[89] I therefore conclude that the authority has jurisdiction to order particular discovery after the commencement of a hearing. It is important, however, to realise that, despite the conclusion that the statutory procedures do not exclude the authority having the power to order discovery during the hearing, it will still be necessary for an applicant to satisfy the authority that discovery is both necessary and appropriate.

[90] Where a disclosure notice has been served, then an additional burden is imposed on applicants for particular discovery. Applicants must show that the evidence they seek to have discovered is able to be raised within the exception to the evidence exclusion rule. If they cannot succeed at this point, then an order for discovery will be useless. To say, however, that the s 138G rule excludes the possibility of discovery is to confuse the discoverability of evidence with its subsequent admissibility.

Decision

[91] The finding of Judge Willy that the foundation is a charitable trust is not disturbed. The finding of Judge Willy that the first proviso to s 61(27) does not apply in the manner contended by the Commissioner is confirmed. The question of whether any apportionment is appropriate in respect of retained income is referred back to the authority.

[92] The appeal is allowed to the following extent. The decision is that Mr Sloan is a settlor of the foundation. He and the trustees are legally able to receive income from the foundation in the carrying on of any business by the foundation. This is because the trust deed (in the case of the trustees) allows them to do so and (in the case of Mr Sloan) does not prohibit him from doing so. Mr Sloan and Mr Grierson are also able to influence the nature, amount and circumstances of the income by virtue of their capacity as settlor and trustee. This means that the foundation's business income is not exempt from tax.

[93] The matter now must revert to the authority to deal with issues of quantum. This will entail argument on what is business income, including whether any foundation income comes within the deeming provisions of s 61(27)(f). It will also entail argument as to the amount of that business income (and any relevant deductions). Of course the onus will be on the foundation to show the extent to which the Commissioner's assessments are incorrect.

Costs

[94] The Commissioner having largely succeeded, costs on the scale 2B are awarded to the Commissioner.

Appeal allowed in part.

Solicitors for the Commissioner: *Meredith Connell* (Auckland).
Solicitors for the trustees: *R W Bell-Booth* (Takapuna).

Reported by: Bernard Robertson, *Barrister*

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McGuire v Hastings District Council

Judicial Committee [2000] UKPC 43
9 May; 1 November 2001
Lord Bingham of Cornhill, Lord Cooke of Thorndon, Lord Hobhouse of Woodborough, Lord Millet and Sir Christopher Slade

Maori and Maori land – Maori Land Court – Jurisdiction – Designation of Maori land for roading – Whether Maori Land Court had jurisdiction to grant injunction restraining designation – Trespass or any other injury to Maori freehold land – Collateral attack on alleged ultra vires decision of district council – Alleged lack of consultation – Direct challenge for alleged breach of public law duties compared to collateral challenge – Te Ture Whenua Maori Act 1993, ss 2, 6, 18 and 19(1)(a) – Resource Management Act 1991, ss 5(1), 6, 7, 8, 168, 168A, 171, 174, 251, 252, 253, 255, 269, 296, 299, 305, 310 and 314.

These proceedings concerned a challenge to the issuing of a note of requirement for the designation of a road through Maori land by the Hastings District Council (Hastings). The applicants obtained an interim injunction restraining the designation in the Maori Land Court. In response Hastings sought judicial review of the decision of the Maori Land Court in the High Court claiming that the Maori Land Court had no judicial review jurisdiction to grant the injunction. It was not disputed that Hastings had the power to designate Maori land for roading under s 168A of the Resource Management Act. In the Maori Land Court the applicants had alleged that the decision was ultra vires on the ground of failure to meet consultative requirements. The Maori Land Court had jurisdiction under s 19(1)(a) of the Te Ture Whenua Maori Act 1993 to grant an injunction against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land. The applicants sought to invoke the line of authority headed by *Boddington v British Transport Police* [1999] 2 AC 143 to the effect that a collateral challenge to the validity of an administrative decision could be raised in civil proceedings. Specifically the applicants claimed the Maori Land Court had jurisdiction to entertain a collateral challenge to the validity of Hastings' decision on the basis that the decision, if invalid, amounted to an actual or threatened trespass or other injury to Maori freehold land. The High Court and Court of Appeal found that the Maori Land Court lacked jurisdiction.

Held: It was not possible to stretch the Te Ture Whenua Maori Act to uphold the injunctions. This was not a collateral challenge to the validity of an administrative act in the context of an injunction application against a threatened injury to Maori land. Rather it was direct challenge seeking to establish breaches of public law duties arising under the Resource Management Act. There was adequate protection under that Act for Maori land rights. The Maori Land Court had a specialised and limited jurisdiction and was not vested

with a judicial review jurisdiction to enable it to make the injunction (see paras [10], [12], [13], [29]).

Boddington v British Transport Police [1999] 2 AC 143; [1998] 2 All ER 203 discussed.

Appeal dismissed.

Observations: (i) In the context of the Te Ture Whenua Maori Act 1993, with its emphasis on the treasured special significance of ancestral land, activities other than physical interference might constitute injury to Maori land (see para [10]).

(ii) It might be useful to have available for cases raising Maori issues a reserve pool of alternate Environment Judges and Deputy Environment Commissioners. If practicable, there should be a substantial Maori membership if this case reaches the Environment Court (see paras [27], [28]).

Other cases mentioned in judgment

Adeyinka Oyekan v Musendiku Adele [1957] 1 WLR 876; [1957] 2 All ER 785 (PC).

Attorney-General v Maori Land Court [1999] 1 NZLR 689 (CA).

McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277; [2000] 4 All ER 913.

R v Secretary of State for the Home Department, ex p Daly [2001] 2 AC 532; [2001] 2 WLR 1622.

R v Wicks [1998] AC 92; [1997] 2 All ER 801.

Appeal

This was an appeal by M A McGuire and F P Makea from the judgment of the Court of Appeal (reported at [2000] 1 NZLR 679) dismissing their appeal from the judgment of Goddard J (High Court, Napier, CP 11/99, 3 September 1999), granting an application by the Hastings District Council, first respondent, for judicial review of the decision of the Maori Land Court, second respondent, to issue an injunction under s 19(1)(a) of the Te Ture Whenua Maori Act 1993 restraining the district council from acting under ss 168 and 168A of the Resource Management Act 1991.

P F Majurey and *C N Whata* for McGuire and Makea.

The Rt Hon Sir Geoffrey Palmer and *M von Dadelszen* for the Hastings District Council.

