as to whether, if the Wai 1840 claim were considered in isolation, any error of law sufficient to justify setting aside the decision had been identified. This was because he considered that both urgency applications had to be determined together.

[42] MacKenzie J then considered the issue of relief. The Crown argued that an urgent hearing was futile. It said the Tribunal had no jurisdiction to consider the claimants' grievances, because that would involve inquiring into the Settlement Bill, which had been since been placed before the House: s 6(6) of the Treaty of Waitangi Act.

[43] MacKenzie J rejected this: he said that his decision in *Te Rūnanga o Ngai Tahu v Attorney-General* HC WN CIV-2007-485-2602 14 August 2009 established that the passing of the Settlement Bill would not prevent an inquiry into whether the Crown's actions in relation to the Ngāti Apa settlement constituted a breach by the Crown of its obligations to the Wai 655 and Wai 1840 claimants. He said s 6(6) could not, therefore, have been intended to preclude a similar inquiry while the legislation is before the House.

[44] He therefore made a declaration that the Tribunal had erred in law, quashed its decision and directed it to reconsider. He did not consider it appropriate to give specific directions to the Tribunal as to the reconsideration.

The events following the High Court decision

[45] On 6 November 2009, the Wai 655 claimants filed an amendment to the amended contemporary claim.

[46] One week later, the Chairperson of the Tribunal, Chief Judge Isaac, issued a memorandum making arrangements for the reconsideration of both urgency applications. He set a fixture for 9 December 2009, at which Judge Savage would preside.

[47] On 17 November 2009, a few days after the hearing of the present appeal, the Settlement Bill was given its first reading in the House of Representatives. It was referred to the Māori Affairs Select Committee, which will hear submissions from interested parties and is due to report back to the House on 17 March 2010.

[48] On 9 December 2009, a panel of the Tribunal comprising Judge Savage, Ms Morris and Sir Hirini Mead heard the renewed applications for urgency. They issued a decision on 16 December 2009 declining the applications. We had reached the conclusions set out in this judgment before we saw that decision. It does, however, provide confirmation of our views.

[49] Having set out the context of the present appeal, we turn now to consider the issues that it raises.

Was MacKenzie J right to find the Waitangi Tribunal acted unlawfully in refusing urgency to the Wai 655 claim?

[50] For the Crown, Ms Gwyn argued that MacKenzie J had erred in his assessment of Judge Milroy's decision. In relation to Wai 655, she argued that:

- (a) He had misconstrued Judge Milroy's reference to "material" prejudice;

- (b) He was wrong in finding that Judge Milroy had not considered intangible prejudice, particularly the potential extinguishment of the Wai 655 claim and the loss of mana and mana whenua for the Wai 655 claimants;
- (c) In effect, he had taken a different view from that of Judge Milroy on the weight to be given to those factors, which was not a proper basis for quashing her decision on judicial review. She emphasised Judge Milroy’s expertise in matters relating to the Treaty and the extensive material she had before her about the participation of Ngā Wairiki members in the Ngāti Apa settlement process.

[51] Dr Harrison supported the High Court finding. In particular, he supported the Judge’s view of the meaning of “material”. He also argued that Judge Milroy had focused on the “irreversible prejudice” criterion in the practice note, to the exclusion of other relevant factors, such as the lack of an alternative remedy, and had unduly focused on the prejudice to Ngāti Apa. Dr Harrison also supported the judgment on the ground that Judge Milroy had failed to apply relevant Treaty principles, which he said were a mandatory relevant consideration under s 5(2) of the Treaty of Waitangi Act.

[52] We will consider this issue under three headings:

- (a) “Material” prejudice;
- (b) Alleged failure to take into account intangible prejudice;
- (c) Treaty principles.

“Material” prejudice

[53] We can dispose of the argument about “material” prejudice briefly. With respect to the MacKenzie J and Dr Harrison, we consider it unlikely that

Judge Milroy confined her consideration to financial detriment. It is far more likely that she used the term in the sense of “more than minimal”.

[54] We also consider it is clear that Judge Milroy did take into account the extinguishment of Wai 655: she expressly refers to this factor at [28] of her decision (quoted at [28] above).

Intangible prejudice

[55] We turn now to the finding in the High Court that Judge Milroy did not consider the intangible prejudice to the Wai 655 claimants of the loss of mana and mana whenua and the extinguishment of their claim.

[56] The context in which Judge Milroy’s decision was made is important. Every court and tribunal is accorded considerable latitude in determining the order in which it will hear claims filed in its registry. It would require something extraordinary before an appellate court or a court on review would second-guess the primary court’s priority decision. It is, after all, impossible for the appellate court to appreciate exactly how much work the primary court has on its books and, more particularly, how one file should rank against another. As a matter of fact, in the current case, we know nothing of the Tribunal’s caseload, the resources it has to meet that caseload and how important the Wai 655 and Wai 1840 claims are compared with others on its docket. The only pointer we have – which, as it happens, suggests resources are stretched – is the Tribunal’s practice note which, among other things, sets out the criteria for urgent inquiries. Clause 2.5 makes clear that “the Tribunal will grant urgency only in exceptional cases and only after satisfying itself that adequate grounds have been made out”: see [20] above. Those are strong words.

[57] The practice note goes on to set out the grounds to which the Tribunal has regard “in deciding an application for urgency”. There can be no doubt that Judge Milroy was aware of those criteria as she set them out at [4] of her decision. Later, when she was evaluating the application, she returned to consider those criteria. In our view, she cannot possibly be said to have failed to take into account

relevant considerations or to have taken into account irrelevant considerations: at best from the challengers' point of view, one can say that some might have weighed the considerations differently. The weight to be given to the various considerations was a matter for her.

[58] Let us now examine MacKenzie J's reason for declaring Judge Milroy's Wai 655 decision unlawful. The first point of uncertainty is who "the Wai 655 claimants" are. The only claimants of which we are aware are Mr Matthews Snr and Mr Matthews Jnr. As noted at [14], when we asked Dr Harrison who else he represented so far as the Wai 655 claim is concerned, he could not or would not tell us but cautioned against "playing the numbers game". Why? The "numbers" on each side are potentially highly relevant to an urgency application, especially in circumstances where it is obvious an iwi or hapū is divided.

[59] In this case, it is abundantly clear from the evidence before the Tribunal and now before us that the overwhelming majority of Māori who affiliate with Ngā Wairiki do not support the Matthews. On the contrary, they have supported a mandating process by which Te Rūnanga has acted on behalf of not only Ngāti Apa but also Ngā Wairiki and others. This process was monitored by Te Puni Kōkiri, which described it as "open, transparent and fair". Of course, no mandating decision could ever realistically expect unanimous support, but the mandate Te Rūnanga acquired, and which the Crown subsequently accepted, was overwhelming and as near to unanimous as could be expected.

[60] MacKenzie J's judgment begins, at [1], "Mr Matthews is the applicant, for and on behalf of Ngā Wairiki, in Wai 655".

[61] There is no evidence to support the assertion that this claim does continue to be mounted "for and on behalf of Ngā Wairiki". On the contrary, Mr Adrian Rurawhe, the chairman of Te Rūnanga, gave evidence before the Tribunal, in opposition to the application for an urgent inquiry, that the Matthews had "not provided any information about when and how they receive the mandate that they purport to have". At no time subsequent to Mr Rurawhe's affidavit has any such information been given either. Mr Rurawhe then went on to give details of

Te Rūnanga's mandate and support. In particular, he stressed that Te Rūnanga's mandate had support from all three marae and hapū groups in the Ngā Wairiki area. He explained that the Matthews had not approached any of the Māori or hapū groups that affiliate to Ngā Wairiki on this matter. Those marae and hapū had formally invited them to attend hapū hui to discuss these matters, but the invitations had not been taken up.

