IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-943
[2017] NZHC 300

IN THE MATTER	of an application for judicial review under the Judicature Amendment Act 1972
BETWEEN	NGAI TAI KI TAMAKI TRIBAL TRUST Applicant
AND	MINISTER OF CONSERVATION First Respondent
	FULLERS GROUP LIMITED Second Respondent
	MOTUTAPU ISLAND RESTORATION TRUST Third Respondent
	NGATI PAOA IWI TRUST Intervener

Hearing:	5 and 6 December 2016
Appearances:	P J Andrew and R A Siciliano for Applicant C D Tyson and E P Chapple for First Respondent A C Pilditch for Second Respondent J S McK Mount and A R Longdill for Third Respondent R B Enright for Intervener
Judgment:	1 March 2017

JUDGMENT OF FOGARTY J

This judgment was delivered by Justice Fogarty on
1 March 2017 at 11.30 a.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] Section 4 of the Conservation Act 1987 provides:

> **4 Act to give effect to Treaty of Waitangi**
>
> This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

[2] This is an application under that section of the Conservation Act by Ngai Tai ki Tamaki Tribal Trust (NTKT) for judicial review of two decisions by the Minister of Conservation which granted concessions for guided tours on Motutapu Island Recreation Reserve (Motutapu) and Rangitoto Island Scenic Reserve (Rangitoto) to Fullers Group Ltd (Fullers) and to the Motutapu Island Restoration Trust (MRT).

[3] Technically the concession held by Fullers is simply to use the Department of Conservation (DoC)-owned self-contained unit building at Rangitoto Wharf, which includes a toilet and shower. This is not a request for exclusive use of the building, the concession envisages shared use. Secondly, it is a concession to conduct walking/hiking/tramping/hunting/fishing/horse-riding/4WD activities etc.

[4] The concession enables Fullers to provide a bundled ferry passage to the island and tours, marketed and known as the Volcanic Explorer Operation.

[5] Fullers have recently been granted a renewed concession for five years, after applying for ten years. In these proceedings the applicant seeks a declaration from this Court that the decision of the Director-General to grant this new concession for Fullers for its Volcanic Explorer operation was unlawful and seeks an order directing the Director-General to reconsider his decision on terms that would allow Fullers' operation to continue pending the outcome of the reconsideration decision. Second, on terms that require the Director-General to take into account any further comments or submissions from NTKT on the group application for a new concession and that require the Director-General to keep NTKT informed of the steps he is taking and to advise NTKT as soon as he has made his reconsideration decision.

[6] Then by a second cause of action, NTKT also challenge the recent renewal of a concession to MRT and here the remedy is sought is similar. They want an order quashing the decision of the Director-General to grant a concession to MRT for guiding tourism and recreation on Motutapu and Rangitoto Islands and directing the Director-General to reconsider the decision.

[7] This application challenges the interpretation and application of the Conservation Act 1987 when granting concessions. In particular, it challenges the following passages. The first from the reasoning of the Minister in the Concession Report on Fullers' application:

> Applications for concessions are processed in the chronological order in which they are received, unless there is an allocation process being undertaken. *There is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents.*
>
> (Emphasis added.)

[8] The second quote is from the MRT Report:

> Furthermore, *the economic benefit* that could potentially be accrued as a result of a concession, or the fact that another applicant is interested in the same benefit *is not something that can be taken account* of under the Conservation Act for the purposes of determining a concession.
>
> (Emphasis added.)

Plain error of law – NTKT's counsel's submissions

[9] Mr Andrew submitted that:

> 7. NTKT opposed the grant of the two impugned decisions on the basis that economic opportunities on the islands, both part of the conservation estate, should be preserved for iwi. The Minister rejected that contention and in granting the two concessions misdirected herself in law and acted in breach of her s 4 Treaty obligations.
>
> 8. The minister erroneously regarded the economic interests of NTKT as essentially irrelevant, confined the interests of NTKT to matters of procedure and treated the Trust as it it was another applicant for a concession or a third party objector. The Minister concluded, erroneously, that she could not lawfully accord any priority or preference to the economic interests of NTKT. This is contrary to the policy and purposes of the 1987 [Conservation] Act which put

Treaty principles to the forefront of conservation decision making, subject only to the overriding principles of the protection and conservation of the environment and natural resources.

9. The Minister's decision to grant the two impugned decisions were based on multiple and material errors of law. By way of relief, the applicant seeks an order quashing the two impugned decisions and directing the Minister to reconsider her decisions.

Visitors to/use of Rangitoto and Motutapu Islands

[10] Both Rangitoto and Motutapu (in combination "motu") are iconic visitor destinations, particularly for recreational and scenic purposes, but also for cultural purposes in the Hauraki Gulf or Tikapa Moana inner motu.[1] Most persons gain access to these islands by ferries operated by Fullers. Fullers have been further operating a tractor/trailer "Volcanic Explorer" operation on Rangitoto for several years.

[11] More recently, MRT and NTKT have obtained concessions for walking tours on the island which focus on the reserves. NTKT's walking tour, trading as Te Haerenga,[2] focuses entirely on the history of the Māori occupation and use of the motu. MRT's tour introduces visitors to the European history of the island as well as to Motutapu's history of use and occupation by the Māori.

The status of NTKT

[12] In these proceedings, NTKT claim rangatiratanga over Rangitoto. Such a claim is not recognised in the Ngā Mana Whenua O Tāmaki Makaurau Collective Redress Act 2014 (the 2014 Act) — the Treaty legislation pertaining to Tāmaki Makaurau, which includes Rangitoto and Motutapu. Rather, the 2014 Act includes a numer of iwi and hapu as having overlapping claims in respect of the Tamaki motu. This is apparent from s 9 which reads:

9 Meaning of Ngā Mana Whenua o Tāmaki Makaurau

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1 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 11(1) states that "motu" means Motuihe Island Recreation Reserve, Motutapu Island Recreation Reserve, Rangitoto Island Recreation Reserve and Tiritiri Matangi Island Scientific Reserve. Section 11(2) of that Act also lists Motuihe Island Recreation Reserve and Rangitoto Island Scenic Reserve as two of the five identified places that make up the "Hauraki Gulf/Tikapa Moana inner motu".