P F Majurey and ***C N Whata*** for the appellants. It is impossible to overemphasise the importance of land to Maori, especially in the spiritual context. They are descended from the land and identify with it. The Te Ture Whenua Maori Act 1993 (TTWMA) represented an unprecedented recognition of Maori land as taonga tuku iho (land passed down through generations since time immemorial) and heralded a change of direction from prior legislation, which facilitated the taking of Maori land, to an emphasis on the retention and control of Maori land by Maori land owners. This special regime exists because of the Crown's guarantee of the Treaty of Waitangi and because less than five per cent of land remains "Maori freehold land".

Parliament through the TTWMA unequivocally recognised the special status of Maori land and identified the Maori Land Court as the mechanism by which Maori land is protected. No other Court, including the Environment Court and the High Court, is specifically mandated and required to seek to protect the retention and control of Maori land as taonga tuku iho. Consequently, the Maori Land Court exercises a unique jurisdiction which should only be circumscribed by clear and express language to that effect. The only potentially express limitation on the jurisdiction is contained in s 359 of the TTWMA which sets out a list of enactments which are stated not to be affected by the Act: the Resource Management Act 1991 (RMA) is not mentioned. Both the TTWMA and the RMA should be interpreted in a manner which best furthers the guarantee of protection affirmed by the Treaty of Waitangi: see *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) at pp 516 – 517. It could not be right that this special form of protection could be watered down by an implication of procedural exclusivity. On standard principles of interpretation there is no need for an express statement that the Maori Land Court has jurisdiction.

On the plain words of s 19(1)(a) of the TTWMA, the Maori Land Court may injunct the council (or any other designating authority) in respect of any actual or threatened trespass or other injury to Maori freehold land consequent upon the purported exercise of its requirement and/or designation powers under the RMA. That construction of s 19(1)(a) will best further the principles set out in the preamble to the TTWMA, as required by s 2 of that Act. More specifically, affirming the capacity of the Maori Land Court to injunct an unlawful exercise of the requirement and designation powers under the RMA will best further: (a) the spirit of exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi; (b) the recognition that land is taonga tuku iho of special significance to Maori people; (c) the retention of that land in the hands of its owners, their whanau and their hapu; and (d) the maintenance of a Court and the establishment of mechanisms to assist the Maori people to achieve the implementation of these principles. A power to injunct a council from improperly notifying a requirement over Maori freehold land will facilitate and promote the retention, use, development and control of Maori land as taonga tuku iho by Maori land owners consistent with s 2(2). The meaning of the Maori words is critical as the English translations are often inaccurate. In the event of a conflict between the English and Maori versions of the Treaty of Waitangi the Maori version prevails.

The RMA does not itself expressly or by necessary implication exclude the jurisdiction of the Maori Land Court. Part VIII, dealing with designations and heritage orders, does not identify a process by which the procedural or substantive merits of a decision to notify a requirement can be tested. There is no right of appeal. Part XII, relating to declarations and enforcement orders, enables the Environment Court to address contravention or likely contravention of the RMA, but this Part does not purport to confer exclusive jurisdiction on the Environment Court in such matters. Section 296 excludes the jurisdiction of the High Court where there is a right to refer any matter for inquiry to the Environment Court or to appeal to the Court against a decision of a council. "Inquiry" in this context is used as a term of art and cross refers to the statutory provisions in the RMA which deal with inquiries by the Environment Court:

see for example s 210. Accordingly, there is nothing in those parts of the Act dealing with requirements and remedies which ousts or requires the ousting of the jurisdiction of the Maori Land Court.

If the Maori Land Court has a discretion to grant an injunction against an unlawful exercise of powers to notify a requirement pursuant to the RMA, it is bound to give effect to the statutory directive to exercise any discretion so as to promote the retention and control of Maori land as taonga tuku iho by Maori. Both the Environment Court and the High Court are to have regard to a wider set of considerations in exercising their discretion. The Environment Court in particular is governed by s 5 of the RMA which states that the purpose of the Act is the sustainable management of natural and physical resources. A consequence of this is that "such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues": *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at p 305. Therefore, the relief afforded by the Resource Management Act does not provide the same guarantee of protection as the Maori Land Court pursuant to s 19(1)(a) of the TTWMA.

It would be open to the Maori Land Court exercising its broad discretion to say that a designation is capable of being an injury to Maori land given Maori sensitivity to land, and therefore a tort in the sense of a wrong, that is, designation can be a tort in Maori eyes, and therefore in the eyes of New Zealand law, under the Act even if it is not a tort under the common law.

There are no Environment Court Judges who are also Maori Land Court Judges, although there is one Commissioner. However, even if there were Maori Land Court Judges sitting in the Environment Court they would not be able to have recourse to the relevant sections of the TTWMA when sitting in that capacity.

Whata following. Assuming a tortious trespass has occurred Maori should have available to them the best opportunity to vindicate their rights in respect of Maori freehold land. This is consistent with the common law and the approach taken in a series of cases dealing with collateral challenge: see *Boddington v British Transport Police* [1999] 2 AC 143 at pp 160 – 161 and pp 172 – 173; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 at p 654; *Wandsworth London Borough Council v Winder* [1985] AC 461 at p 477; *Steed v Secretary of State for the Home Department* [2000] 1 WLR 1169; *Tamaki v Baker* [1901] AC 561 and *R v Wicks* [1998] AC 92. The recurring theme in these cases is the affirmation of the right of individuals to vindicate their rights in the face of executive action through Courts which provide the best possible remedy for the individual. The Maori Land Court is concerned with the land rights which are protected by the TTWMA whereas the Environment Court is not concerned with property rights at all. Therefore, the Environment Court under the RMA does not provide a comprehensive nor full set of remedies for unlawful decision by the council to notify a requirement. There is no "positive prescription of law by statute or by statutory rules" which prohibits the appellants from enforcing their rights to protect Maori freehold land from unlawful trespass or other injury by action against the council in the Maori Land Court: see *Davy v Spelthorne Borough Council* [1984] 1 AC 262 at pp 276 – 278.

The two jurisdictions are not in conflict. The RMA is irrelevant when it comes to interference with the property rights of Maori. When assessing the interface between two separate statutes, it is reasonable to construe the provisions so as to give effect to both. The construction argued for by the appellants is consistent with the purpose of s 19(1)(a) of the TTWMA and s 168A of the RMA. The purpose of s 19(1)(a) of the TTWMA is to prevent "unlawful" trespass or other injury to Maori freehold land. The purpose of s 168A is to enable "lawful" requirements to proceed to notification. There is therefore no prima facie conflict between the two enactments.

By contrast, the construction adopted by the district council and approved by the Court of Appeal directly derogates from the clear imperatives of the TTWMA to promote the retention and the control of Maori land as taonga tuku iho by Maori. Indeed that construction involves derogating from the key purpose of the TTWMA by process of implication, where such implication is neither necessary nor warranted by the RMA. The two Acts are not in conflict but complement each other. Where the RMA does not expressly derogate from the protection afforded by the TTWMA, that protection subsists.