[62] Mr Rurawhe further explained that Te Rūnanga had 6,685 members on the Ngāti Apa register, of whom 5,578 members indicated an affiliation to a Ngā Wairiki marae, hapū or both. All registered members over the age of 18 years had had an opportunity to vote on the deed of settlement and the Post-Settlement Governance Entity (PSGE). Voting took place on 4 October 2008, with 97% voting to accept both the deed and the PSGE. None of this is disputed in any affidavit to the contrary.

[63] Mr Galvin provided strong support for Mr Rurawhe's assertions. He detailed the efforts to which Te Puni Kōkiri had gone in attempting to ensure that Te Rūnanga's mandate had the support of those it claimed to represent. He also detailed the efforts to which the Crown had gone in attempting to meet the Matthews' interests.

[64] All of this information was before the Waitangi Tribunal and was part of the material Judge Milroy considered. At [28] of her decision (see [28] above) she carefully distinguished the interests of the Matthews as the Wai 655 claimants from those of the Ngā Wairiki people. The former will be unable to pursue their claim. But they are not mandated representatives of Ngā Wairiki. On the contrary, the evidence before the Tribunal established that the Ngā Wairiki people want the Ngāti Apa settlement to proceed so they can get access to the benefits it will provide them. Judge Milroy addressed the potential loss of mana and mana whenua of the Wai 655 claimants, but decided that it was not an issue of sufficient weight to justify an urgent hearing. It is wrong therefore to say the Judge failed to consider this factor. She gave it little weight but it was for her to determine what weight to give to it. She made no error of law.

[65] In summary, Judge Milroy was entitled to conclude that the Matthews' claim was in these circumstances not entitled to urgency. She was entitled to conclude that the thousands who supported the deed and the PSGE, of whom a large majority affiliated with Ngā Wairiki, should not be prejudiced in bringing their negotiations to settlement, as could occur if the Matthews' claim were accorded urgency. In our view, Judge Milroy was entitled to give little weight to "the [alleged] loss of mana and mana whenua for the Wai 655 claimants [the Matthews]" when determining the application for urgency.

Treaty principles

[66] Dr Harrison also sought to uphold MacKenzie J's judgment on another ground, namely that Judge Milroy's decision was in breach of the principles of the Treaty of Waitangi. MacKenzie J found it unnecessary to determine that issue: at [28] – [31]. We must deal with it, however, having found against Dr Harrison on the previous two points.

[67] Dr Harrison's argument is based on s 5(2) of the Treaty of Waitangi Act. That subsection reads as follows:

In exercising any of its functions under this section the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 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.

[68] Dr Harrison accepted that that provision could be interpreted as no more than a direction to the Tribunal to consider, when interpreting the Treaty, both the Māori and English versions (rather than having recourse to one in preference to the other). He submitted, however, that, having regard to the wording of the long title and the preamble to the Act and to s 6(1) read with s 6(3), the preferred interpretation of s 5(2) was that the principles of the Treaty are to be applied by, or at the very least are a mandatory relevant consideration for, the Tribunal when exercising its s 6 jurisdiction at all (including interlocutory) stages of its s 6(2) inquiry process. That necessarily included, he submitted, determining applications for urgency under any Tribunal practice note dealing with progressing inquiries and allocating hearings.

[69] We are unable to accept that argument. We think it clear beyond any doubt that Dr Harrison’s first suggested meaning of s 5(2) is the correct one. If Parliament had intended to introduce such a sweeping interpretative overlay to the Treaty of Waitangi Act, as Dr Harrison’s preferred interpretation requires, it would surely have done so in a much less oblique fashion. One might also have expected it to spell out the principles which were to apply, especially if they are intended to be, as Dr Harrison suggests, mandatory considerations, even down to the level of case management decisions.

Conclusion

[70] In our view, MacKenzie J was wrong to find Judge Milroy had acted unlawfully in refusing urgency to the Wai 655 claim.

Was MacKenzie J right to find the Waitangi Tribunal acted unlawfully in refusing urgency to the Wai 1840 claim?

[71] MacKenzie J did not examine the Wai 1840 claimants’ complaint in detail because he considered “the two claims [were] closely inter-linked”, with the consequence that, since he thought Judge Milroy had erred in refusing urgency to the Wai 655 claim, that was sufficient to require reconsideration of whether Wai 1840 should also be accorded urgency: at [34].

[72] Since we have found Judge Milroy’s decision on the Wai 655 claim was within the scope of her discretion, we do need to consider separately whether she erred in refusing to accord the Wai 1840 claim urgency.

[73] The essence of Judge Milroy’s reasoning on the Wai 1840 application is set out at [29] – [30] above. The challenge to that reasoning, as set out in the statement of claim, is identical to the challenge with respect to the Wai 655 decision. That is to say, the Judge erred in restricting “her inquiry to or unduly focusing on the question whether the Whanganui Southern Cluster would or would not suffer significant or irreversible prejudice in a material sense” and in “failing to apply and/or to have

regard as a mandatory relevant consideration to applicable principles of the Treaty of Waitangi”.

[74] The second attack can be dismissed for the same reasons we dismissed the like attack with respect to Wai 655: see [66] – [69] above.

[75] As to the first, there is in fact no reference to “in a material sense” in this part of Judge Milroy’s decision. But, quite apart from that, there is no doubt that the Judge did turn her mind to whether the Wai 1840 claimants would suffer “significant and irreversible prejudice” if urgency was not granted. In this respect, the Judge concluded that, even if the Ngāti Apa settlement proceeded, there would still be a 35 per cent stake in the Lismore Hills Forest available to settle Whanganui claims. She noted at [31] that the difference between that figure and the Wai 1840 negotiating position (50 per cent) was “a 15 per cent stake in the Lismore Hills Forest”; that there were “other Crown Forestry Lands in the Whanganui Inquiry district, such as the Karioi Forest” which could be available; and that even if, for some reason, that forest was not available, there would “clearly not [be] irreversible prejudice, since the Crown is able to offer monetary compensation in future”. She further observed at [32] that the Crown was retaining “a 50 per cent stake in the Lismore Sand Forest ... for future settlement with Whanganui iwi”.

[76] The Judge also noted that “negotiations between the Crown, Ngāti Apa and the Wai 1840 claimants [had] been in train for quite a period of time, and that ... considerable progress [had been] made”: at [33].

[77] In all the circumstances, she concluded that the benefit to the Wai 1840 claimants of an urgent hearing was outweighed by “the likely prejudice to Ngāti Apa of a delay in their settlement”: at [33].

[78] In our view, her decision in that regard was unimpeachable. She carefully considered the criteria set out in the practice note. In the end, she considered that the Wai 1840 claimants would not suffer “significant and irreversible prejudice” if an urgent hearing of their claim did not take place and Crown were to settle with Ngāti Apa. While other judges may have weighed the competing considerations

differently, it cannot be said the Judge failed to take into account relevant considerations, took into account irrelevant considerations or was otherwise plainly wrong in the exercise of her discretion.

[79] For these reasons, we consider MacKenzie J was in error in finding Judge Milroy had acted unlawfully. He should have dismissed the claimant's application for review. For these reasons, we would allow the appeal.

Should relief have been granted?

[80] As we have concluded that MacKenzie J erred in his conclusion that Judge Milroy had acted unlawfully, we do not need to consider whether he ought to have declined relief to the respondents in the exercise of his discretion on the basis that, because the Settlement Bill had since been introduced to the House of Representatives, s 6(6) of the Treaty of Waitangi Act precluded the Tribunal from considering the respondents' claims. We do, however, record that we do not see the authority referred to by MacKenzie J at [38] of his judgment as supporting the conclusion reached by the Judge on s 6(6). We should not be taken as endorsing his decision on this aspect of the case, which should not be regarded as binding on the Tribunal.

[81] Baragwanath J has expressed in his reasons for judgment a view on the s 6(6) issue. We prefer to express no view on that; the Tribunal's decision of 16 December 2009 not to grant an urgent hearing means s 6(6) no longer has any relevance to the Ngāti Apa settlement. In our view, the issue of the scope of s 6(6) is best left for decision in a case in which the outcome depends on it.

Result

[82] We would allow the appeal and set aside the orders made in the High Court.