2 Te Haerenga is a subsidiary of NTKT, which holds the concessions to provide tourist guiding services on Rangitoto and Motutapu

In this Act, **Ngā Mana Whenua o Tāmaki Makaurau—**

(a) means the collective group of the following iwi and hapū:

(i) Ngāi Tai ki Tāmaki; and

(ii) Ngāti Maru; and

(iii) Ngāti Pāoa; and

(iv) Ngāti Tamaoho; and

(v) Ngāti Tamaterā; and

(vi) Ngāti Te Ata; and

(vii) Ngāti Whanaunga; and

(viii) Ngāti Whātua o Kaipara; and

(ix) Ngāti Whātua Ōrākei; and

(x) Te Ākitai Waiohua; and

(xi) Te Kawerau ā Maki; and

(xii) Te Patukirikiri; and

(xiii) hapū of Ngāti Whātua (other than Ngāti Whātua o Kaipara and Ngāti Whātua Ōrākei) whose members are beneficiaries of Te Rūnanga o Ngāti Whātua, including Te Taoū not descended from Tuperiri; and

(b) includes the individuals who are members of 1 or more of the iwi and hapū described in paragraph (a); and

(c) includes any whānau, hapū, or group to the extent that it is composed of those individuals.

[13] This is a collective group and it is as the collective group that the Act acknowledges, in s 65 and following, the important cultural activities and traditional uses of Rangitoto and Motutapu.. A large number of Ngāi Tai ki Tāmaki voted against NTKT (as trust) participating in the settlement recorded in the 2014 Act, disagreeing with the collective nature of the redress over Rangitoto and Motutapu in particular. However, NTKT did settle. I read the 2014 Act such that the tangata whenua of the motu are a collective group of local iwi and hapū, which includes Ngāi Tai ki Tāmaki and its representative body, NTKT.

[14] NTKT's claim to rangatiratanga was advanced in its oral submissions at the hearing. It was argued that the other iwi and hapu of Ngā Mana Whenua o Tāmaki Makaurau all defer to NTKT as having rangatiratanga over the motu. That claim was not substantiated. It is not enough for NTKT to point to Ngāti Paoa (the intervener) acknowledging that NTKT have primary customary rights. In any event, the affidavit of Mr Jamie Forsman (a representative of Ngāti Paoa), which NTKT points to in order to demonstrate its point, states only that "Ngāti Paoa recognises that Ngāi Tai has a greater level of customary association with Motutapu than Ngāti Paoa".

[15] As will appear from the following reasoning, I do not think, however, that this case turns on whether or not NTKT have rangatiratanga over Rangitoto and Motutapu. I do not make any finding on that point.

[16] NTKT certainly considers that its people are tangata whenua of the islands of the inner Tikapa Moana (the Hauraki Gulf). I accept that, and the proposition that NTKT is an iwi with close links with Rangitoto is also respected. As the 2014 Act states, NTKT (that is, the iwi it represents) hold mana whenua over Rangitoto and Motutapu.

The ambitions of NTKT

[17] The applicants opened their submissions describing these proceedings as "a further step in the long struggle by NTKT to regain control and influence of their ancestral motu, wrongfully taken from them in the 19th century". Now on the cusp of a Treaty settlement, economic opportunities on the motu are all important for the iwi.

Ability to compete with Fullers

[18] NTKT cannot seek title to Rangitoto. They rather seek to run their own form of Fullers' "Volcanic Explorer" activity for five years without competition from Fullers. Mr James Brown, a trustee of NTKT, says that NTKT currently cannot compete with Fullers. He contended that the Fullers' concession is essentially a monopoly, because of the economic realities on the islands, and for ecological reasons. Fullers has had the benefit of years of commercial operations on Rangitoto

and have the capital to fund the roads and bridges on the motu. It has invested in the new wharf on Rangitoto.

[19] Mr Brown is of the view that there is a real risk that NTKT may never be able to compete on the motu with the likes of Fullers because of what they have had to battle with marginalisation in Tāmaki Makaurau. He said that to establish their own operations on the motu, NTKT need the Crown's support and a period of time to be on the motu (in a commercial sense) without competition from others. The period of time needs to be reasonable. He advocates for five years.[3] He contends that if NTKT could get a period free of competition they would take immediate steps to establish their own operation similar to Fullers' Volcanic Explorer operation. Although there is no absolute guarantee, there is a very high likelihood that the settlement pending with the Crown would enable NTKT to raise the necessary finance to run its own operation.

[20] I had several exchanges with counsel as to whether or not Fullers had market power, as a monopoly. I was told that Fullers offer both a bundled price for the ferry ride and trip on the Volcanic Explorer and separate ferry only prices to the island. As noted, the latest concessions granted to Fullers and MRT are for five years only — a much shorter period than the ten years sought. Any market power of Fullers is at the least qualified by Fullers being dependent upon a future Department of Conservation concession.

[21] I accept Mr Brown's contention that NTKT cannot expect to compete viably with Fullers at the present time. There is evidence that Fullers have offered a partnership relationship with NTKT, an offer which has not been taken up, even in discussion phases. The options are either a concession, exclusive to NTKT for five years, a partnership with Fullers or a NTKT minor walking concession business likely dependent on the frequency of Fullers ferry, and competing with Fullers.

[22] As will become clear in the course of this judgment, the Crown settlement reflected in the 2014 Act, and the separate impending Crown settlement with NTKT

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[3] Mr Brown's suggestion of five years is based on the period of time given to Ngāi Tahu in Kaikoura in relation to their whale-watching venture. See generally *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

was seen as the basis for pursuing concessions which, if granted, would effectively displace the incumbent franchises of Fullers and MRT.

