

WAITANGI TRIBUNAL

CLAIM WAI 276, 72, AND 121

CONCERNING the Treaty of Waitangi Act 1975

AND claims affecting Auckland lands generally and Sylvia Park, Mt Wellington in particular, by:

- (i) Hohepa Parata Hawke and others for Ngati Whatua o Orakei Maori Trust Board (Wai 276)
- (ii) Hariata Gordon for Ngati Paoa and Ngaitai Umupuia o Tamaki (Wai 72)
- (iii) William Mohi te Maati Manukau and others for Ngati Whatua (Wai 121)

TO Hon Doug Kidd, Minister of Maori Affairs

AND TO Hon D A M Graham, Minister of Justice  
Hon Maurice McTigue, Minister for State-Owned Enterprises  
Hon Rob Storey, Minister of Lands

INTERIM REPORT ON SYLVIA PARK AND  
AUCKLAND CROWN ASSET DISPOSALS

To facilitate the disposal of Crown assets in Auckland, the Auckland iwi have proposed an arrangement that they expect to be beneficial to Aucklanders, Government, and iwi. We report on that matter and matters affecting Sylvia Park.

Ngati Whatua, Ngati Paoa, and Ngaitai have claims to the Tribunal in respect of various losses in the Auckland area that are said to have arisen from early Crown acts or omissions contrary to the Treaty of Waitangi. The Tribunal is aware of some independent historical opinion, which, though yet to be vigorously tested, is supportive of those contentions, and should the claims be well founded, compensation will be sought from Crown assets in the Auckland area, or from former Crown assets now transferred to State Enterprises or on-sold to private citizens, pursuant to the Treaty of Waitangi (State Enterprises) Act 1988. As Government will know, that Act gave effect to an out-of-court settlement between Maori and the Crown in 1987, whereby the titles to State Enterprise lands or land now on-sold would be subject to a memorial warning all parties that those lands are liable to resumption on a binding recommendation from this Tribunal. We understand there are many Auckland properties now so affected including many that have passed now to private ownership.

In addition, there are particular claims to certain properties, including some 21 hectares at Mount Wellington known as Sylvia Park. This land is part of the 1300-acre

Hamlin purchase of 1838. The Crown became involved in that matter since all pre-Treaty acquisitions required the Crown's approval and as, in the 1840s, the Crown approved the acquisition save for some 200 acres. Amongst other things, the iwi claim the 200 acres, and perhaps other lands too, should have been reserved for them; but instead the Crown kept it for itself, even though the Crown was never a party to the original transaction. Maori make claim to that land or that part of it that has not passed to private ownership. Sylvia Park is all that the Crown has left.

The iwi were dismayed therefore when they learnt of Government's intention to sell this land, and to do so through the Department of Survey and Land Information, not through a State Enterprise, thus effecting the transaction outside of the State Enterprise provisions for the protection of Maori claimant interests. Not unnaturally in our view, the iwi consider that at very least the alienation proceeds should now be held in escrow, pending resolution of the claim. Thus, we introduce the first issue before us, whether any duty on the Crown in such circumstances has been performed, and if not, whether the course the iwi propose is appropriate.

Meanwhile, a number of Aucklanders who have acquired former Crown lands have applied to the Tribunal to have the resumption memorials removed from their titles. As the lands are in Auckland and the iwi have claims there, then save for a full hearing of those claims, which is presently impractical, the consent of iwi is needed to any removal at this stage. This requires either a responsible selection of properties by the iwi concerned in the context of the total Crown land holdings, or a blanket 'no' to everything. Since the iwi have neither the facility nor the funding to attend to the former option, they are forced to the latter. In addition, when Government declines to withhold the sale of those properties in which the iwi have a particular interest, and sells outside the ambit of the protective scheme, there is no incentive for iwi to cooperate in return.

This position became apparent with regard to the applications of Aryan Equities Ltd and anor and V Ockleston and others heard at the same time as the preliminary matters in the Sylvia Park claim were addressed. The iwi were not minded to consent to such applications, save in the Ockleston case where it was obvious that the asset concerned was of no value to anyone but the current owners.

The iwi nonetheless proposed that they and Government should consult and if practicable agree, on those Crown properties or former Crown properties in Auckland that ought properly to be retained, on account of the claims or because of some historic or cultural associations, and on the basis that the balance be released. Though the iwi are presently unable to undertake the extensive work that would be required, it was put to us that the matter might be arranged through the facilities of the National Maori Congress, or that, using a structure like that employed by the Crown-Congress Joint Work Party in the railways settlement, of which Government will be aware, a workable arrangement might be achieved.

We could see at once the advantages of such a proposal, for the citizen through the prospective removal of numerous resumption memorials without further ado and for State Enterprises and the Crown, through future sales being effected without the devaluing effects of the resumption caveats. There is a benefit to the iwi too, we were told. They have no wish to obstruct national policies or to frustrate the expectations

of fellow citizens. They believe they would have no need to do so if the Crown were prepared to renegotiate with them on the Auckland asset sales programme. We think they are right and have taken a most responsible course in putting this proposal to us.

As to the question of Crown sales outside the State Enterprise arrangement we prefer to express a preliminary view only, since the Crown was absent from the hearings, though it had notice of them, and the issue was not fully argued. We therefore put the matter briefly, and in the following way. There are earlier opinions of this Tribunal that the duty on the Crown, in the Treaty of Waitangi, to protect Maori in the ownership of their lands, becomes in our time a duty to restore Maori to ownership where practicable, where past wrongful dispossessions are established, and not to alienate lands so as to prejudice Maori claims to them. That principle is nothing novel. It is a fraud by any fair law to so dispose of assets as to defeat a creditor's right of recovery. That principle has general application. It is not a principle peculiar to the State Enterprise circumstance. It follows in our view that the Crown ought not to dispose of properties without first being satisfied either that there are no claims to them, or that the claimants consent, or in the further alternative, that a scheme protective of the claimants' interests is first in place.

In the Sylvia Park case however, we were advised, the land has now been sold. There was apparently no protective arrangements. The iwi understood certain ministers to say however, that there were sufficient other Crown assets from which any compensation could be met. That answer, in our view, is not satisfactory when the claim is to a particular area and is on the grounds that there should once have been and still should be an iwi reserve there. Nor is it the same to secure compensation from general Crown or taxpayer funds, as against assets held in escrow on account of a claim against them.

We will hear the Crown and claimants further on that preliminary opinion should the Crown so desire.

In the interim, and for the reasons given, we recommend:

- (a) that the proceeds of the Sylvia Park sale be held in a separate interest-bearing trust pending determination of the claims in respect of that particular property, or a prior resolution of the asset sales question; and
- (b) that Government negotiates with the Ngati Whatua of Orakei Maori Trust Board in association with representatives for Ngati Paoa–Ngaitai as proposed by Hariata Gordon, for a separate settlement and arrangement for the disposal of Crown or State Enterprise assets in Auckland.

We consider the pursuit of those recommendations could lead to very material advantages for the Crown and Maori parties and for Aucklanders generally.

Dated at Wellington this 22nd day of April 1992

for Chief Judge E T J Durie, Chief Judge, Chairperson

G S Orr, Member

J R Morris, Member