"Trespass or other injury" includes conduct wider than actual or threatened physical damage or interference with physical possession of land. Section 2 of the TTWMA directs that the meaning given to "trespass or other injury" must best further the principles set out in the preamble to the Act. Based on that clear statutory direction, the word "trespass or other injury" should not be given the limited or narrow meaning of "physical trespass or other injury", as this would not best further those principles. The conception of "trespass or other injury" which best furthers those principles includes interference with the relationship that Maori have with the land as taonga tuku iho and this would include the imposition of controls which removed the ability of Maori to exercise their rangatiratanga in respect of the land.

Support for a broader rather than narrower statutory construction can be found in *R v Kensington and Chelsea Royal London Borough Council, ex p Lawrie Plantation Services Ltd* [1999] 1 WLR 1415. By contrast, a focus on physical injury only, using case law in support of such an approach, is Anglocentric and reminiscent of native land legislation which sought to assimilate the rights of natives according to British law. The "planning blight" caused by designation of land has became known as a special kind of injury to land.

The Rt Hon Sir Geoffrey Palmer and ***M von Dadelszen*** for the district council. In the instant case there is no ground on which an injunction can be issued, but more importantly, there is no jurisdiction for the Maori Land Court to grant an injunction at all.

The Te Ture Whenua Maori Act 1993 and the RMA are two large, modern statutes which are unique to New Zealand. There is no equivalent to either of them in the United Kingdom. The RMA is a huge piece of legislation which consolidates more than 50 statutes and provides a new framework compared to the old Town and Country Planning Act 1977. It was designed with great care and designed to fit in with the Public Works Act 1981, under which Maori land can be taken. The New Zealand legislature deliberately considered the interface between the TTWMA, the RMA and the Public Works Act 1981. The jurisdiction of the Maori Land Court to injunct the district council is

circumscribed by the scheme and provisions of the RMA. The legislature designed the TTWMA and the RMA to provide concomitant jurisdictions for the Environment Court and the Maori Land Court. Each is a specialist Court of record: see s 247 of the RMA and s 6 of the TTWMA. The RMA contains procedures and processes to protect all interests involved, including Maori interests, and this cannot be reconciled with the purported jurisdiction of the Maori Land Court under the TTWMA to make orders that would cut across the administration of the RMA: see Part II of the RMA, including in particular ss 6(e), 7(a), 8, 14(3)(c), 168A and 171. Parliament contemplated some potential involvement on the part of Maori Land Court Judges in resource management matters, but determined that such involvement should occur under the jurisdiction of the RMA and its Court system: see ss 249, 250, 252 and 254.

This is supported by the Parliamentary Debates on the Te Ture Whenua Maori Bill. At the Bill's second reading in 1992 the Hon Doug Kidd, the Minister of Maori Affairs, stated: "Finally, since the Bill was introduced in 1987, changes have occurred that have required the Bill to be updated. For example, the area of Maori affairs has undergone substantial restructuring, and the Resource Management Act has been passed. Those areas of change have been taken into account" *Hansard* (531, *New Zealand Parliamentary Debates*, 17 November 1992 at p 12367). The implication from the provisions of the RMA is that the requirements of that Act apply to Maori land unless specific alternative provision has been made: see ss 11(1)(c), 11(2), 108(9)(b) and 353.

When land is acquired following designation under Part VIII of the RMA, the Public Works Act 1981 provides the statutory framework for acquisition by either the Crown or by local authorities: see ss 17, 18, 23(2), 41 and 42A of the 1981 Act.

Parliament has also carefully considered and limited the interface between the Te Ture Whenua Maori Act 1993 and the Public Works Act 1981. The TTWMA does not change the legal position that Maori land is subject to the 1981 Act: see ss 4, 130, 134(2), 183(6)(d) and 320 of the TTWMA; ss 16(2), 17(4) and 18(5) of the 1981 Act; *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129.

The Te Ture Whenua Maori Act 1993 strictly prescribes the jurisdiction of the Maori Land Court and does not grant jurisdiction in respect of matters arising under the RMA. The only interrelationships between the Maori Land Court and the Environment Court are those that are specified. The RMA's requirements and designation provisions are not subject in any way to the TTWMA. When the TTWMA was enacted Parliament specifically addressed the application of the RMA: see ss 4, 99(3), 123(6A) and 301 – 305 of the TTWMA. Conversely, Maori values have been particularly recognised and elevated under the RMA: see Part II – "Purpose and Principles" and ss 14(3)(c), 39(2)(b), 42(l)(a), 51, 61, 66, 74, 77, 104, 168(3), 168A, 171, 191, 199, 253(e), 269(3), 276(3) and 345. In determining the jurisdiction of the Maori Land Court, the right approach is to conduct an extensive analysis of the TTWMA, having regard to the particularity with which the legislature defined the scope of the Maori Land Court: see *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA).

The three Acts constitute a carefully balanced system which is fair, open and transparent and takes into account a variety of competing interests. The provisions of the RMA providing for designation are clear and precise. The exceptions to the designation process were revisited in 1997 when the Act was amended and further provisions were added. Nothing in any of the three statutes exempts Maori land from normal planning control: see Boast, Erueti, McPhail and Smith, *Maori Land Law* (1999) at pp 257 – 268. Maori freehold land can lose its status. The very procedures under attack by the appellants are contemplated by the statutes.

The Court of Appeal decision is plainly correct and the appellants have demonstrated no legal error in its reasoning. A literal interpretation of the Maori phrasing used in the Treaty of Waitangi and the TTWMA means that nothing can be done to Maori land without Maori consent. That is not what the law of New Zealand provides. In essence the appellants' argument consists of extending the application of the TTWMA in a way which has never been contemplated before in New Zealand and which is contrary to the recent approach of the Court of Appeal: see *Attorney-General v Maori Land Court*; *Grace v Grace* [1995] 1 NZLR 1 (CA). It has been rejected by all the Judges below.

The appellants' reliance on the preeminent place of the Treaty of Waitangi is misplaced, the references to the Treaty in the TTWMA do not extend the reach of the Act, and nor does the statement of purpose in the preamble. For a neutral analysis see Boast, Erueti, McPhail and Smith, *Maori Land Law* at p 285.

There are deep and significant policy implications if the appellants' case is accepted. It will be disruptive to local government if the Maori Land Court can intervene in the manner the appellants are arguing for. If Courts of similar status but with different specialist jurisdictions both have jurisdiction over the same matter it will lead to chaos, delay, confusion and expense. The Board should have regard to the practical results as well as the legal arguments.