Costs

[83] The parties did not address us on costs. We anticipate that no award of costs will be sought. But, as we did not hear from the parties on that, we formally reserve costs. Any claim for costs must be made within ten working days of the date of this judgment.

BARAGWANATH J

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Introduction

The directions of the Presiding Officer

[84] Three issues were argued in this case. The first concerns the interpretation and effect of directions given by a Presiding Officer of the Waitangi Tribunal, Judge

Milroy. The High Court, quite understandably, considered that the directions had failed to address the core of the respondents' argument. Following extensive argument and anxious consideration I have reached the same conclusion as my colleagues that the Judge's decision did not err in law. But the fact that MacKenzie J was of the opposite opinion and our difficulty in discerning whether the decision was properly focused bring out the imperative need in decision-making to identify with clarity both the point in issue and the reasons for the conclusion upon it.

Is the Waitangi Tribunal itself bound by the principles of the Treaty of Waitangi?

[85] The second issue is whether the Waitangi Tribunal is bound in its decision-making by the principles of the Treaty of Waitangi which it must apply to the Crown. It can be discussed shortly and because it bears on the interpretation of the Treaty of Waitangi Act 1975 it should be dealt with immediately. Section 6 of that Act materially states:

6 Jurisdiction of Tribunal to consider claims

(1) Where any Māori 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;

...

(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 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.

(2) The Tribunal must inquire into every claim submitted to it under subsection (1)...

(3) If the Tribunal finds that any claim submitted to it under this section 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.

...

[86] In some contexts the Crown connotes the Executive Government of New Zealand, as noted by Professor Joseph in *Constitutional & Administrative Law in New Zealand* (3ed 2007) at [16.2.2]. Part 2 of the Constitution Act 1986 adopts that usage in speaking of Ministers of the Crown, whereas in Parts 3 and 4 the Legislature and the Judiciary are mentioned without reference to the Crown.

[87] But the jurisdiction of the Treaty of Waitangi Act is not confined to the Executive. By extending to any Act of Parliament it embraces the Legislature. It applies also to “any policy or practice ... adopted by or on behalf of the Crown”.

[88] So New Zealand legislation, public policy and practices are all within the Tribunal’s jurisdiction. It is now indisputable that the Judiciary, recognised by s 3 of the New Zealand Bill of Rights Act 1990 as “the ... judicial branch ... of the government of New Zealand” contributes to all three. In the case of legislation, that includes both interpretation of statutes, as to which the decision of the court is definitive, and the development of the judge-made common law. It must follow that like the Bill of Rights (see *Paki v Attorney-General* [2009] NZCA 584), the Treaty of Waitangi Act extends to the Judiciary. And since it extends to the courts there can be no reason to exclude its application to the Waitangi Tribunal itself. A further and surely decisive point is that New Zealand legislation is presumed to conform with our obligations under treaties, of which the Treaty of Waitangi is paramount.

The Tribunal, the Executive and Parliament

[89] The third issue, as to when and to what extent the jurisdiction of the Waitangi Tribunal is ousted by the presentation by the Executive of a bill to Parliament, is of general constitutional significance. It brings out the need for the three elements of the Crown – Executive, Legislature and Judiciary – to see as complementary their roles in the administration of justice and to handle with sensitivity and vision the challenging issues of Treaty jurisprudence.

The historic grievance and the Tribunal claims

When Ngāti Apa migrated to the Rangitikei District they encountered Ngā Wairiki tangāta whenua, who had arrived considerably earlier. When in 1849 the colonial government's purchasing agent, Donald McLean, drew up the Deed of Purchase for the Rangitikei-Turakina block, Ngā Wairiki were a separate iwi, although allied to and much intermarried with Ngāti Apa. In negotiating the Whanganui purchase in 1848, and especially the Rangitikei-Turakina Deed, McLean rode roughshod over the separate identities, boundaries and protests of Ngā Wairiki and awarded their land to Ngāti Apa alone, even though he was aware of their separate identity and boundaries. By merging Ngā Wairiki with Ngāti Apa, he undermined Ngā Wairiki's ability to survive as a group with a separate identity. He thereby breached the Treaty of Waitangi principles of good faith and active protection. Such were the findings in the *Report on Aspects of the Wai 655 Claim* issued on 27 July 2009 by a distinguished panel of the Waitangi Tribunal comprising Judge Wainwright, Dr Angela Ballara, Mr JW Milroy and Dr Ranginui Walker, who in August 2007 had heard evidence and submissions on a claim on behalf of Ngā Wairiki.

[90] On 15 May 2009 a Presiding Officer of the Waitangi Tribunal declined an urgent hearing for the claims of the first and second respondents under s 6 of the Treaty of Waitangi Act. The respondents successfully sought judicial review in the High Court. This appeal by the Crown as Executive is against that judgment. The appeal concerns the procedures for disposal of competing claims to interests in Māori ancestral land near Whanganui. Underlying it are competing substantive claims to those lands.

[91] One claimant is Ngāti Apa, which is not a party to these proceedings but whose interests are represented and supported by the Attorney-General, with whom the Ngāti Apa Rūnanga has contracted to settle its historical claims. The competing claimant is, according to the first and second respondents, Ngā Wairiki which, according to those respondents, was and is an iwi independent of Ngāti Apa. According to Ngāti Apa and the Crown, however, the respondents have no authority to represent Ngā Wairiki, which is merely a hapū of Ngāti Apa.

[92] The respondents' claims are described by Chambers and O'Regan JJ (the joint judgment) at [12] – [16]. They were commenced by submission to the Waitangi Tribunal under s 6(1) of the Treaty of Waitangi Act.

[93] The remedies sought by the respondents extend to relief under ss 8HB, 8HC and 8HF of the Treaty of Waitangi Act which empower the compulsory return of forest land. They have pursued before the Waitangi Tribunal the procedures of the statute which to date have involved the part-hearing during August 2007 and interim decision of 27 July 2009.

[94] There is a major issue as to whether the respondents are the proper representatives of Ngā Wairiki. In November 2004 the Crown agreed, over the dissents of the respondents, to recognise Te Rūnangā o Ngāti Apa Society Incorporated as representing Ngāti Apa. Dr Harrison QC was unable to answer the Court's enquiry how many support the respondents' claim. There is much evidence that the Crown acted with care before determining that the Rūnanga was entitled to the mandate to negotiate for Ngā Wairiki. That was the opinion of members of Te Puni Kokiri, the Crown's principal adviser on Crown-Māori relationships. The Rūnanga advised that of the 6,101 people registered with it, at least 85.9 per cent are of Ngā Wairiki descent and that only a small number support the respondents. That issue would normally be a matter not for the High Court or this Court but for the Tribunal. Ngāti Apa and the Crown elected to adopt a non-statutory procedure of extra-curial negotiation. On 12 July 2007 the Rūnangā and the Crown signed a non-binding and without prejudice Agreement in Principle contained in a Deed of Settlement that was to be given effect by legislation. The deed did not recognise Ngā Wairiki as an iwi. Nor did it leave available any land to meet Ngā Wairiki's claims in its own right; it would allocate to others all the land claimed as that of Ngā Wairiki. It included an interest in the Lismore Forests which are Crown forest land.

[95] For that reason, on 31 August 2008 counsel for the Wai 655 claimants, claiming to represent Ngā Wairiki, sought an urgent hearing. Sitting alone on 15 May 2009 Judge Milroy rejected the claimants' application for an urgent fixture to conclude their claim on behalf of Ngā Wairiki. The Judge considered that the Wai

655 claimants would be able to obtain redress through the Rūnanga in respect of their claims.

[96] The next stage was the introduction to Parliament of a the Ngāti Apa (North Island) Claims Settlement Bill 2009 (the Bill) to give effect to the deed. If enacted, the Bill will confirm that Ngā Wairiki is merely a hapū of Ngāti Apa and substantially defeat the Tribunal claims advanced by the first and second respondents.