Application of Treaty Principles to Prefer Māori over Others

[23] In 1986 Parliament brought the Treaty of Waitangi out of history into law by enacting the State Owned Enterprises Act 1986 and including in that Act s 9:

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

[24] Considerable content was incorporated into s 9 by subsequent decisions of the Court of Appeal and the Privy Council in *New Zealand Maori Council v Attorney-General*.[4] This is because Parliament had left it to the Courts to explore what was meant by "principles". In that Privy Council advice, the concept of "protection" received authority. In the judgment of their Lordships, delivered by Lord Woolf, we have the passage:[5]

> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which may exist at any particular time.

[25] In the Conservation Act, passed the following year in 1987, Parliament enacted s 4; a provision similar to s 9 in the State Owned Enterprises Act, but different:

> **4 Act to give effect to Treaty of Waitangi**

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4 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

5 At 517.

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

[26] The meaning of s 4 is at the heart of this judicial review. Essentially, NTKT argue that the Conservation Act effectively imposes on the Crown a duty to actively protect the economic interests of Māori. That it imposes upon the administrators of the Act the obligation to prefer the tangata whenua over Fullers and the MRT. Therefore the decision of the delegate of a Minister of Conservation to grant concessions to Fullers and MRT is in breach of s 4.

[27] NTKT opposes the grant of the two impugned decisions on the basis that economic opportunities on the island, both part of the Conservation Estate, should be preserved for iwi, in this case the applicant which has the rangatiratanga. That the Minister erred in regarding the economic interests of NTKT as essentially irrelevant confining the interests of NTKT to matters of procedure and treating NTKT as if it was just another applicant for a concession or a third party objector. That the Minister concluded erroneously that she could not lawfully accord any priority or preference to the economic interests of NTKT. So her decision was based upon multiple and material errors of law such that this Court should quash both decisions and direct the Minister to reconsider.

The position taken by the Ngati Paoa Iwi (NP) as intervenor

[28] As already noted (see [14] above), the third respondent Ngati Paoa Iwi Trust (NP) is an intervener in support of the applicant. Ngati Paoa has cultural and historic relationships with Motutapu but defers to NTKT as having primacy, but not exclusivity, over Motutapu.

[29] Mr Enright, for the intervener, NP, submitted that the Supreme Court decision of *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* stood for the proposition that:[6]

> The duty to give effect to the principles of the Treaty of Waitangi is a strong directive, creating a firm obligation on the part of those subject to it. Priority must be given to Treaty considerations in relation to applications for

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6 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593, [2014] NZSC 38 (emphasis added).

> concessions under Part 3B of the Conservation Act, where these relate to the Hauraki Gulf. Priority does not mean exclusivity, but the decision maker must give primacy to Treaty principles including active protection of the relationship of iwi with their Taonga lands and waters. Priority consideration arises even in the absence of a competitive allocation process for concession applications. This is what s 4 Conservation Act requires.

[30] In the same case the Supreme Court said:[7]

> [77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in Clevedon Cares Inc v Manukau City Council:
>
> > [51] The phrase "give effect to" is a strong direction. This is understandably so for two reasons:
> >
> > [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
> >
> > [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.
>
> [80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[31] Mr Enright submitted that the Treaty principles of active protection and rangatiratanga (which he defined as control over traditional resources including Taonga), meant that DoC was entitled to consider the impact to iwi's economic interests when considering applications under Part 3B of the Conservation Act. It was not an irrelevant consideration. He cited the Hauraki Gulf Marine Park Act 2000 as recognising in s 3(a):

> [The Hauraki Gulf]…important values including the "historic, traditional, cultural and spiritual relationship of the tangata whenua with the Hauraki Gulf and its islands.

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7 Emphasis added.

[32] Both Statutes he said demonstrate the importance of iwi relationships with the Hauraki Gulf including Rangitoto and Motutapu. This was recognised, he acknowledged, by the Department in considering both sets of legislation.

[33] He submitted though:

> The statutory context supports priority consideration of Treaty Principles in relation to concession applications that involve lands and waters in the Hauraki Gulf. This is a special factor arising on the facts, not necessarily applicable to concession applications arising elsewhere in New Zealand. The decision maker correctly had regard to the statutory context but did not give priority to Treaty principles.

[34] He went on:

> From a property rights perspective, underlying title may be a determinative factor, here title to the islands re-vested in the Crown (save for the summit of Rangitoto) but the act of vesting in Auckland-based iwi was more than just symbolic and reflects the strength of iwi interests in the conservation management regime that applies to the islands. The coastal environment is of particular importance to Māori. (Preamble to the New Zealand Coastal Policy Statement.)

[35] Mr Enright described the issue in this case as an important issue in the evolving relationship between Crown and iwi as Treaty partners. This includes ability to have regard to economic impacts (as a relevant consideration) whether the statutory definition of "conservation" includes preservation and protection of Māori relationships with historic sites and taonga (the islands) is also important.

[36] Like Mr Andrew, Mr Enright stressed that the Department had erred in the two propositions:[8]

> <u>There is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents.</u>
>
> (Emphasis added.)

And:

> Furthermore, <u>the economic benefit</u> that could potentially be accrued as a result of a concession, or the fact that another applicant is interested in the same benefit <u>is not something that can be taken account of</u> under the Conservation Act for the purposes of determining a concession.

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[8] See [6] and [7] above.

(Emphasis added.)

The Crown case

[37] The Crown does not agree. Crown counsel agree that the Crown must take reasonable steps to inform itself of Māori views and interests.

[38] The Crown case is that there is room on both islands for multiple concessions. So that NTKT had and would keep its concession to operate its own guided tours focussing on iwi history and culture, MRT keep its concession for guided tours focussing on the iwi and European history and culture of the island, while Fullers ran its tractor/train Volcanic Exploration of Rangitoto.