In order for there to be a trespass, there must be some unlawful act and physical entry or use of force. Section 19 of the TTWMA, which grants jurisdiction in respect of "trespass or other injury", should be read in conjunction with s 346. The same logic should apply to s 18(l)(a) which confers the equivalent jurisdiction in relation to injunctions: see Boast, Erueti, McPhail and Smith, *Maori Land Law* at p 114. Under the principle ejusdem generis the term "or other injury" is to be limited by the same criteria that apply to the word "trespass". The phrase "trespass or other injury" has been in statutes since the Native Land Act 1909 (s 24(l)(d) and the Maori Affairs Act 1953) and, because the words were not changed in the drafting of the TTWMA, a change in meaning should not be inferred from the purpose of the Act.

The district council's actions are authorised by statute: see ss 168 and 168A of the RMA. Civil liability cannot arise in respect of actions authorised by statute. If the actions of the district council are ultra vires, the requirement and/or designation will be a nullity and hence there will be no trespass without physical entry. If the actions are intra vires, they do not by definition amount to

a trespass because they are lawful. Cases like *Boddington v British Transport Police*; *R v Wicks* etc can be distinguished. The New Zealand statutory scheme provides the appellants with plenty of opportunities to challenge the district council's decision.

von Dadelszen following. [Submissions were made on the facts: the roles of the district and regional councils were outlined; the history of the planning process in Hastings, the consultation which takes place and the current situation were described.]

Majurey in reply. The public consultation on planning decisions is inadequate as is the available appeal procedure. There is already a concurrent jurisdiction between the Environment Court and the High Court. There is no pragmatic reason not to add the Maori Land Court to the equation. The fact that there is no similar United Kingdom legislation is not a reason for the Board to follow the New Zealand Courts. The Board is a manifestation of the Crown and its advisory role to the Crown symbolises the Treaty between the Crown and Maori.

The following was said to mark the last appearance at the Board of Lord Cooke of Thorndon:

The Rt Hon Sir Geoffrey Palmer: My Lords, this is the occasion of Lord Cooke's last sitting at the Judicial Committee of the Privy Council and I think he has already had his last sitting as a Lord of Appeal. And it is therefore an occasion to acknowledge His Lordship's contribution to the law and it is a felicitous occasion that this was an appeal from New Zealand on the occasion of his last sitting. We New Zealand lawyers feel grateful and humble that we can be here on this occasion. New Zealand is a small country, My Lords, but there are those who love her, and His Lordship is one of them. He has served the bulk of his career in New Zealand when a man of his talents could easily have served it elsewhere in larger places, but he elected to serve for many years as a New Zealand Judge and his contribution to New Zealand has been of inestimable value. One of his former judicial colleagues, lately the Governor-General of New Zealand, Sir Michael Hardie-Boys, has described Lord Cooke as, and I quote, "Undoubtedly one of New Zealand's intellectual giants. His influence has been vast".

My Lords, at this point it must recognised that Lord Cooke is the greatest Judge that New Zealand has produced and his qualities have been recognised far beyond New Zealand's shores. His Lordship graduated LLM with first class honours from Victoria University of Wellington; he won the travelling scholarship in law in 1950 and went to Cambridge as a research fellow; he won the Yorke Prize; he got a PhD when he returned to practice law in New Zealand and he took silk in 1964. He was appointed a Judge at a relatively early age in 1972. He was appointed, after it was clear that he had unusual juridical ability, to the Court of Appeal in 1976. He was President of the New Zealand Court of Appeal from 1986 to 1996. He was then appointed a Lord of Appeal in the United Kingdom, something that has never occurred to any other New Zealand lawyer, and now that the ties that bind us are becoming less it will probably never happen again. My Lords, it has been a glittering legal career. Lord Cooke has always been able to see the human and social consequences of legal rules and not to be afraid to be robust and bold on occasion. Lord Cooke's contribution to the law and to life will live in the pages of the Law Reports

forever and there are some jurisdictions who are fortunate enough to be able to continue receiving his judicial services because they don't have these retirement laws that infect some countries including New Zealand and (it seems) the United Kingdom, though the age here is a little higher. Oliver Wendel Holmes I recall sat on the Supreme Court of the United States until well into his 90s. Lord Cooke has rendered the state some brilliant, long and distinguished service. And on behalf of the New Zealand lawyers I would like to pay a tribute to him for that. I have been asked by the New Zealand Law Society on this occasion to say on their behalf the following:

> "Christine Grice, the President of the Law Society, wishes to say that the Society itself and the legal profession as a whole join with these remarks that I have made. Lord Cooke's long and distinguished career as a lawyer, Judge and jurist is recognised justifiably and warmly by us all as extraordinary and unsurpassed."

I have also been asked to convey the following message to Your Lordships by the Attorney-General of New Zealand, The Honourable Margaret Wilson. She says, and I quote:

> "Lord Cooke has made a seminal contribution to the development of New Zealand jurisprudence at a critical time in the development of New Zealand's nationhood."

That says it all My Lords. The hour has come when Your Lordships must say farewell to Lord Cooke. Perhaps he will now have more time to watch cricket, of which he is particularly fond, and perhaps the pages of the law reviews will see even more of his legal analyses than they have seen in recent times. I certainly hope so. It has been an honour to be able to make these remarks, I am very grateful for the opportunity, and could I say that my learned friend Mr Majurey would like to say a few words.

LORD BINGHAM OF CORNHILL: Thank you very much indeed. Mr Majurey.

Majurey addressed the Board in Maori and then continued as follows: May it please Your Lordships, at this time I want to pay homage to My Lord, Lord Cooke, supporting the words of my learned friend which are fully endorsed by our people. I do not need to go through the many achievements that have been achieved by Lord Cooke. He is a mountain of a man in our country. Oftentimes the tributes in our country, which perhaps reflects our society, are placed on those who achieve exploits in the sporting field and elsewhere in the world. But it is also important that the deeds of Lord Cooke are recognised. It is somewhat of a humbling experience to convey the appreciation and love of the Maori people to Lord Cooke. His is a lofty position in the world of Maoridom. One needs only think of the famous cases of *New Zealand Maori Council* (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641), *Tainui Maori Trust Board* (*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA)) and his judgment in the *Maori Broadcasting* case (*New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA)); and on a personal note, as a very young junior counsel – Lord Cooke would not probably remember – of the famous *Kerikeri* case (*Environmental Defence Society Inc v Mangonui County*

Council [1989] 3 NZLR 257 (CA)), a case of some moment to Maori in the Court of Appeal. Those cases are a testament to the shining light that this individual has been in our country. There was many a tear that fell when Lord Cooke left our shores and brought his skills to this country.

It is a tradition in our country for speeches to have a song.

Majurey, ***Whata*** and the tangata whenua of Karamu, Hastings then sang *E Toru Nga Mea*.

Majurey: Thank you, Your Lordships.