[97] In the High Court MacKenzie J ordered judicial review of Judge Milroy's decision. The Crown appeal is against that judgment of the High Court.

[98] MacKenzie J found that Judge Milroy erred in failing to bring into play the loss of mana whenua and of mana for the Wai 655 claimants ([37] of the joint judgment). The Crown challenges his conclusion on appeal. MacKenzie J's conclusion is supported by the respondents on other grounds.

[99] But the Crown advances the further submission that the Tribunal claim is now impeded by s 6(6) of the Treaty of Waitangi Act so that there is no purpose in referring the claim back to the Tribunal to review the decision whether to grant an urgent fixture. That raises considerations of difficulty and importance which extend beyond this case to others, where the claimants may not be a small minority. For that reason I have decided to address it.

The two procedures

[100] There are two procedures available for the disposal of competing claims to redress under s 6(1) in relation to Crown forest assets. One option is for the Crown to exercise the prerogative right to act without statutory authority. Dr Harrison did not argue otherwise. For reasons summarised at [169] below there can be no doubt that, so long as it otherwise acted and continues to act lawfully, the Crown was not and is not constrained by the Treaty of Waitangi Act procedures from establishing its Office of Treaty Settlements and seeking to reach agreement with Treaty claimants.

[101] The other option, endorsed by Parliament in the Treaty of Waitangi Act, is to use the procedures the Act provides, which include a hearing before the Waitangi Tribunal followed by the Tribunal's decision. Such decision is expressed in terms of a recommendation in either of two very different forms. The common form, which in this case applies to assets other than Crown forest land, is that of s 6(3) which is no more than a true recommendation:

If the Tribunal finds that any claim submitted to it under this section 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.

A s 6(3) recommendation must be taken into account by a decision-maker (*Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 at 135 (CA)) but may be rejected by the Executive (*Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA)).

[102] But as elaborated at [134]ff below, the settlement of the *Lands* case (*New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA)) resulted in the addition to the Treaty of Waitangi Act of procedures in relation to State-Owned Enterprise (SOE) land which, while expressed as recommendatory, are ultimately adjudicatory: ss 8A, 8B, 8C and 8E. And the settlement of the *Forests* case (*New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA)) resulted in the further addition to the Act of procedures in relation to Crown forest land which also, while expressed as recommendatory, are ultimately adjudicatory: ss 8HB, 8HC, 8HD and 8HF.

[103] The result is that the bundle of rights possessed by a claimant to Crown forest land with a sound case for the exercise of the judgment of the Tribunal is, or is very close to, a proprietary right that is justiciable before the Tribunal essentially as if it were a court.

The grounds of claim

[104] The respondents assert the following conduct in breach of the principles of the Treaty of Waitangi:

- (a) Historical breach by the Crown of rights to ancestral land;
- (b) Consequential grave damage to the fabric of Ngā Wairiki which has resulted in the current Crown contention that no such iwi exists;
- (c) Refusal to acknowledge the distinct identity of Ngā Wairiki as an iwi;
- (d) Conduct that threatens to perpetuate the wrong;
- (e) The exclusion of Ngā Wairiki as an iwi from the relief available to be provided by the Crown from its existing land stock;
- (f) The deprivation of those they represent of relief without due recourse to the statutory processes.

[105] The respondents seek to support the decision of the High Court on the grounds:

- (a) The principles of the Treaty of Waitangi apply to the Tribunal;
- (b) Such principles entitle Ngā Wairiki to restoration of its land and mana as an independent iwi;
- (c) On application of such principles the High Court ought to have held that the Tribunal erred in law by failing to direct an urgent fixture before both losses are perpetuated.

[106] The respondents' Tribunal claim included a claim for clawback under special provisions which make the Tribunal the judge of whether land wrongly taken should be returned.

[107] A theme of MacKenzie J's judgment and of the submissions of counsel for the respondents is that the respondents' claim to sue on behalf of Ngā Wairiki was dismissed by a procedural order of a Presiding Officer who, sitting alone, had no authority to determine the substantive issues in the case which had been the subject of evidence to a full Tribunal duly constituted, and who, in her decision, did not properly confront their argument.

[108] Procedural directions can have substantive consequences. Failure to order urgency in a case where it is contemplated that there will be legislation removing its subject-matter may well have such an effect. It does not however follow that the Presiding Officer was bound to direct an urgent hearing. The Tribunal is subject to many pressures and has limited capacity. While it is required by s 6(2) of the Treaty of Waitangi Act to inquire into every claim, which is a precept of special significance when it is called upon to exercise the clawback jurisdiction, a direction to decline priority will be lawful so long as its conclusion is rational and has duly taken account of relevant considerations.

[109] This Court may decline leave to appeal to it in cases that clearly lack merit. Equally, if the Presiding Officer of the Waitangi Tribunal was satisfied after due consideration of the relevant evidence and submissions that the respondents' claim to represent Ngā Wairiki was unfounded, it was not necessary for her to direct urgency. The practical consequence of such a decision meant she would have been entitled to determine that, unless Parliament should choose to direct otherwise, the historical Ngā Wairiki iwi would simply have to pass into history, its land passing to Ngāti Apa and its members securing relief via the Ngāti Apa settlement.

[110] Such consequences are dire. This outcome had to be faced directly by the Tribunal, and would only be justified by overwhelming evidence that the respondents do not speak for Ngā Wairiki. The difficulty in this part of the case is that on one view the Presiding Officer did not state the issues so starkly. What she said is central to the appeal and warrants repeating:

[27] I ... accept that the issue as between the Wai 655 claimants and the Crown is one relating to whether the Crown should or should not have accepted the mandate of the Rūnanga to negotiate for Ngā Wairiki. In terms of the criteria for urgency however, the question is whether the Wai 655 claimants would suffer significant, irreversible prejudice if the Ngāti Apa settlement legislation extinguished the Wai 655 claim. The Ngāti Apa settlement is intended to make redress for claims involving Ngā Wairiki. The Wai 655 claimants will be able to obtain redress through the Rūnanga in respect of their claims. The Rūnanga also advises that as beneficiaries of the Rūnanga, the Wai 655 claimants are entitled to participate in the post-settlement governance entity by taking part in voting, standing for election and attending hui and participating in those community activities.

[28] The prejudice to the Wai 655 claimants is that they will be unable to pursue their claim against the Crown in the manner that they choose – that is

through a Waitangi Tribunal inquiry. That avenue to confirm Ngā Wairiki as a separate and distinct entity from Ngāti Apa will therefore be closed to them. However, others claiming Ngā Wairiki whakapapa have chosen to mandate the Rūnanga to settle Ngā Wairiki grievances. I consider that in a material sense the Wai 655 claimants will not suffer significant or irreversible prejudice, as redress for their claim is available through the Ngāti Apa settlement.

[29] I also take into account that the Crown and the Rūnanga have convened a number of meetings with the Wai 655 claimants and have tried to include them and take account of their issues in the negotiation and settlement process. It is unfortunate that the issues could not be resolved, but there would be significant prejudice to Ngāti Apa, and those of Ngā Wairiki whakapapa who have given a mandate to the Rūnanga to settle, if that settlement were further delayed.

[111] For the reasons given in the joint judgment I am satisfied that, on the evidence available to her, it was open to Judge Milroy to find that the case against the respondents' claim to represent Ngā Wairiki was overwhelming (see the joint judgment at [58] – [63]). That is effectively the conclusion now reached by the Tribunal in its decision of 16 December 2009 on the de novo hearing of the application for an urgent fixture.

[112] The remaining questions are whether the Judge asked herself that question and whether she made such a finding, effectively:

Although I did not sit when the evidence was heard the opposing case is so overwhelming I can safely say the claim is unarguable.

[113] The point does not admit of elaboration. The key passages are (at [27] and [28] respectively):

... if the Ngāti Apa settlement legislation extinguished the Wai 655 claim

... others claiming Ngā Wairiki whakapapa have chosen to mandate the Rūnanga to settle Ngā Wairiki grievances

[114] I have concluded after careful consideration that that the Judge not only recognised that extinguishment of the respondents' claim, expressed to be on behalf of Ngā Wairiki, would extinguish the elements of mana whenua and status as iwi advanced in that claim but felt able to conclude that their claim to speak for Ngā Wairiki was excluded by the overwhelming mandate given to the Ngāti Apa Runanga.