[39] The Crown argues that there is no significant difference between s 9 of the State Owned Enterprises Act 1986 and s 4 of the Conservation Act 1987. The Crown disputes the proposition that the effect of s 4 of the Conservation Act is to require positive outcomes consents by Māori with tangata whenua over the subject land ahead of other applicants creating a statutory priority. Or to put it in the negative, the Crown rejected the notion that iwi with mana whenua over the subject land or assets had effectively a right of veto via the Treaty. That the 2014 Act did not effectively give the applicant an exclusive right to concessions on Rangitoto or Motutapu. So the natural respondents in this case are the Minister of Conservation, Fullers and the MRT.

The scope of review

Review for error

[40] The remedy of judicial review of government decisions has as its principal function to ensure the rule of law. It is usually necessary for the applicant to persuade the Court that there has been a material error or misunderstanding of the legal tests to be applied to resolve a matter, or that there has been a failure of the government decision-maker to take into account all relevant facts and apply the relevant tests; or a failure to conduct a fair procedure so that all those whose interests are at stake in a decision have an opportunity to be heard. Essentially it is an exercise of finding error or fault on the part of the decision maker. It is not an

appeal. It is not an occasion for the Court to assume any authority given by Parliament to a government department to make a decision.

Ability to test reasonableness, and in so doing develop policy

[41] Counsel before me contended that this is not such a review, so shackled. Rather, this is a "constitutional" review, to use a term deployed by Professor Philip Joseph in his leading text, *Constitutional and Administrative Law in New Zealand.*[9] Professor Joseph says:

> The courts have developed a method of judicial review that is appropriately termed "constitutional review". Constitutional review embraces the "unity of public law" thesis, that constitutional, administrative and international law each articulates a common set of fundamental values. Constituional review invites courts to consult openly the full range of public law values that inform public decision-making. In New Zealand, these values are organised principally around the principles of the Treaty of Waitangi, international human rights instruments and the New Zealand Bill of Rights Act 1990. Fundamental values are also the birth right of the common law. The panoply of values that have shaped common law developments supplements constitutional review, as do the discrete principles of proportionality and consistency of decision-making, and the constitutional concept of the rule of law… Constitutional values condition the moral content of our laws and have a priori force …

[42] I agree with the fundamental values/natural law perspective of Professor Joseph, discussed earlier in his text in Chapter 7, "Rule of Law", where he espouses a natural law perspective rather than the legal positivist perspective. There are common values at work in the Treaty of Waitangi, in international human rights agreements, in the New Zealand Bill of Rights and within the common law. However, I do not think sitting in the High Court I can adopt constitutional review as judicial authority to effectively direct Crown policy to apply natural law values.

[43] Before I go to authority I should explain further that fundamental values that identify property rights, and that one should keep one's promises, are imbedded in all civilised legal systems, including the common law, and are naturally reflected in the terms of the Treaty of Waitangi and in the New Zealand Bill of Rights Act. In that

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[9] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 920 and 921, though see more generally [22.12] "Constitutional Review".

respect such principles may be, and are, described in the literature as "natural law".[10] But that term has received hostile treatment from sceptical philosophers.[11] In New Zealand there is no general acceptance of the natural law perspective in legal thinking.

[44] Rather to decide this case I think that it is sufficient to go to two cases. The first is the decision of the Privy Council in *New Zealand Māori Council v Attorney-General (Broadcasting Assets),*[12] as understood and followed by the unanimous Supreme Court in a later case with the same name, *New Zealand Māori Council v Attorney-General,*[13] (the *Mighty River Power* decision), where the Court said:[14]

> [88] In the *Broadcasting Assets case*, the Privy Council identified the test to be applied for deciding whether a proposed transfer of assets to a State enterprise would breach s 9 of the State-Owned Enterprises Act:
>
> > The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty.
>
> In the same case the Privy Council also said:
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> > Section 9 is not a statutory provision which requires the Crown to establish, as Miss Elias argues, as precedent fact, that the transfer would not be inconsistent with the principles of the Treaty. The decision in *Khera v Secretary of State for the Home Department* [1984] AC 74, on which she relied, was dealing with a different situation where the Crown's conduct would be unlawful except in a case of an illegal entrant so the Crown had to establish that their actions related to an illegal entrant. Here, on the other hand, the conduct of the Crown was only not permitted if it fell foul of s 9; accordingly, the onus was on the appellants to show that the transfer was not permitted in the normal manner. But, as is usually the situation, the outcome of this case does not depend on any question of onus of proof. Equally the Solicitor-General and the majority of the Court of Appeal (if this is what they were saying, which is by no means clear) were mistaken in suggesting that as the question of the manner in which the Crown chooses to fulfil its obligations under the Treaty is a matter of policy the Court has no power to intervene

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10 See Joseph at [7.2.3] and [7.2.4].

11 See Joseph at [7.2.4]. Joseph emphasises the positivists contention a priori that law is/must be certain. Which it cannot be as law is not and never has been a system of rules. I would add to that the continuing influence of David Hume's proposition that values equate to personal sentiment. See *An Enquiry Concerning the Principles of Morals EPM*, Appendix 1.

12 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets* case].

13 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31..

14 At [88] (emphasis added).

> unless the Court is satisfied that the policy is unreasonable in a *Wednesbury* sense. The question is a matter on which the Court must form its own judgment on the evidence before the Court.

[45] Mr Andrew relied particularly upon another Court of Appeal decision known as the *Whale's* case[15] as exemplifying the ability of a Court to examine the merits and promote government action. Ngai Tahu[16] commenced judicial review proceedings in the High Court challenging on Treaty of Waitangi and legitimate expectation grounds the Director-General of Conservation's intention to issue a further permit for commercial whale watching by boats off the Kaikoura Coast. The effect of this would be for Ngai Tahu to have exclusive competition in the market for taking persons out onto the water for viewing the magnificent young adult sperm whales which gather to mature in the deep water off the Seaward Kaikoura mountain range. There were at the time some 15 permits for commercial operations for viewing and swimming with dolphins and seals, but only Ngai Tahu had the right to view sperm whales from boats. Ngai Tahu had pioneered commercial whale watching tours in 1988. The High Court declined relief and the matter went to the Court of Appeal.