LORD BINGHAM OF CORNHILL: Sir Geoffrey, Mr Majurey, I'm afraid that my capacity to respond musically is as deficient as my capacity to respond in Maori, but his British colleagues would wish to pay tribute to Lord Cooke. He is very easily the longest serving member of this Board, having sat on the Judicial Committee since 1978, shortly after his appointment to the Court of Appeal of New Zealand. Happily we have been privileged to welcome him on very many occasions since then and we have valued more than I can say his erudition which has marked him out as one of the outstanding jurists of the common law world; and we have valued also his long and broad experience, his humane and radical vision, his commitment and his youthful zest for the case in hand. I think it is true of Lord Cooke as it is of every legal addict that his pulse still quickens as he opens a new bundle of papers. We've enormously valued him as a colleague, never backward in forming or expressing opinions but never seeking to overbear or dominate as a man of lesser quality with his record of achievement might have been tempted to do. This is, as Sir Geoffrey suggested, a slightly sombre occasion not only because we must bid a reluctant professional farewell to a cherished colleague and friend but also because Lord Cooke's career in its British dimension seems very, very unlikely ever to be repeated. That will be our loss. But we have been uniquely privileged to enjoy his company and his contribution for so long. So we offer him our congratulations on his birthday yesterday, our profound thanks for all that he has done, our continuing good wishes and our recognition that the law is yet another field in which the southern hemisphere has proved itself a world beater.

LORD COOKE OF THORNDON: Thank you all for those very kind messages, however undeserved. Since retiring from the New Zealand bench five years or so ago, I have been fortunate to have had a sort of judicial Indian summer in this place and the Lords. That experience I greatly value and from it I have learnt. Now, subject to a useful collection of reserved judgments the composition of which will sustain me into the summer, statute puts me out to judicial grass in the United Kingdom and rightly so. I leave not with sadness but with gratitude and there could have been no more appropriate last case than this very New Zealand one, sitting with a Board of English judicial friends presided over by Lord Bingham of Cornhill and with the New Zealand Bar lead by Sir Geoffrey Palmer, who bore political responsibility for my appointment as President of the Court of Appeal. I appreciate too the messages that Sir Geoffrey and Mr Majurey have conveyed from other New Zealand sources. I have also appreciated the amicable surveillance of Mr Registrar John Watherston, and am glad that he is here today; and finally there has been the delightful accompaniment of some beautiful Maori singing. For all of that I am truly grateful. Tena koutou, tena koutou, tena tatou katoa.

Cur adv vult

The judgment of Their Lordships was delivered by

LORD COOKE OF THORNDON. **[1]** This case raises an issue about Maori land rights. The Hastings District Council (Hastings) was proposing at a meeting to be held at 1.00pm on 29 April 1999 to issue notice of a requirement under s 168A of the Resource Management Act 1991 (the RMA) for the designation of a road (the northern arterial route) intended to link the Hastings urban area and Havelock North to a motorway between Hastings and Napier which was opened that month. The proposed route would run through inter alia Maori freehold lands known as Karamu GB (Balance), Karamu GD (Balance) and Karamu No 15B. On 23 April 1999 representatives of the owners filed in the Maori Land Court applications for injunctions under s 19(1)(a) of the Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993) preventing Hastings from so designating their lands. The applications were heard by Judge Isaac, on short notice, on the morning of 29 April 1999. He had before him affidavits by the applicants Mr Frederick Pori Makea and Mrs Margaret Akata McGuire, and from Hastings' Policy Manager, Mr Mark Anthony Clews; and he heard the applicants in person and Mr Mark von Dadelszen, counsel for Hastings. He granted interim injunctions. They were only interim, until the further Order of the Court, to enable further discussion by the applicants with Hastings: a substantive hearing was to be arranged if necessary. But on 22 May 1999 Hastings filed a judicial review application in the High Court seeking declarations that the Maori Land Court had acted ultra vires and an order setting aside its decision.

[2] In the High Court the judicial review application came before Goddard J. A brief agreed statement of facts and a series of agreed questions of law came to be placed before the Judge. In a judgment delivered on 3 September 1999 she decided these questions in favour of Hastings. The Maori applicants appealed to the Court of Appeal, where the case was heard by Richardson P, Henry, Thomas, Keith and Tipping JJ. In a judgment delivered by the President on 16 December 1999 the appeal was dismissed: [2000] 1 NZLR 679. The Maori applicants have appealed to Her Majesty in Council by leave granted by the Court of Appeal.

[3] The case turns partly on the relationship between the Te Ture Whenua Maori Act 1993 (henceforth referred to as "the MLA") and the Resource Management Act 1991. The directly or indirectly relevant provisions of both were reviewed very fully by Goddard J and to a large extent by the Court of Appeal; and the Board has had the advantage of helpful wide-ranging reviews of these and other enactments by Mr Majurey and Mr Whata for the appellants and Sir Geoffrey Palmer and Mr von Dadelszen for Hastings. (The second respondent, the Maori Land Court, abides the decision of the Board.) Their Lordships think that no good purpose would be served by their reciting and commenting on all the statutory provisions having arguably some degree of relevance. They will concentrate, rather, on the main provisions which they regard as of importance for this case.

The Maori Land Act

[4] Certainly the preamble to the MLA and the directions about interpretation in s 2 are important and should be set out in full. There are both Maori and English versions of the preamble, and it is sufficient to quote the latter, with a preliminary explanation of some of the terms. Some meanings are or may be contentious, but for the purposes of the present case it is enough to say that kawanatanga approximates to governance, rangatiratanga to chieftainship, and taonga tuku iho to land passed down through generations since time immemorial. Whanau may be rendered as family, and hapu as subtribe. The English version of the preamble reads:

> "Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles."

[5] Section 2 reads:

> **2. Interpretation of Act generally** – (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.
>
> (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu and their descendants, and that protects wahi tapu.
>
> (3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

[6] The MLA is, by its long title, an Act to reform the laws relating to Maori land in accordance with the principles set out in the preamble to this Act. Previous statutes relating to the Maori Land Court had tended to be seen as giving that Court the role of facilitating the ascertainment and division of title, and the alienation of Maori land. The jurisdiction was perceived as linked with the former goal of assimilation. The Act of 1993 has manifestly a different emphasis, which must receive weight in its interpretation.

[7] Section 6 provides that there shall continue to be a Court of record called the Maori Land Court. It is to have all the powers that are inherent in a Court of record and the jurisdiction and powers expressly conferred on it by this or any other Act. Thus it is a specialised Court of limited (though important) jurisdiction – a consideration which underlay the decision of the Court of Appeal in a case not otherwise closely relevant, *Attorney-General v Maori Land Court* [1999] 1 NZLR 689. Section 17(1), another section new in the Act of 1993, states that the primary objective of the Court in exercising its jurisdiction shall be to promote and assist in:

> (a) The retention of Maori land and General land owned by Maori in the hands of the owners; and
>
> (b) The effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

Some further objectives, which need not be quoted, are then set out in subs (2).