[115] The position is not affected by my opinion that the principles of the Treaty of Waitangi apply to the Tribunal itself. In *Ngāti Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (HC) I argued that the principles of the Treaty of Waitangi are not a one-way street, but extend to the protection of rights of others as British (now New Zealand) subjects, guaranteed under art 3 as well as those protected under art 2. There being no just impediment to giving effect to the rights of Ngāti Apa and those claiming under Ngāti Apa, such rights must be given effect.

[116] It follows that the Crown succeeds on the first issue and its appeal must be allowed. That conclusion is reinforced by the 16 December 2009 Tribunal decision which would require in any event the exercise of discretion against the grant of judicial review.

[117] I turn to the issue of s 6(6).

Perspective of the s 6(6) issue

[118] The judicial function of interpreting legislation cannot safely be performed without an understanding of the statute's provenance.

[119] The claim of an indigenous group to recognition of its distinctive characteristics is treated by the law with great respect. It will be determined as a question of fact according to the usages of the indigenous people. That principle, applied routinely to religion, extends also to idols as an expression of culture (see *Bumper Development Corp Ltd v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362; (CA); *Pramatha Nath Mullick v Pradyumna Kumar Mullick* [1925] LR 52 Ind App 245 (PC) discussed in Paton *A Textbook of Jurisprudence* (4ed 1972) at 393 and 411). It applies a fortiori to the identity of an iwi which is a facet of the fundamental human right to dignity.

[120] On the Crown's argument the Waitangi Tribunal is barred by s 6(6) from delivering to Māori claimants rights for breach of the Treaty of Waitangi by wrongful seizure of ancestral land, including Crown forest land. That is so, it argues, even though land of that description is the subject of specific legislation, enacted

after s 6(6) in settlement of proceedings in this Court, by which the Executive relinquished authority to interfere with decision-making by the Waitangi Tribunal. Yet acceptance of such argument would not only interfere with, but also exclude, the Tribunal from exercising its function which here, exceptionally, equates to that of the Court of declaring and enforcing legal rights. It does so by reference to general legislation which on its plain reading does not contemplate such a result and is to be presumed to accord with rather than to defy basic principles of our unwritten constitution.

[121] For reasons that follow I am satisfied:

- (a) The two Parliamentary procedures for responding to that wrong – that via the clawback legislation and that via an ad hoc statute – can and should be reconciled;
- (b) It is the task of this Court to facilitate that process by exercising its own constitutional function of construing legislation.

[122] The present generation of New Zealand decision-makers has acknowledged that the Treaty of Waitangi is New Zealand's founding document. By it, sovereign Māori peoples accepted, according to the English language version, that their sovereignty should pass to the Crown on terms that it would protect their lands, estates, forests and fisheries. They were also promised the rights of British subjects, which include access to the courts and tribunals of the state. By the Treaty of Waitangi Act Parliament established a procedure for resolving claims by Māori for relief in respect of loss of their protected assets caused by breach of the Treaty by the Crown. In order to settle two major cases it had lost in this Court, the Crown as Executive supported Parliament's enactment of legislation in respect of Crown forest land to ensure, in addition, that Māori who could establish a Treaty breach before the Waitangi Tribunal would have rights of similar quality to those of other New Zealanders in relation to land that has been wrongly taken. Yet acceptance of the Crown argument on s 6(6) would mean that the strengthened procedures can be swept aside, by action not of *Parliament* but of the *Executive*, in introducing an inconsistent bill into the House. The argument relies on a reading of a subsection of the Treaty of Waitangi Act which the text does not require. It asserts that a wider

reading should be given to the subsection as a result of the principle of comity – that the Tribunal, although acting as a court, will defer to Parliament to the extent of being deflected from the processes Parliament has established by the Executive’s placing a bill before it. The consequence of this wider reading would be that the Waitangi Tribunal is debarred from exercising *its* constitutional function of giving effect to legal rights. MacKenzie J was not prepared to accept such a result. Nor am I.

[123] It is common ground that both Ngāti Apa and Ngā Wairiki were wrongly deprived by governmental conduct of their ancestral land in breach of the Treaty of Waitangi. The Crown has accepted that Ngā Wairiki and Ngāti Apa were stripped of their land by sharp conduct on the part of the colonial government’s agent, Mr McLean and, as a result, by the government on whose behalf he was acting. In the case of Ngā Wairiki, being deprived of their land also deprived them of their identity as an iwi.

[124] There was nothing unique about such conduct. The Evangelicals at the British Colonial Office, led by its Under-Secretary James Stephen, had seen how indigenous people were expelled from their lands by colonists in North America a century before. Alert to the prospect of repetition of such conduct elsewhere, including New Zealand, the Colonial Office instructed William Hobson to afford protection for the indigenous people as had the instructions in 1825 to Captain Hobson’s equivalent in what was later Gambia: Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37 at 39. The result in New Zealand was the inclusion of the Preamble and arts 2 and 3 of the Treaty of Waitangi. In its English language version the Treaty states:

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 Pre-emption 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.

(Emphasis added.)

[125] The Māori language version, translated by Sir Hugh Kawharu, stated:

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 Māori 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.*

(Emphasis added.)

[126] Despite the emphasised passages, what Mr Stephen apprehended unhappily occurred in New Zealand and on a large scale, in breach of the Preamble and art 2. The parliamentarians and judges of this generation have been confronted with it, as in this case. Indeed had it not been open to Judge Milroy to find that those mandated to speak for Ngā Wairiki have accepted the deed, there could as well have been interference with a Māori right (see [103] above) to art 3. Equality of treatment is a basic principle of the common law of New Zealand (see Principle 14, Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001) at [3.1.2]). Non-Māori have never been deprived by Executive action of any right to pursue litigation by the introduction of a bill to Parliament. The decision of this Court in *Paki v Attorney-General* at [105]ff points in a very different direction from that proposed by the Crown argument on s 6(6) in this case.

[127] By the 1975 Act the Waitangi Tribunal was granted the authority contained in s 6, substantially set out at [85]. A further subsection states:

(6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives ...

[128] The special protective mechanisms in respect of Crown forest land were later enacted to give unchallengeable effect to the Crown promise in art 2. The legislation was the Treaty of Waitangi (State Enterprises Act) 1988 and the Crown Forest Assets Act 1989. Each materially changed both the role of the Tribunal from being a merely advisory body and also, in consequence, the rights of Māori claimants. They did so by additions to the Treaty of Waitangi Act of the new ss 8A-8H (concerning land passing to SOEs) and, of immediate relevance, ss 8HA-8HI. By s 8HA the latter provisions apply to Crown forests as defined in the Crown Forest Assets Act. They include land within the present claim. Other sections of direct importance are:

8HB Recommendations of Tribunal in respect of Crown forest land

(1) Subject to section 8HC of this Act, where a claim submitted to the Tribunal under section 6 of this Act relates to licensed land the Tribunal may,—

(a) If it finds—

(i) That the claim is well-founded; and

(ii) That the action to be taken under section 6(3) of this Act to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Māori ownership of the whole or part of that land,—

include in its recommendation under section 6(3) of this Act a recommendation that the land or that part of that land be returned to Māori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Māori or group of Māori to whom that land or that part of that land is to be returned);

...

8HC Interim recommendations in respect of Crown forest land

(1) Where the recommendations made by the Tribunal include a recommendation made under section 8HB(1)(a) ... of this Act, all of those recommendations shall be in the first instance interim recommendations.

(2) The Tribunal shall cause copies of its interim findings and interim recommendations to be served on the parties to the inquiry.

(3) Subject to subsection (5) of this section, the Tribunal shall not, without the written consent of the parties, confirm any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b) of this Act, until at least 90 days after the date of the making of the interim recommendations.