[46] The Director-General, who said he acted on legal advice, accepted he had an obligation by a reference to the Treaty in s 4 of the Conservation Act to act in good faith to consult and to be fully informed of Māori interests, but not that those obligations included giving Ngai Tahu exclusive rights or the right of veto over the grant of permits to others; on the contrary his duty was to act fairly and even-handedly between all interested parties.

[47] The Court examined the history before 1840 of Māori over this coastline. There was no evidence that Ngai Tahu would hunt to take live whales, as distinct from taking advantage of beached whales for food, and also for bone. The Court of Appeal held:[17]

> Although a commercial whale watching business is not *taonga* or the enjoyment of a fishery within the contemplation of the Treaty, certainly is

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15 *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

16 Ngai Tahu Māori Trust Board, Wiremu Te Haere Solomon, Whale Watch Kaikoura, and New Zealand Nature Watch Charters Ltd.

17 *Ngai Tahu*, above n 15, at 560.

> this so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant. Such principles are not to be approached narrowly. The Crown is right to accept in this case that Treaty principles apply, at least if not inconsistent with the particular legislation.

[48] In addition to the similarity to fishing or shore whaling the Court of Appeal also identified that:[18]

> Historically guiding visitors to see natural resources of the country has been a natural role of the indigenous people. Secondly, the whale watching activities are essentially tribal, rather than those of a few individual Māori… thirdly Ngai Tahu were the pioneers of whale watching off Kaikoura. They have had the initiative to find capital for and devote energy to the use of the waters.

[49] The Court of Appeal then went on to cite the Privy Council in the fisheries case *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*.[19] In the latter case, the Court had said:[20]

> It was held unanimously by a Court of five Judges, each delivering a separate judgment, that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other.

[50] The Court of Appeal in the *Whale's* case summed up this passage in the following sentence:[21]

> In the light of the positive duty there recognised, and of the statutory incorporation of the principles of the Treaty and the conservation legislation, it is plain that on the particular facts of this case a reasonable Treaty partner would not restrict consideration of Ngai Tahu's interest to mere matters of procedure.
>
> The iwi are in a different position in substance and on the merits from other possible applicants for permits. Subject to the over-riding conservation considerations that we have mentioned and to the quality of service offered, Ngai Tahu are entitled to a reasonable degree of preference.

[51] Although the Whale's case was applying the Marine Mammals Protection Act 1978, s 4 of the Conservation Act was in play. This was because s 6 of the Conservation Act provided that the functions of the Department of Conservation were to administer the Conservation Act and the enactments specified in its first

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18 At 561.
19 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).
20 At 304.
21 *Ngai Tahu*, above n 15 at 561.

schedule which included the Marine Mammals Protection Act. The Court of Appeal approved Neazor J in the High Court holding that s 4 of the Conservation Act was a sufficient direction to make it a requirement that the Director General administer the Marine Mammals Protection Act so as to give effect to the principles of the Treaty.

[52] Therefore the dicta of the Court of Appeal in the Whale's case is an interpretation of s 4. I have set out that dicta above. It is plain that s 4 has not been interpreted as requiring a preference for Māori over non-Māori applicants all other facts being equal. That would over-simplify it. There is no Māori veto. Rather the Judges have identified a "reasonableness in the context" test.

[53] In the recent Supreme Court's decision in *Ririnui v Landcorp Farming Ltd,* Mr Mita Ririnui, as chairman of the Ngati Whakahemo Claims Committee and Te Runanga o Ngati Whakahemo brought judicial review proceedings in an attempt to halt the sale of a farm property, Wharere, over which Ngati Whakahemo claim mana whenua.[22] The vendor was a Crown entity, Landcorp Farming Ltd, and the interested party Wayland Farms was the purchaser.

[54] There were a number of issues in this case. Only one needs to be identified here. This was whether or not Landcorp was a Crown entity subject to s 9 of the State Owned Enterprises Act. The Supreme Court held that land sales by Landcorp in this context were subject to the s 9 provisions of the State Owned Enterprises Act.[23]

[55] The Court then went on:[24]

> [51] Facilitating the commercial purchase by Māori of ancestral lands is a means by which the Crown can (and does) meet its ongoing Treaty obligations, broadly construed. The Crown's Treaty obligations in relation to righting historical wrongs do not necessarily end with a settlement, as is illustrated by the ministers' response to Ngati Makino's concerns about Landcorp's sale of Wharere. Moreover, the Crown's Treaty obligations to Māori are not confined to righting historical wrongs but are continuing and forward-looking. Creating the opportunity for Māori to re-acquire ancestral lands by encouraging Landcorp to negotiate with the traditional owners on a commercial basis is a means by which the Crown can assist Māori to re-

22 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62. [2016] 1 NZLR 1056.
23 At [50].
24 At [51] (emphasis added).

> establish their connection with their lands and obtain all the cultural, spiritual and other benefits that go with that, including opportunities for economic development.

I regard this paragraph as particularly pertinent to the predicament confronting NTKT here.

[56] The function, in this context, of s 4 of the Conservation Act should be to encourage DoC to work to facilitate a rapprochement between NTKT and Fullers to reach a commercial agreement by which the interests of both Māori with tangatawhenua over Rangitoto and Fullers/MRT can participate on a commercial basis with the exploitation of the ongoing public demand for access to Rangitoto and Motutapu and an interest in learning of its history.

[57] Another formulation of the issue in this case is whether or not DoC has, within the constraints posed by the facts, recently pursued the objective of giving effect to the principles of the Treaty of Waitangi. Fullers have offered to enter into a partnership relationship with NTKT. Similarly, MRT, by electing not to take up its concession, and in other respects, is keen to have a good relationship with NTKT. Despite quite what that relationship would be is not clear, but it can also be described as some kind of partnership or common participation in making the history of Motutapu accessible to visitors.

[58] NTKT has rebuffed both overtures by Fullers and MRT.

Distinguishing between the facts in the *Whale's* case and the facts here

[59] NTKT relies on the *Whale's* case as setting the standard to be followed by DoC.