[8] In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, s 18(1) then lists in (a) – (i) a range of powers, including "(c) To hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land". None of these powers are expressed to include judicial review of administrative action or anything tantamount thereto. Subsection (2) provides that "any proceedings commenced in the Maori Land Court may, if the Judge thinks fit, be removed for hearing into any other Court of competent jurisdiction."

[9] Section 19 gives jurisdiction in respect of injunctions. Section 19(1)(a), whereunder the interim injunctions were sought and granted in the present case, empowers the Court at any time to issue an order by way of injunction "(a) [a]gainst any person in respect of any actual or threatened trespass or other injury to any Maori freehold land". Thus it is the counterpart of s 18(1)(c) already mentioned. Historically s 19(1)(a) goes back to 1909 and Sir John Salmond; but until 1982 the jurisdiction was restricted to granting injunctions against any native or (in more contemporary language) any Maori. Originally "trespass or other injury" may well have had quite a restricted ambit, confined to traditional torts; but in its new context the phrase may well have a new reach. The question is analogous to that which arose in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 as to the contemporary meaning of "public meeting", which was held to include a press conference such as occurred in that case. Lord Bingham of Cornhill put it at p 292:

> "4 Although the 1955 reference to 'public meeting' derives from 1888, it must be interpreted in a manner which gives effect to the intention of the legislature in the social and other conditions which obtain today."

And Lord Steyn said at p 296 that, unless they reveal a contrary intention, statutes are to be interpreted as "always speaking"; they must be interpreted and applied in the world as it exists today, and in the light of the legal system and norms currently in force. In law, he has said elsewhere, context is everything: *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, p 447.

[10] The Court of Appeal preferred to leave open the question whether s 19(1)(a) can be read as embracing conduct wider than actual or threatened physical damage to or interference with the possession of land. The Board is disposed to think that in the context of the Act of 1993, with its emphasis on the treasured special significance of ancestral land to Maori, activities other than physical interference could constitute injury to Maori freehold land. For example activities on adjoining land, albeit not amounting to a common law nuisance, might be an affront to spiritual values or to what in the RMA is called tikanga Maori (Maori customary values and practices). But it is indeed

unnecessary to decide the point. Clearly if there was a physical interference, as by unlawful bulldozing in anticipation of the taking of Maori freehold land or as incidental to roadworks on adjoining land, the Maori Land Court would have jurisdiction under s 19(1)(a). The first respondent (Hastings) does not dispute this. Nor can it be disputed that a notice of designation, whether lawful or unlawful, and though appealable, can have a blighting effect which might well be described as an injury. The fundamental difficulty for the appellants lies deeper. It is that, as already mentioned, the Maori Land Court is not given judicial review jurisdiction. There are remedies under the RMA, to which Their Lordships will turn later, and there is the residual judicial review jurisdiction of the High Court. But, like both the High Court and the Court of Appeal in New Zealand, the Board is unable to stretch the scope of the MLA so far as would be needed to uphold these interim injunctions.

[11] For the appellants reliance was placed on *Boddington v British Transport Police* [1999] 2 AC 143 and the line of recent English cases there applied. In *Boddington* the House of Lords held that in a summary criminal prosecution the defendant was entitled to raise before the Magistrates for adjudication a defence that the bylaw under which he was being prosecuted, or an administrative act purportedly done under it, was ultra vires. The actual decision does not apply to the present case, as the Maori Land Court was not exercising any criminal jurisdiction. What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings also, as when the defendant is being sued civilly by a public authority: see the observations of Lord Irvine of Lairg LC at p 158 and pp 160 – 162, and Lord Steyn at pp 171 – 173. These passages are qualified, however, by recognition that a particular statutory context or scheme may exclude such collateral challenges, *R v Wicks* [1998] AC 92 being an example in the planning field. *Wicks* itself, a case of a criminal prosecution and statutory provisions different from those of the present case, is not particularly helpful for present purposes. Still, as will appear from the discussion of the RMA later in this judgment, there are strong grounds for regarding the RMA as an exclusive code of remedies ruling out any ability of the Maori Land Court to intervene in this case.

[12] But in any event there is the earlier and more basic obstacle already discussed, that is to say the limited and specialised jurisdiction of the Maori Land Court. In the typical case where the *Boddington* principle applies, a collateral challenge arises incidentally to proceedings in a Court of general (albeit often "inferior") criminal or civil jurisdiction. The width of the jurisdiction of magistrates in England was emphasised in *Boddington* by both the Lord Chancellor and Lord Steyn. The latter described them at pp 165 – 166 as "the bedrock of the English criminal justice system: they decide more than 95 per cent of all criminal cases tried in England and Wales". By contrast the Maori Land Court has a range of quite precisely defined heads of civil jurisdiction in matters pertaining to Maori land, a range not extending to issues of the invalidity of administrative action. Although dressed up as a claim for an

injunction against a threatened injury to Maori freehold land, the pith and substance of the present proceeding is a contention that express or implied requirements of consultation in the RMA have not been or will not be complied with.

[13] The Board does not consider that this can properly be described as a collateral challenge within the ambit of the reasoning in *Boddington*. It is essentially a direct challenge. The whole purpose of the injunction claim is to establish a breach of public law duties arising in the administration of the RMA. In *Boddington* at p 172 Lord Steyn distinguished "situations in which an individual's sole aim was to challenge a public law act or decision". The facts of this case relating to Maori land and the structure of the New Zealand judicial system are remote from anything under consideration in the *Boddington* line of cases. In the opinion of Their Lordships, both the substance of the proceeding in question and the background judicial system have to be taken into account in deciding whether those authorities apply; and this case is outside their purview and spirit.

The course of the litigation

[14] The history of the case in New Zealand calls for some further explanation. When the injunction applications came on so suddenly before Judge Isaac, he correctly addressed himself to the questions appropriately considered at the interim stage, the first two of which are commonly described as whether there is a serious question to be tried and the balance of convenience. Apart from the fact that the owners were strenuously opposed to the proposal and were concerned that there might be actual or intended trespass or damage to the land, he gave no express indication of why he thought there was a serious question. The affidavits of the applicants alleged lack of consultation. Mr Clews countered in his affidavit by deposing to a wide-ranging consultative and publicity process, including the obtaining of a report from consultants suggested by Maori interests but paid for by Hastings. He spoke also of unsuccessful attempts to arrange meetings with some of the applicant owners. The details of the affidavits were not canvassed in argument before the Board, but it is plain that there had been at least considerable consultation with Maori and that the evidence of insufficient consultation with the applicants was less than overwhelming. Moreover there was the argument for Hastings that the Maori Land Court lacked jurisdiction. At a minimum it was an argument requiring careful consideration. Nevertheless the Judge's decision to grant interim injunctions is understandable. Hastings' meeting was scheduled for that afternoon, but the route of the northern arterial road had been under debate for years and the matter may not have appeared particularly urgent. Also, as he stressed in his decision, the applicants were not that day represented by counsel, although it was said that counsel had been appointed and would be appearing at a substantive hearing. Evidently the Judge saw his decision as no more than a holding operation.

