

BETWEEN THE NEW ZEALAND MAORI  
COUNCIL AND OTHERS

Applicants

AND HER MAJESTY'S ATTORNEY-  
GENERAL AND OTHERS

Respondents

Coram: Richardson P  
Gault J  
McKay J  
Henry J  
Thomas J

Hearing: 26 June 1996

Counsel: J A Farmer QC and J M Dawson for Applicants  
H M Aikman, A M Kerr and C Linkhorn for Respondents

Judgment: 26 June 1996

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**ORAL JUDGMENT OF THOMAS J**

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To a large extent, my attitude to the application by Maori for leave to appeal to the Privy Council is indicated in the terms of my substantive judgment dissenting from the judgment of the majority in this proceeding. For myself, I would grant Maori leave to appeal, but I would refuse a stay pending the hearing of an appeal. I will address that issue first.

My reason for refusing a stay is the same reason as I gave for refusing interim relief to restrain the Crown's sale of its commercial radio assets in my substantive judgment. No elaboration of the point is required now. The refusal of a stay means that an appeal by Maori to the Privy Council would not delay a sale of the assets proceeding. But the disposition of commercial radio does not and will not dispose of all the substantive matters which Maori sought to put in issue in the third cause of action. Indeed, the absence of a prospective sale would provide the Privy Council with the opportunity to consider those issues without the pressure which circumstances forced on both the High Court and this Court in determining the various applications.

My decision to grant Maori leave to appeal would include leave to appeal against this Court's decision to refuse interim relief. I acknowledge that it is difficult to see how that issue will not be rendered academic if and when the proposed sale is completed. As dealt with in my substantive judgment, however, that does not exhaust the third cause of action. Consequently, my opinion that leave should be granted relates principally to this Court's decision to strike out the third cause of action.

In this regard, I do not base my decision on Mr Farmer's initial argument that an interlocutory judgment striking out a cause of action is a final judgment. I make no comment on that issue. It is sufficient, in my view, that an order to strike out a cause of action has the effect of a final decision. I believe that, when regard is had to the fact that Maori are essentially asserting that the Crown is in breach of its obligations under the Treaty of Waitangi, any interlocutory decision which has the effect of putting an end to that claim should be as closely scrutinised as if it were a final decision.

Ultimately, the question which Maori seek to put in issue is whether the Crown is in breach of its obligation to protect the Maori language as guaranteed by the Treaty, and the function of mainstreaming the language on radio in the context of that obligation, having regard to the Crown's decision to dispose of its commercial radio assets. That question is of immense public importance. The immediate question is whether the appeal should proceed so that Maori, if they are successful, will have the opportunity to contest that issue at a substantive hearing.

Mr Farmer raised a number of legal issues which he wishes to pursue in the Privy Council on behalf of Maori. Other than to the extent that they may have been touched upon in my substantive judgment I do not have the time to address them here. I do, however, wish to identify the following legal issues as questions which give rise to concern on my part.

The first is whether it was appropriate to strike out the third cause of action having regard to the established principles relating to applications to strike out, and the impact on the general law and practice if it is held that it was appropriate to do so.

The second question is whether, on a proper analysis, the judgment of the majority holding that there was no tenable basis for the third cause of action introduces a different approach and lesser standard to the question whether the Crown is in breach of its obligations under the Treaty, and the approach or function of the Courts in determining whether there has been a breach, than the approach, standard or function which has been adopted in previous cases in this Court and in the Privy Council.

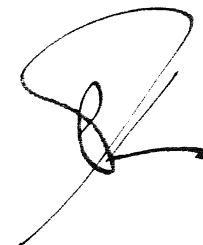
The third question is whether, on a proper analysis, the effect of the judgment of the majority is to preclude any indirect enforcement of the Crown's obligations under the Treaty based on the recognised administrative law remedies and, in particular, the doctrine of legitimate expectation.

Such a short list of my primary concerns is not, of course, exhaustive of the legal issues which arise out of the substantive judgments of this Court. Other legal points, such as the correct interpretation of the *Mercury Energy* case for example, would fall for decision if the case were to proceed to the Privy Council.

I am not persuaded by the argument that once a sale has taken place it would be open to Maori to commence a new proceeding based on the circumstances which pertain then. It would seem to me that Maori would face certain opposition from the Crown and real difficulties in Court with any new pleading based, as it would need to be substantially based, on issues pleaded in or raised by a cause of action which has been held to lack a tenable basis by this Court.

In my view, therefore, Maori should have the opportunity to seek to reinstate the third cause of action and argue the important issues which arise. As I have said, I do not entertain any doubt about the importance of those issues. Many appeals proceed with leave to the Privy Council which are of far less significance than this appeal.

For myself, therefore, I would grant leave to appeal.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a horizontal stroke.

Solicitors

Luckie Hain, Wellington, for applicants

Crown Law Office, Wellington, for respondents