(4) Where any party to the inquiry is served with a copy of any interim recommendations that include a recommendation made under section 8HB(1)(a)... of this Act, that party—

(a) May, within 90 days after the date of the making of the interim recommendations, offer to enter into negotiations with the other party for the settlement of the claim; and

(b) Shall, within 90 days after the date of the making of the interim recommendations, inform the Tribunal—

(i) Whether the party accepts or has implemented the interim recommendations; and

(ii) If the party has made an offer under paragraph (a) of this subsection, the result of that offer.

(5) If, before the confirmation of any interim recommendations that include a recommendation made under section 8HB(1)(a) ... of this Act, the claimant and the Minister of Māori Affairs settle the claim, the Tribunal shall, as the case may require, cancel or modify the interim recommendations and may make, if necessary, a final recommendation under section 8HB(1)(a)... of this Act.

(6) If subsection (5) of this section does not apply in relation to any interim recommendations that include a recommendation made under section 8HB(1)(a) ... of this Act, upon the expiration of the 90th day after the date of the making of the interim recommendations, the interim recommendations shall become final recommendations.

...

8HD Right to be heard on question in relation to Crown forest land

(1) Where, in the course of any inquiry into a claim submitted to the Tribunal under section 6 of this Act any question arises in relation to licensed land, the only persons entitled to appear and be heard on that question shall be—

(a) The claimant:

(b) The Minister of Māori Affairs:

(c) Any other Minister of the Crown who notifies the Tribunal in writing that he or she wishes to appear and be heard:

(d) Any Māori who satisfies the Tribunal that he or she, or any group of Māori of which he or she is a member, has an interest in the inquiry apart from any interest in common with the public.

(2) Notwithstanding anything in clause 7 of Schedule 2 to this Act or in section 4A of the Commissions of Inquiry Act 1908 (as applied by clause 8 of Schedule 2 to this Act), no person other than a person designated in any of paragraphs (a) to (d) of subsection (1) of this section shall be entitled to appear and be heard on a question to which subsection (1) of this section applies.

...

[129] Their effect is to charge the Waitangi Tribunal with the sole responsibility for deciding whether clawback will occur and, if so, by which Māori in relation to what land. It is the constitutional responsibility of the courts of general jurisdiction to ensure that the legal rights to which they give rise are delivered; that is required by the rule of law.

[130] The respondents complied meticulously with those procedures. Were it not for the unusual facts discussed at [111] they would be entitled to pursue them just as if the Tribunal were a conventional court. A recent example of how the courts approach such claims has been provided by the United Kingdom Supreme Court in the travellers' case *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11 which, as it happens, displays a distinct sensitivity to the values of a minority in that society.

[131] In considering the Crown's argument that, as a result of the recent introduction of the Bill, the Waitangi Tribunal is prohibited from considering the fact of the claim by Ngā Wairiki to part of the land in question it is necessary to consider the text and purpose of art 9 of the Bill of Rights Act 1688 and s 6(6) of the Treaty of Waitangi Act. The latter requires examination of its specific context.

Context of the s 6(6) issue

The past

[132] Ngā Wairiki as well as Ngāti Apa was wrongly deprived of ancestral land by McLean and as a result Ngā Wairiki lost its mana over its part of the land.

The Treaty of Waitangi Act

[133] The purpose of the 1975 Act, in establishing the Waitangi Tribunal, was said to be:

... 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
...

The SOE report and the Lands case in this Court; the Forests episode and the Forests case in this Court; the consequent legislation

[134] In December 1986 the Tribunal reported that policies proposed to be adopted by the Crown infringed the principles of the Treaty. The Crown accepted that advice. As a result it advised Parliament to legislate in terms (s 9 of the State-Owned Enterprises Act 1986) which permitted the judgment of this Court in the *Lands* case, which held that the Crown's SOE policy infringed the principles of the Treaty. There resulted the enactment of the Treaty of Waitangi (State Enterprises Act) 1988 which added ss 8A-8H to the Treaty of Waitangi Act.

[135] In 1988, in the wake of the settlement following the *Lands* case, Crown conduct in breach of the principles of the Treaty led the New Zealand Māori Council to return to this Court pursuant to the leave reserved to apply. That resulted in the decision in the *Forests* case and the extension to Crown forest land of the clawback protection extended to land transferred to or vested in state-owned enterprises. Sections 8HA-8HI (see [128] above) were added to the Treaty of Waitangi Act by the Crown Forests Assets Act.

The effect of the settlement legislation

[136] The statutory terms on which the *Lands* case and the *Forests* case were settled were intended to safeguard Māori with claims to land transferred to or vested in State enterprises and claims to Crown forest land.

Construction of s 6(6)

The Crown's argument

[137] The Crown argues that s 6(6) of the Treaty of Waitangi Act is to be read as disapplying the safeguard of the special legislation. I repeat that subsection:

(6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives

[138] It supports that argument by reference to art 9 of the Bill of Rights 1688 which declares:

Freedom of speech—That the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

[139] Implicit in the argument is, first, that unless subs (6) is read as meaning that the Tribunal may not examine prior conduct which overlaps with anything said in the bill, the subsection is meaningless; Parliament is not to be taken to have legislated in vain. Secondly, it is implicit that any other construction will bring the Court into collision with Parliament.

[140] It cites the judgments of this Court in *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA), *Milroy v Attorney-General* [2005] NZAR 562 (CA) and *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 (CA) (*NZMC 2007*) as supporting its argument.

Discussion

[141] The essential challenge by claimants who seek clawback is not to the bill. It is to antecedent Crown conduct in breach of the principles of the Treaty. The Legislation Advisory Committee *Guidelines* state as among the fundamental principles of our law at ([3.1.2]):

The principle that a citizen is entitled to have access to the courts [*Chester v Bateson* [1920] 1 KB 829 cited in *New Zealand Drivers Association v Attorney-General* [1982] 1 NZLR 374 at 390 (CA)] despite legislation which might be construed to remove it [*L v M* [1979] 2 NZLR 519 (CA)].

General authority as to the privileges of Parliament

[142] The general authorities as to the privileges of Parliament do not advance the Crown case. In *Bradlaugh v Gossett* (1884) LR 12 QBD 271 (QBD) in which the Lord Chief Justice, Lord Coleridge stated at 275:

What is said or done within the walls of Parliament cannot be inquired into a Court of law. On this point all the judges in the two great cases which exhaust the learning on the subject - *Burdott v Abbott* (1811) 14 East 1 and *Stockdale v Hansard* (1839) 9 Ad & E 1 - are agreed, and are emphatic.

[143] In *British Railways Board v Pickins* [1974] AC 765 (HL) Lord Morris of Borth-y-Gest stated at 794:

It must be for Parliament to decide whether its decreed procedures have been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with such orders ... It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.

In the same case, Lord Simon of Glaisdale in his judgment stated at 798 – 799:

Parliamentary privilege is part of the law of the land (see Erskine May's *Parliamentary Practice* 18th ed. 1971, Ch.V). Among the privileges of the House of Parliament is the exclusive right to determine the regularity of their own internal proceedings.

[144] In *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 at 526 (CA) Richardson J stated:

the Courts must always be sensitive to the rights and privileges of Parliament and the constitutional importance of Parliament's retaining control over its own proceedings. The rule which has emerged is that it is for the Courts to determine whether a particular privilege exists and for the House to be the judge of the occasion and of the manner of its exercise ...

[145] In the Privy Council *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, on appeal from the Court of Appeal Lord Browne-Wilkinson cited art 9 of the Bill of Rights and stated at 7:

In addition to art 9 itself, there is a long line of authority which supports a wider principle of which art 9 is merely one manifestation, viz., that the Courts and Parliament are both astute to recognise their respective

constitutional roles. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges ... As Blackstone said in his *Commentaries on the Laws of England*, 17th ed. (1830), vol. 1, p.165:

the whole of the law and custom of Parliament has its original from this one maxim, that whatever matter arises concerning either House of Parliament, ought to be exercised, discussed, and adjudged in that House to which it relates, and not elsewhere'.