[15] When the judicial review proceeding initiated by Hastings was before Goddard J the following agreed questions of law were propounded on behalf of the parties at para [8]:

> "**[8]** The questions of law to be determined in the proceeding can be characterised at several different levels of generality but the fundamental common element is ultra vires:

(a) Does the Maori Land Court have jurisdiction to issue injunctions under s 19(1)(a) of Te Ture Whenua Maori Act 1993 that restrain a territorial authority from the purported exercise of its powers under the processes and procedures specified in the Resource Management Act 1991 to make designations where those designations if made under s 168A would apply to Maori freehold land?

(b) Can preparation for a decision whether valid or invalid by a territorial authority to designate Maori freehold land under s 168A of the Resource Management Act 1991 amount to an 'actual or threatened trespass or other injury to Maori freehold land'?

(c) Can a decision, whether valid or invalid, by a territorial authority to designate Maori freehold land under s 168A of the Resource Management Act 1991 amount to an 'actual or threatened trespass or injury to Maori freehold land'?

(d) Does the first respondent have the power to determine the validity of a decision by a territorial authority to designate Maori freehold land under s 168A of the Resource Management Act 1991 on the ground that the action amounts to an 'actual or threatened trespass or injury to Maori freehold land'?

Note: it is not intended that the adequacy of any consultation be determined in these proceedings. It is agreed by counsel that there will be no need for the second respondents to plead to the statement of claim."

[16] In those questions the phrase "whether valid or invalid" in (b) and (c) was unhappily chosen. It was made crystal-clear in the argument before the Board that the appellants do not contend that implementation of a valid decision by a local authority can be restrained by an injunction from the Maori Land Court. It is common ground, furthermore, that Maori freehold land can be validly designated under the RMA and can be acquired compulsorily under the Public Works Act 1981. This accords with a proposition of Lord Denning, giving a judgment of a Judicial Committee of the Privy Council comprising Earl Jowitt, Lord Cohen and himself, in *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876 at p 880, which has been quoted previously in the Court of Appeal in Treaty of Waitangi litigation:

> "In inquiring . . . what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it . . .."

Lord Denning was speaking in a case concerning a ceded territory (Nigeria), and whether New Zealand is in that category has long been the subject of academic controversy. There can be no doubt, however, that in the absence of some constitutional provision to the contrary the same must apply prima facie to a state with a legislature of plenary powers such as New Zealand.

[17] As Their Lordships understand it, the present appellants also accepted in the Courts in New Zealand that the Maori Land Court could not question the lawful exercise of powers under the RMA. Goddard J said at p 19:

> "It is axiomatic that powers conferred under the RMA are lawful because they are legislatively provided. Therefore, a territorial authority cannot commit a 'trespass' or 'other injury' to land by the simple lawful exercise of its powers to notify requirements and propose designations. A prima facie unlawful exercise of powers, such as would merit injunctive relief and pose a serious question for trial, is therefore only likely if the Council's actions appear to be ultra vires. Conceivably, the appearance of ultra vires might arise if the process upon which the decision to notify or designate was based seemed demonstrably flawed. In the present case, however, the fact or adequacy of any consultation to date is specifically exempt as an issue and there is no evidence that the procedure is flawed in any other way."

[18] With regard to Goddard J's reference to the possibility of a decision to notify or designate seeming demonstrably flawed, Their Lordships likewise reserve the possibility of a purported decision under the RMA so egregiously ultra vires as to be plainly not justified by that Act and conceivably within the scope of the Maori Land Court's injunctive jurisdiction. But that is no more than a hypothetical possibility. It is certainly not the present case.

[19] In the Court of Appeal the confusion apt to be created by the phrase "whether valid or invalid" was also noticed. The Court accordingly, with the agreement of counsel for the appellants, rephrased the issue (at para [25]) as being:

> ". . . whether the Maori Land Court has jurisdiction to entertain a collateral challenge to the validity of the decision by the council to make and notify a requirement under ss 168 and 168A of the RMA on the basis that such decision, if invalid, amounts to an 'actual or threatened trespass or other injury to Maori freehold land'."

This is an alternative way of expressing the original question (d). The Board's opinion upon it has already been stated.

The Resource Management Act

[20] While what has been said may be strictly enough to decide the case, it is desirable for two reasons to turn more particularly to the RMA. The first reason is that, with the possible exception of an extreme case such as the hypothetical one previously postulated, the Act of 1991 provides a comprehensive code for planning issues, rendering it unlikely that Parliament intended the Maori Land Court to have overriding powers. The second is that this code contains various requirements to take Maori interests into account. The Board considers that, faithfully applied as is to be expected, the RMA code should provide redress and protection for the appellants if their case proves to have merit. It would be a misunderstanding of the present decision to see it as a defeat for the Maori cause.

[21] Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far

from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, Their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

[22] Some features of the RMA code will now be mentioned. By s 168A and sections thereby incorporated, when a territorial authority proposes to issue notice of a requirement for a designation, public notification is to be given, with service also on affected owners and occupiers of land and iwi [tribal] authorities. That stage has not yet been reached in the present case; the injunctions applied for were aimed at preventing its being reached. By s 168(e) notice of a requirement for a designation must include a statement of the consultation, if any, that the requiring authority has had with persons likely to be affected. There is provision for written submissions and for discretionary prehearing meetings. Persons who have made submissions have a right to an oral hearing. By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. Hastings has in effect the dual role of requiring authority and territorial authority, so in a sense it could be in the position of adjudicating on its own proposal; but, by s 6(e), which Their Lordships have mentioned earlier, it is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

[23] The function of the territorial authority under this procedure, after having regard to the prescribed matters and all submissions, is to confirm or cancel the requirement or modify it in such manner or impose such conditions as it thinks fit. From the authority's decision there is a right of appeal to the Environment Court, available to any person who made a submission on the requirement (s 174). The Environment Court is specifically required by s 174(4) to have regard to the matters set out in s 171; but Their Lordships have no doubt that the provisions thereby incorporated and the general scheme of the Act, including ss 6, 7 and 8, apply in the Environment Court and that a full right of appeal on the merits is contemplated. Under s 174(4) the Court has wide powers of decision. It may confirm or cancel a requirement or modify one in such manner or impose such conditions as the Court thinks fit.