[60] All reasoning in judgments is a reaction to the facts of the particular case. In the *Whale's* case Ngai Tahu had brought proceedings to challenge the Director General of Conservation's intention to issue a further permit for commercial whale watching by persons who were not Ngai Tahu. Ngai Tahu was the incumbent. Both the High Court and the Court of Appeal were impressed by the personal financial risks and sacrifices made by the Ngai Tahu people to raise the funds to embark upon

the whale watch venture at a time when they did not know whether or not it would be successful. This was an important part of the reasoning of Neazor J in the High Court.[25]

[61] In the High Court Neazor J declared that the Director General ought to have consulted Ngai Tahu interests before granting the bow-rider (rival) permit, but dismissed the claim that the applicants be entitled by virtue of the Treaty to a period of operation protective from competition for five years or be able to require the Director-General issue no new permits. The Court of Appeal re-directed this issue back for reconsideration. That reconsideration favoured Ngai Tahu.

[62] The material facts here are quite different from the *Whale's* case. Both Fullers and MRT have had their concessions for some time, as has NTKT.

[63] In the case of Fullers they have a well-established business, with an established brand, that has been operating for many years. Fullers' operations have created goodwill in the "Volcanic Explorer" service. In the case of MRT they have been committing resources to Motutapu for many years, a commitment which needs fairly to be acknowledged. In short, in the Whale's case the question was whether a new entrant should be allowed a concession whereas in this case, the issue has an important dimension of whether or not incumbent holders of concessions should be ousted in favour of the tangata whenua.

[64] To oust Fullers and MRT would be to interpret s 4 as requiring the Minister to give precedence to the tangata whenua over existing concession holders to the point of depriving those concession holders of the prospect of renewal of their concessions from time to time. Both concession holders having effectively committed or accumulated "capital", in the case of Fullers by vessel and plant, in the case of MRT, by volunteers.

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[25] *Ngai Tahu Māori Trust Board v Director-General of Conservation* HC Wellington CP841/92, 23 December 1994 at 8.

MRT's Concession

[65] MRT was established in November 1993 to implement the Motutapu Restoration Plan prepared by the Department and was incorporated as a charitable trust on 16 February 1994. The Trust has carried out numerous conservation projects and tasks on the motu since its establishment, 22 years ago. It claims that its contributions to Motutapu are valued at over $70 million. That it has been instrumental in restoring the natural eco-systems, to facilitate release of threatened species including Coromandel Brown Kiwi and Takahe. MRT has also restored European sites on the motu: the Reid homestead and some of the historic military sites.

[66] On 21 October 2014, MRT lodged an application with the Department for a concession for guiding, tourism and recreation on Motutapu and Rangitoto Islands for a term of nine years, six months.

[67] NTKT were advised of the application by MRT on 7 November 2014 and lodged an objection to that application with DoC on 17 November 2014. NTKT argued that concessions to undertake commercial activities on the motu should not be granted to entities with no historical or cultural connection to the motu. That NTKT have long been marginalised and seek to preserve economic opportunities for the iwi on these islands. That MRT and its staff mispronounced Te Reo Māori and have insufficient cultural knowledge of the motu. That the MRT operation would be in direct competition with the guiding walk concession operation granted by DoC to NTKT and known as Te Haerenga.

[68] On 5 August 2015 the Minister granted a concession to MRT for a lesser period of five years. It included terms such that MRT must consult with and seek guidance of the iwi claiming mana whenua over any parts of the lands prior to the interpretation of matters of cultural significance to those iwi.

[69] Following the grant of the concession, MRT deferred the commencement of its guided walks, i.e. taking advantage of the concession, given the issues raised by NTKT.

[70] As a result of this, on 15/16 October a further concession report to the decision maker was prepared to record variation of the term of the earlier concession and MRT has indicated that it will further defer the commencement of any guided walks on Motutapu until the current proceedings are concluded. So the present position is that MRT holds a five year concession term which it is not exercising pending the outcome of this litigation.

Fullers Group Concession

[71] In December 2013 Fullers applied for a concession for 10 years to follow upon a concession licence granted in 1998, due to expire in December 2013.

[72] The DoC report writer began by recording:

> **Background:** [Fullers] is a current concessionaire who has been operating this activity on Rangitoto and Motutapu Islands since 1998. This concession has been rolling on under s17ZAAB of the Conservation Act since 1 January 2014.
>
> [Fullers] runs a ferry service to Rangitoto Island 364 days of the year, transporting approximately 80,000 visitors per annum. Visitors are transported to the Rangitoto Wharf and picked up by the tractor train. Trips are timed to coincide with the arrival and departure times of the ferry. Depending on numbers, sometimes two tractor trains are required to transport all passengers.
>
> There are a number of walking tracks available on Rangitoto and Motutapu Island, which are readily used by a number of visitors. For those who do not wish to walk, or who do not have the physical ability, the tractor train transports them around the Island via the Islington Bay and Summit Roads, as well as to the base of the summit walk on existing roads. Passengers then disembark and take the short walk up to the summit.

[73] The DoC report records consultation with NTKT and notes that another iwi, Te Kawerau a Maki (TKaM) was served with the application and did not get involved. And similarly, eight other Māori groups. There was active consultation with the Tamaki Collective. The report records that a representative of Fullers has met with Mr Paul Majurey on behalf of the Collective. That resulted in agreement, including such matters that Fullers were to meet the full costs of maintenance and repair work on all roads used and would avoid adverse effects and make a payment to the iwi of an agreed sum in the order of $10,000 to $15,000. There followed a variety of analyses of adverse effects, followed by analyses of cultural effects. It

recorded a submission by NTKT requesting the declining of the application on the basis that the concession opportunity should be preserved for the economic benefit of iwi within whose rohe that opportunity was presented. It followed that report with the following comment (already set out in [7] above):

> Applications for concessions are processed in the chronological order in which they are received, unless there is an allocation process being undertaken. There is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents.
>
> (Emphasis added.)