[146] In his *Constitutional & Administrative Law in New Zealand* (3ed 2007) Professor Joseph has written of Lord Browne-Wilkinson's "wider principle" at 434:

The concept of a wider principle should be construed, not as adding to parliament's freedom of speech, but as embracing all of the protections that comprise Parliament's privileges. Extending parliamentary free speech beyond the scope of art 9 lacks historical foundation and subjects the law to uncertainty. No one knows how far Lord Browne-Wilkinson's principle extends. The cases are silent on how wide the wider principle is (if indeed it is wider than art 9). The courts routinely repeat the need to maintain institutional respect and restraint as between the political and judicial branches but this rationale is not exclusive to the common law principle. The need to maintain institutional comity applies equally to art 9 and each of Parliament's other privileges. Article 9, liberally construed, wants for no addition or supplement as a constitutional bulwark.

[147] None of these, or any other case cited, assists the Crown argument that art 9 requires s 6(6) to be read up in the manner for which it contends.

The specific authorities

[148] Judgments and their reasoning are to be read in context. *Te Rūnanga o Wharekauri Rekohu* concerned a deed of settlement relating to Māori fishing rights which the Crown proposed should be given effect by legislation. Māori opposed to the settlement issued proceedings in the High Court seeking a declaration that the deed was not binding on iwi who had not authorised its signature. This Court accepted the Crown's argument that no such declaration was necessary as it the deed did not suggest the iwi who had not signed were bound by it. The Court construed the challenge as directed at restraining the Minister from introducing legislation. In a judgment delivered by Cooke P it held, inevitably, that the principle of non-interference by the courts in parliamentary proceedings (at 308):

... applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.

... [T]he proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment. In our opinion, non-interference with the introduction of a Bill is the corollary of the principle identified by the High Court of Australia in *Nationwide News Pty Ltd v Wills* (1992) 17 Leg Rep 1 and *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 18 Leg Rep 1: namely that an implied right to freedom of expression in relation to public and political affairs necessarily exists in a system of representative government. That right, which is reflected in the Bill of Rights 1688 (UK), being accepted, it is impossible to suppose that a Minister may be judicially prevented from presenting to a representative assembly a measure for consideration.

Closely allied is the conclusion that the Courts would not compel a Minister to present a measure to a representative assembly for consideration. Surely in a democracy it would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament... [P]ublic policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider.

[149] Here, unless s 6(6) is read up, there is no question of the courts' interfering in parliamentary proceedings as was in issue in that case. The issue is the reverse: whether the Executive may interfere in Tribunal proceedings by presentation of a bill to the House.

[150] In *Milroy v Attorney-General* there was another attempt to challenge Executive action preparatory to presentation of a bill to Parliament. It was held not to be amenable to judicial review by the courts. The Waitangi Tribunal was not involved.

[151] In *NZMC 2007* again there was no involvement of the Waitangi Tribunal. This Court declined to declare that the Crown had breached legal, not Treaty, obligations, holding that the courts will not interfere with actions of the Executive which are preparatory to the introduction of legislation.

[152] For reasons that follow, those decisions, limiting the interference of the courts with the Executive when preparing materials to be placed before Parliament,

are not transferable across to the code, established by Parliament, for the Waitangi Tribunal to make decisions without the involvement of the Executive.

[153] What then is the scope of s 6(6)? As with all classification judgments the test is one of substance and proportion. Certainly the deed of settlement (discussed at [11] of the joint judgment) is closely associated with the parliamentary processes it contemplates and recites that it is effectively identifiable with the bill prepared for introduction into the House. Tribunal discussion of either would infringe the policy of art 9.

[154] On the other hand, had the respondents possessed authority to represent Ngā Wairiki, their submission that on an application of Treaty principle Ngā Wairiki should now be recognised as a distinct iwi and provision made for it in a s 8HC recommendation, would be focused upon the proper function not of Parliament but of the Tribunal. The fortuity that an extra-statutory process and a bill to give it effect are inconsistent with such a remedy is, in my opinion, beside the point. Of course Parliament might have chosen to enact the bill in its present form and so terminate the Tribunal proceeding. But a further option for it to consider would have been to await whatever further information fell from the Tribunal, which it might have wished to take into account.

(1) The Interpretation Act 1999: text and purpose

[155] Section 5 of the Interpretation Act 1999 requires the court to consider text and purpose. Section 6(6) of the Treaty of Waitangi Act does not say it may be used to stop the agreed statutory process. It does no more than its text states: it concerns freedom of parliamentary speech and prevents the Tribunal from examining *a bill*; not the conduct that preceded it.

[156] Since the text supports the respondents, if the Crown's argument is to be accepted the text must be read up, according to some inconsistent purpose, to capture what its plain language does not cover.

[157] The argument for doing so is that the courts of New Zealand would infringe principles of comity with Parliament by presuming to examine conduct that preceded a bill with overlapping content.

[158] But art 9 of the Bill of Rights has no greater application here than is provided by s 6(6). It is the very purpose of the Treaty of Waitangi Act to subject to the jurisdiction of the Tribunal *all* conduct of the Crown both as Executive and as Legislature, even including Acts of Parliament, other than what falls within the language of the s 6(6) exception. What matters is New Zealand's own legislation, read in the light of ss 5 and 6 of the Interpretation Act and the constitutional evolution of this country.

[159] The construction asserted by the Crown would deny to Māori rights resulting from the settlement of the *Lands* case and the *Forests* case. It therefore raises the question whether, as was necessary in the *Forests* case, a second application should now be made to this Court pursuant to the leave reserved in the former decision.

[160] If Parliament had such purpose it could readily have said so. This Court would require very clear language before accepting such a result. But there is none.

[161] It is contrary to settled principles of Crown dealing with indigenous peoples for legislation to be read up against them and their interests. Parliament has chosen to limit the constraint on the Tribunal's jurisdiction only to specific interference with its own processes; apart from that the Tribunal is empowered to examine all prior conduct. There is no reason to make any assumption to the contrary.

[162] Since Parliament has authorised the Tribunal to review statutes it must a fortiori countenance review of all Legislative and Executive conduct short of the bills referred to in s 6(6).

[163] In considering purpose there is need for comparative examination. While there is good reason for it, it is the case that New Zealand courts are now alone in the free world in not claiming the power to set aside legislation as unconstitutional. To a significant extent the United Kingdom and Israel have left that category. By not

claiming such a power the New Zealand courts recognise that such an exceptional regime has proved broadly satisfactory for this small community. But to withdraw from reviewing conduct *antedating* introduction of the bill would take us even further from what elsewhere is considered necessary to protect the constitutional rights from the very kind of loss in this case to which, since Mr McLean, Māori have been vulnerable.

[164] Elsewhere there are effective protections against and remedies for expropriation. In Italy the Constitutional Court has recently applied the principle of equality in order to reject Prime Minister Berlusconi's claim to be the only citizen exempt from the criminal law: Judgment no 262 of 2009 19 October 2009. It is inconsistent with New Zealand jurisprudence to apply that principle in reverse: that while other New Zealanders can come to the ordinary courts to vindicate their property rights, Māori who received a statutory protection for theirs by ss 8HA – 8HI will be prevented from enforcing them if a backbencher happens to have obtained a ballot permitting presentation of an inconsistent bill.

[165] Since art 1 of the Bill of Rights of 1688, the law has excluded the Executive from overriding vested legal rights. It is one thing for Parliament to be able to do so, but to permit the Executive to revoke a legal right of access to the s 8HA – 8HI procedures is another thing again. Whatever the construction of s 6(6) before the enactment of ss 8A – 8H and 8HA – 8HI, Parliament has come nowhere near saying that the clawback they guarantee can be stopped in its tracks as the Crown proposes.