[24] Section 299 gives any party to any proceedings before the Environment Court a right of appeal to the High Court on a point of law. Section 305 enables a further appeal on law, by leave, to the Court of Appeal.

[25] Provisions of significance in this case are to be found in s 296. In summary that section stipulates that, where there is a right of appeal to the Environment Court from a decision, no application for judicial review may be made and no proceedings for a prerogative writ or a declaration or injunction may be heard by the High Court unless that right of appeal has been exercised and the Environment Court has made a decision. Thus the administrative law jurisdiction of the High Court (or the Court of Appeal on appeal), though naturally not totally excluded, is intended by the legislature to be very much a residual one. The RMA code is envisaged as ordinarily comprehensive. In the face of this legislative pattern the Board considers it unlikely in the extreme that Parliament meant to leave room for Maori Land Court intervention in the ordinary course of the planning process.

[26] Before the Board counsel for Hastings also drew attention to ss 310 and 314 of the RMA. Section 310 gives an Environment Judge sitting alone or the Environment Court original jurisdiction in proceedings brought for the purpose to grant declarations, including in (c) whether or not a proposed act contravenes or is likely to contravene the RMA. Section 314 and the following sections similarly authorise enforcement orders. Under s 314(a) such an order may prohibit a person commencing anything that in the opinion of the Court (or the single Judge) contravenes or is likely to contravene the Act. While it may be that the more normal route – submissions to the local authority and, if necessary, a hearing at that level and a subsequent appeal to the Environment Court – would offer the best way of having this dispute determined on the merits, Their Lordships accept the proposition of counsel for Hastings that, if there are any questions about whether Hastings is acting in accordance with the RMA, a declaration can be sought under s 310 or an enforcement order applied for under s 314.

[27] Another factor to which the Board, like both the High Court and the Court of Appeal in New Zealand, attaches importance is the composition of the Environment Court. The relevant provisions are in Part XI (ss 247 to 298) of the RMA. The Court consists of Environment Judges (or alternate Judges) and Environment Commissioners (or Deputies). There are to be not more than eight Judges and any number of Commissioners. The quorum generally for a sitting of the Court is one Judge and one Commissioner, although (as already noticed)

in declaration and enforcement proceedings a single Judge may sit, as may also happen with certain incidental matters. Of course a greater number than a bare quorum can sit, and commonly does; usually the Court comprises one Judge and two Commissioners; occasionally a larger Court is convened. A Judge must either be already a District Court Judge or be appointed as such at the time of appointment to the Environment Court. Appointments as Environment Judges and Commissioners are made by the Governor-General on the recommendation of the Minister of Justice, after consultation with the Minister for the Environment and the Minister of Maori Affairs. Section 253 states that the appointment of Commissioners is to ensure that the Court possesses a mix of knowledge and experience, including knowledge and experience in matters relating to the Treaty of Waitangi and kaupapa Maori. An alternate Environment Judge may act as an Environment Judge when the Principal Environment Judge (appointed under s 251), in consultation with the Chief District Court Judge or Chief Maori Land Court Judge, considers it necessary for the alternate Environment Judge to do so (s 252). A Deputy Environment Commissioner may act in place of an Environment Commissioner when the Principal Environment Judge considers it necessary (s 255). Section 269, dealing with the powers and procedure of the Court, includes an express direction that the Court shall recognise tikanga Maori where appropriate. These various provisions are further evidence of Parliament's mindfulness of the Maori dimension and Maori interests in the administration of the Act.

[28] Counsel for the appellants made the point that at present there are no Maori Land Court Judges on the Environment Court and only one Maori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a qualified Maori as an alternate Environment Judge or a Deputy Environment Commissioner. Indeed more than one such appointment could be made. Alternate Environment Judges hold office as long as they are District Court or Maori Land Court Judges; Deputy Environment Commissioners may be appointed for any period not exceeding five years. It might be useful to have available for cases raising Maori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events Their Lordships express the hope that a substantial Maori membership will prove practicable if the case does reach the Environment Court.

[29] For these reasons Their Lordships are satisfied that Maori land rights are adequately protected by the RMA and will humbly advise Her Majesty that the appeal ought to be dismissed. They adopt the suggestion of counsel that any question of costs may be raised by subsequent memoranda to the Board.

Appeal dismissed.

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Solicitors for the Hastings District Council: *Bannister & von Dadelszen* (Hastings).

Reported by: James Kirk, *Barrister*
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Kena Kena Properties Ltd v Attorney-General

Judicial Committee [2001] UKPC 51
23 July; 27 November 2001
Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hobhouse of Woodborough, Lord Millett and Lord Scott of Foscote

Revenue – Goods and services tax – Whether payment eligible for automatic statutory increase when rate of GST raised – Whether "grant or subsidy" – Goods and Services Tax Act 1985, s 78(2).

The Department of Social Welfare (the department) administered a scheme to subsidise the long-term care of elderly people. Rest home proprietors who joined the scheme agreed to provide a minimum standard of service in return for a maximum fee. The resident's national superannuation was paid direct to the rest home by the department. The balance of the maximum fee was to be made up by the resident or family where appropriate or, in cases where the resident was assessed as unable to pay, by the department.

After Kena Kena Properties Ltd (KKP) joined the scheme the government raised the rates of GST. The evidence was that this increase was built into the payments made by the department at the annual reviews provided for in the scheme. Nonetheless KKP sued for the increase in GST under s 78(2) of the Goods and Services Tax Act 1985, which provided for automatic increases in contract prices when the rate of GST was put up. The section also provided that it did not apply in the case of a payment by a public authority "in respect of any supply of goods and services where the consideration for that supply is in the nature of a grant or subsidy". The department defended the action not on the basis that it had effectively paid the increase but on the ground that the payments were in the nature of a "grant or subsidy" rather than a payment for services and hence the department had not been liable to pay the increase at all. KKP argued that while the payments might have the economic effect of a subsidy for the residents, they were paid not to the residents but to the rest homes, which were profit-making businesses, under a contract and in consideration for the rest homes providing services at a maximum fee.

Held: (Lords Hobhouse of Woodborough and Scott of Foscote dissenting) The payment was a "grant or subsidy". It was the character or quality of what was to be paid and of the consideration given which was crucial to determining whether a payment was a "grant or subsidy", not its receipt in the hands of the payee. It was not possible to restrict the concept of subsidy to cases where the intended beneficiary was the direct recipient. Most grants or subsidies would be made to public charitable or private bodies in order to confer benefits on third parties (see paras [11], [12], [14], [15], [20], [21], [22], [23]).

Director-General of Social Welfare v De Morgan [1996] 3 NZLR 677 (CA) approved.