[74] It has been submitted by Mr Andrew, on behalf of NTKT that the underlined passage is a plain and material error of law, which of itself justifies the application for review and warrants the matter being reconsidered.

[75] The report also continues with the comment:

> The Department recommends a 5 year term for this concession, aligning with the development of the Tamaki Makaurau motu plan … This shorter term has an associated effect of not foreclosing the opportunities to undertake these activities by other potential concessionaires.

[76] The DoC report has a section on the subject of "active protection of Māori interests". It recorded NTKT as having identified future opportunities on the island as important to them whether economic or otherwise. It then records:

> The granting of this concession does not remove the opportunity for NTKT to apply for concessions that cover the same or similar activities, and the Department is committed to exploring any potential opportunities with Iwi. The Inner Motu CMS will provide an opportunity to further clarify and protect Māori interests on the Islands, and provide guidance for future management of these resources.
>
> The Department will not recommend a decline on the basis of active protection of Māori interests, instead implementing a shorter term to align with the development of policy documents. Monitoring of concessions on the Islands over the terms will provide further information to support the development of any management plan.

[77] The report went on to examine the protection of cultural values, recognising submissions in that regard by NTKT. It recorded a concern by NTKT, reiterated in this Court, that visitors will receive from Fullers a substandard experience that does

not represent the islands in the full context of Māori history and culture which is substandard to the experience they would receive from members of the NTKT iwi. The Department acknowledged that there are clear cultural effects identified by NTKT but was wary of setting standards which effectively excluded all other providers of visitor experiences, if the standard set were such that no one other than iwi could meet the high test of knowledge and competency that had been identified.

[78] The report also took into account that NTKT had nearly reached its own Treaty breach deed of settlement with the government. It noted that the Minister had a statutory power in s 17ZC(3)(b) of the Conservation Act to vary concessions.

[79] The Minister granted concessions to both Fullers and MRT but for five years rather than the ten years as sought.[26] The Minister's counsel submitted that the reason for the five-year period was to line up with future planning documents to be developed with iwi (the Tamaki Makaurau motu plan) and also to take into account the impending NTKT settlement. That it was a logical, reasonable and good faith approach in the circumstances.

[80] That summary lines up with the Minister's delegate Ms MN Douglas' explanation which is as follows:

> 9. Although the MRT applied for a concession term of 9 years, six months, and Fullers applied for a concession term of 10 years, I decided to grant both concessions for a limited 5 year term. The decision not to grant to longer concession terms requested was in recognition of the Inner Motu Conservation Management Strategy currently under development. I considered that a reduced term of 5 years would allow for the concessions to be re-evaluated in line with the new Conservation Management Strategy and any new management direction developed in light of it. The shorter timeframe also took account of the impending Ngai Tai ki Tamaki settlement.

[81] However, the writer of the concession report in respect of both Fullers and MRT, made to Ms Douglas as delegate, Ms AM Litchfield, had a fuller explanation for the five year period. It included the explanation just set out in paragraph 9. But Ms Litchfield also noted:

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[26] I note that the report writer, Ms Litchfield, also reported that Fullers had requested a 15-year term.

> 95. As noted on pages 7 to 8 of each Concession Report, the recommendation for a reduced concession term (considerably shorter than what might be issued or what was asked for by either of the applicants as noted later below) was made in part to balance the interests at play, reflecting that settlements progress over an extended time frame. The shorter term ultimately adopted in this case also reflected the Tamaki Collective settlement, already enacted, and the requirements of that piece of legislation, notably the drafting and approval of the Tamaki Makaurau motu plan.

[82] It may be remarked that she placed the awaited legislation as the last of a number of factors.

[83] Whether it was intentional or not the limited five year term creates an incentive to Fullers to renew its invitation to NTKT to form a partnership, and similarly, if it is necessary, for Fullers to have an even closer relationship with MRT.

Analysis of the Decisions under Review

[84] Because of its relative novelty and my doubt about the scope of "constitutional review" I have decided to follow a two-step analysis, examining:

(a) Whether the Court can identify any error of law in the reasoning of the DoC decisions; and

(b) Whether the Court is satisfied positively that the DoC decisions give effect to the principles of the Treaty of Waitangi.

[85] I am satisfied that this is not a case where it can be argued that DoC via the report writer or the delegated decision maker were not aware of all the relevant facts.

[86] The reviewable error is imbedded in this sentence:

> There is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents.

[87] That is an error of law. There is a difference between s 9 of the State Owned Enterprises Act requiring all decisions not to be inconsistent with the Treaty of Waitangi and the positive expression in s 4 of the Conservation Act that the decision

makers should give effect to the principles of the Treaty of Waitangi. Depending on the facts giving effect may result in a preference for an iwi over a business.

[88] This is because "giving effect to" means, literally, providing an "effect", in context a positive one, as a result of consideration of Treaty principles. Economic benefits are relevant. Both decisions contained errors of law, in the passages italicised in [7] and [8] above.

[89] Counsel for the Crown argued that the obligation in s 4, requires the Crown to give effect to the principles of the Treaty, by taking "*such action as is reasonable in the prevailing circumstances*". While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take depending on the situation which exists at any particular time".[27] I agree that that is a correct succinct statement of the law.

[90] The Broadcasting Assets case was discussing Treaty principles in the context of the protection of the Māori language. Counsel for the Crown in this case submitted:

> The core Treaty principle at issue in this case is that of active protection – the obligation on the Crown to actively protect Treaty interests enshrined in Article 2 of the Treaty when making relevant decisions. However, what active protection reasonably requires that any particular case will differ according to the circumstances and may change over time as the Privy Council emphasised in the Broadcasting Assets case …

[91] The Crown went on:

> There will be a range of permissible and Treaty compliant outcomes where active protection is engaged, whereas the applicant's case proceeds as if there is only one. The question is what is reasonably required in the prevailing circumstances.