[166] Section 6 of the Interpretation Act requires the courts to construe legislation in the light of changing circumstances. One can imagine the reaction of the plaintiffs in the *Lands* and *Forests* cases if during the negotiations the Crown had said “You realise that we can disapply the whole scheme of ss 8A – 8H and 8HA – 8HI by deciding to lodge an inconsistent bill in the House”. Any such suggestion would have run foul of the “honour of the Crown”. It still does.

[167] It may be added that if s 6(6) were intended to have the effect suggested by the Crown, it could hardly have escaped the notice of the Crown counsel before the Tribunal in the *Lands* case, which in addition contained members with outstanding

legal experience. The point would have defeated the report that led to s 9 of the SOE Act. What was before the Tribunal was not a challenge to the parliamentary process but an invitation to it to perform its function of advising the Executive about a topic which warranted the attention of each. In the result Parliament was able to legislate in a manner that was better informed. To facilitate the due conduct of the business of the House is the precise opposite of the challenge to its dignity to which s 9 of the SOE Act is directed. Neither s 9 of the SOE Act nor s 6(6) of the Treaty of Waitangi Act presented an impediment that was surprisingly overlooked.

[168] While the Tribunal has also given opinions to the opposite effect, it is ultimately for the Court, not the Tribunal, to determine the meaning of statutes.

(2) The extra-statutory procedures

[169] There is much wisdom in the Executive's seeking more imaginative methods for approaching the complex and deep-seated problems resulting from our nation's past than waiting for claims to be processed through the Waitangi Tribunal. In *Daniels v Attorney-General* HC AK M 1615-SW99 3 April 2002 I was minded to reject the opinion of Diplock LJ in *BBC v Johns (Inspector of Taxes)* [1965] Ch 32 at 79 (CA) that the Crown may not exercise prerogative powers beyond those that can be traced into ancient history. I now confirm the view stated provisionally in that case:

[47] ... there is a distinct difference between denying the Crown a perquisite of sovereignty and depriving it of the authority that any citizen would be free to exercise if able to obtain lawful funding. The view that the Crown has the power to act in the public interest without breaching the law is outlined by WR Edeson in *The Prerogative of the Crown to Delimit Britain's Maritime Boundary* (1973) 89 LQR 365, 366.

[48] Prerogative powers are to be permitted according to whether their function is essential to government, the historical data performing only a secondary role in the determination of the existence of a prerogative. "Essentially prerogative powers are those which of necessity inhere in governments" [Mitchell *Constitutional Law* (2ed) at 172-5]. Such a pragmatic approach is desirable, for given adequate judicial control in determining the existence of such prerogatives, it would be possible to discard archaic prerogatives that are unsuited to unchecked executive power in our modern constitutional system. Likewise, this approach would permit the preservation or development of prerogative powers that are so suited. Unfortunately, this solution has at present little judicial support.

[48] But it does have the support of Professor Philip Joseph, who cites in aid of the functional approach the classic passage from John Locke's *True End of Government* ch14 *Of Prerogative* which is reproduced in *Constitutional and Administrative Law* (2nd Ed, 2001) p583 and also in John Locke *Political Writings* (Penguin Classics p334). At 586 Professor Joseph observes:

The context of these [prerogative] powers changes as the essential needs of government change. Under the modern Constitution, the doctrine of ministerial responsibility assimilates the royal prerogative within the overall powers of the elected government whose members – the Crown advisers – take political responsibility.

[49] There is much force in the argument noted in paras [47-8]. The definitive expression of public policy is the function of Parliament, speaking through its statutes and in its grant of supply. The application of such policy is the responsibility of the Ministers who have the confidence of the House so as to be able to secure supply. They must not infringe the law pronounced by the Judiciary. But, as Locke memorably observes,

For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of Nature a right to make use of it for the good of the society ... till the legislature can conveniently be assembled to provide for it;...

[50] Where Parliament has not spoken the management of public affairs cannot be permitted to fall into a vacuum. Provided it can secure supply and provided further it does not infringe any law of Parliament or the judge-made common law, the Executive may continue to act – as in the preparation of policy to invite Parliament to pass legislation or to grant supply. The limits of its authority are to be found in the law, which includes the Public Finance Act 1989 and the Constitution Act 1986; not in an examination of the scope of the Sovereign's prerogatives in English history at a time when the King, not the elected representatives of the people, governed the land. In the absence of inconsistent law there is no impediment to the formation and execution of policy by the New Zealand Executive which is answerable for it both to Parliament and in due course to the electorate. On such approach McPherson J's decision in *Hashish [v Minister of Education of Queensland]* [1997] QCA 13] would not represent New Zealand law.

In *Daniels* it was appropriate for the courts to accept that the Executive must have whatever powers are reasonably required to discharge its manifold functions, so long as it does not infringe the law and can secure supply. The same reasoning applies to dealing with Treaty claims by a process of negotiation which results in legislation.

[170] It is however a wholly different matter to assert that the Executive by the extra-statutory process is able, prior to any enactment of legislation:

- (a) to override a statutory Tribunal hearing, in which it participated throughout, and
- (b) to brush aside the right that could result from the hearing,

by the presentation of an inconsistent bill.

(3) The ultimate issue

[171] The Court may not seek to restrain the presentation of a bill to Parliament. But as MacKenzie J correctly held, it can and will resist attempts to restrain access to judicial bodies to which there is a legal right of access. In this case the bodies are the Tribunal, at least in clawback cases, and the courts.

The Court/Parliament dialogue

[172] In offering my opinion as to where the demarcation line runs between the courts and the Legislature, I am conscious of the point made in *Cooper v Attorney-General* [1996] 3 NZLR 480 at 483 (HC):

... both Parliament and the Courts observe, and must be clearly seen to observe, the conventions whose acceptance in New Zealand has substantially avoided the constitutional friction that is a feature of the arrangements of other societies.

That is why courts of other jurisdictions, notably Canada, which assert authority to strike down legislation, take care to act with courtesy to the Legislature. The topic is analysed by Rosalind Dixon in “The Supreme Court of Canada, Charter Dialogue, and Deference” (2009) 47 Osgoode Hall Law Journal 235. Likewise in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC) Wild CJ adjourned the case for six months so that Parliament could consider the matter. A note, reported as *Attorney-General v Daniels* [2004] 2 NZLR 632 (HC), following the decision of the Court of Appeal (reported at [2003] 2 NZLR 742) in the *Daniels* case, records how, following judgment, agreement as to settlement was reached as had occurred in the *Lands and Forests* cases. By informing Parliament of the legal position, just as occurred in the *Lands* case, the Tribunal and the courts will assist Parliament better to ensure that the result of its deliberations will be fully considered.

[173] What has been said of this Court applies equally to the Tribunal. It too, having the Crown before it, may in a given case prefer to offer a more developed interim decision rather than a formal s 8HC (or other) report having immediate legal consequences. In the end all elements of the Crown – Legislature, Executive and Judiciary, the last in s 8H matters plainly including the Tribunal – have no personal interest in any case beyond finding the optimal result for others. If we can work together that is likely to be of advantage.

[174] It is unnecessary to say more than that this Court will give effect to the statutory rights of Treaty claimants and that it has always respected the ultimate power of Parliament to override accrued rights if it is determined to do so, while reserving the right to make a *Quilter v Attorney-General* [1998] 1 NZLR 533 (CA) declaration where that is seen as necessary to discharge its responsibility for maintaining the rule of law.

Conclusion

[175] I do not read subs (6) as inhibiting the Tribunal from pursuing its hearing for the following reasons. First, in terms of s 5 of the Interpretation Act there is lacking the clear language that would be required to bring about such result (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL)). Secondly, s 6(6) is to be read against later developments, among them that the parties to the settlements could never have contemplated that the Crown could easily escape the fetters of ss 8A – 8H and 8HA – 8HI hammered out in the constitutional settlements (s 6 Interpretation Act). Thirdly it is in my opinion inconceivable that such purpose could properly be attributed to a New Zealand Parliament of the 21st century (see ss 5 and 6 of the Interpretation Act).

[176] But because the Crown succeeds on the first issue I agree that the appeal should be allowed.

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