[92] It is a relevant fact that the Crown had recognised that there had to be a Treaty settlement, as there have been relevant Treaty breaches in the past. The Treaty was founded on property rights, reasonableness, mutual co-operation and trust. Where it is reasonable the Crown should take such action which recognises the historic and continuing bond between the iwi and the land.

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[27] *Broadcasting Assets* case, above n 12, at 517.

[93] The Crown and NTKT have entered into a deed of settlement of Treaty grievances. The deed is conditional upon settlement litigation coming into force. In the meantime it is described within the deed as being without prejudice. In that sense, the position of the Crown is that NTKT cannot seek to advance any cause of action based on the deed of settlement itself. However, the Crown has accepted that the existence in the settlement negotiations and the deed itself were part of the factual context in the decisions under review and may be referred to for the purposes of evaluating any reviewable error.

[94] On my reading, the DoC decision did take into account all the relevant facts. It was conscious of the incumbency of Fullers and of MRT. It recognised that there was no authority for preferring NTKT simply because it was an application by the relevant iwi. The Treaty never guaranteed such a preference. The Treaty was all about protecting property rights, to be sure. But post-settlement, NTKT do not have property rights over Rangitoto and Motutapu beyond the terms of the settlement.

[95] On my reading DoC at all times knew of the NTKT settlement deed, and so of the recognition of its mana whenua over both islands, albeit shared with other iwi. The reason why NTKT did not get a State grant of monopoly for five years, is that the material facts of this circumstance are quite different from the material facts pertaining to Ngai Tahu in the *Whale's* case.

[96] I agree with the Crown's submission that the DoC decision was logical and reasonable, in the circumstances.

[97] By limiting the term of the concession of Fullers to five years DoC enabled Fullers to renew its negotiations of a partnership with NTKT or otherwise accommodate the interests of the iwi.

[98] I think the imperative "give effect to" in the Conservation Act is prescriptive, compared with an injunction not to be inconsistent. There is, however, no Treaty principle imposing an obligation on the Crown to give priority to the economic welfare of Māori in preference to those of non-Māori. Rather, the promise in the

Treaty of Waitangi at its core was to respect Māori property rights and to bring the peace of the Crown to the administration of government.

[99] Many, if not most of the Treaty grievances come from confiscation of Māori property. The purpose of the Treaty settlements is to redress what are wrongs. But the redress is complicated by and qualified by the passage of time. So it can only be reasonable. There is no constitutional principle expressed in s 4 of the Conservation Act, nor one to be inferred, which requires preference to the economic interests of Māori ahead of interests of other persons, all other things being equal.

[100] This latter point is reflected in the practice, exemplified in relation to the motu, where land previously held by Māori, which has become by sale (which may have been for trivial consideration) or by force, part of Crown land, is formally vested and re-vested to the New Zealand State. The fact that it was once confiscated land does not mean that in a treaty settlement it will always be returned back to iwi.

[101] The vesting and revesting practice gives visible recognition to the prior rangitiratanga of Māori over that land, but also a visible recognition that for good or ill that land will continue to be the property of the Crown. The rest of the Treaty settlement provides for compensation.

[102] It is a matter for Parliament on an ongoing basis to strike the balance of redress for Treaty breaches and continuing to take advantage of Treaty breaches. That is not the task of the Courts. One must be very careful to recognise that the Court's role has limits; it is not for the Court to right past wrongs in this context.

Whether the Court is satisfied positively that the DoC decisions give effect to the principles of the Treaty of Waitangi

[103] I have found so far, applying the first step in the analysis, that there is an identifiable error of law in the reasoning of the two DoC decisions. I have made that finding recognising that DoC overstated the law when saying that there is no basis for preferential entitlement, and that economic benefits were irrelevant considerations.

[104] The next step is whether, nonetheless, the DoC decisions give effect to the principles of the Treaty of Waitangi. I am satisfied that they did. It was not, on the facts, reasonable to prefer NTKT beyond limiting the Fullers and MRT concessions to five years, and in so doing giving the parties time to come to a mutually beneficial accommodation of self-interests. That is clear once it is accepted that giving effect to the principles of the Treaty of Waitangi is inherently qualified by the facts, so that it is in truth an effort to give effect to the principles of Treaty Waitangi to the extent that the circumstances allow. The Crown has a policy of seeking to remedy Treaty breaches but, as just discussed, does not pretend that the remedies can hope to erase all the adverse consequences from past breaches of the Treaty.

Summary of findings

[105] I have made the finding that the Minister, through his delegates, did err in law in respect of both the Fullers Group concession and the MRT concession.

[106] However, I do not think that the Minister disregarded the economic interests of NTKT. Rather, his delegate was of the opinion that there was room for more than one operator on Rangitoto.

[107] I find that the errors of statements of principle by the Minister's delegates were not sufficient to say that the Minister failed to give effect to Treaty principles. I find that in fact he did give effect to the principles of the Treaty of Waitangi by limiting the new terms of Fullers, and MRT to five years, enabling the possibility of a partnership with NTKT in the near term. I would add the Minister's delegates were acting reasonably and in good faith.

[108] Overall I find that the Minister and his delegates, notwithstanding their misstatements of the law, did not fail to give effect to the Treaty principles. On the facts both decisions did "give effect to the principles of the Treaty of Waitangi". Accordingly, there is no basis for this Court to intervene and set aside the decisions.

[109] There were a number of other pleadings not pursued at the hearing. I do not think anything turned on the failure of the Minister to not disclose immediately to

NTKT his decision on the Fullers' application during the final stages of the Crown-NTKT Treaty Settlement negotiations.

Conclusion

[110] For these reasons I find that this application for judicial review fails.

[111] I will hear the respondents on costs. I invite the three respondents' counsel to confer and exchange drafts of their submissions before filing. I will then receive submissions from the applicant and the intervener. Depending on the degree of difference between the parties there may be a hearing on costs or the matter may be dealt with on the papers or by a case management conference, before there is any decision on costs.

Solicitors:
Skinner Law Limited, Wellington
Copy to:
R B Enright, Auckland