IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BVH WGLMC-W

SET 2

CP No. 135/88

IN THE MATTER of Part 1 of the Judicature Amendment Act 1972

A N D

IN THE MATTER of the Treaty of Waitangi Act 1975

BETWEEN M R R LOVE

First Applicant

A N D PARININIHI KI WAITOTARA INC

Second Applicant

A N D TARANAKI MAORI TRUST BOARD

Third Applicant

A N D R H N LOVE

Fourth Applicant

A N D HER MAJESTY'S ATTORNEY-GENERAL

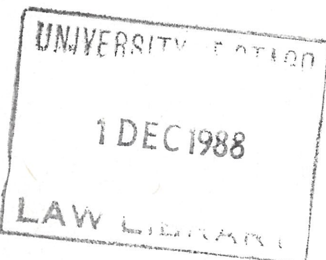
First Respondent

A N D THE HONOURABLE THE MINISTER OF FINANCE R O DOUGLAS

Second Respondent

A N D THE HONOURABLE THE MINISTER OF DEFENCE R J TIZARD

Third Respondent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Hearing: 15 March 1988

Counsel: Mr P.D. Green and Miss Taylor for the First, Second, Third and Fourth Applicants
Mr D.P. Neazor QC and Mr C.T. Gudsell for the First, Second & Third Respondents

Judgment: 17 MAR 1988

ORAL JUDGMENT OF ELLIS J

Petroleum Corporation of New Zealand Limited ("Petrocorp") was incorporated as a private company with a share capital of 45 million shares and prior to May 1987 these shares were held by two Ministers of the Crown on behalf of the Crown. From 18 December 1986 to 1 July 1987 Petrocorp was a State-Owned Enterprise under the State-Owned Enterprises Act 1986. It ceased to be such on the passage of the State-owned Enterprises Amendment Act 1987. This was to enable the Government to give effect to its intention to make shareholding in Petrocorp available to private investors. On 22 May 1987 Petrocorp increased its nominal capital to 700 million shares. In its Budget of June 1987 the Government announced its intention to sell its shareholding in a number of corporations and specific reference was made to Petrocorp. The present position is that the Crown holds 450 million shares out of an issued share capital of 650 million shares, giving it approximately 70% of the issued share capital. Petrocorp is now a publicly listed company with both Crown and private shareholders. It acts through a Board of Directors, some of whom are appointed by the Government in accordance with the Articles of Association.

As a result of negotiations, the Government announced on 15 February 1988 that it intended to sell its 70% shareholding in Petrocorp to British Gas. This announcement created widespread media and public interest and resulted in an application to this Court by Mr F.B.N. Fox to prevent the sale.

Mr Fox sued as a shareholder of Petrocorp. His application for an injunction to stop the sale was refused by Eichelbaum J on 26 February 1988. On 1 March 1988 the Government announced that the negotiations with British Gas had not proceeded as anticipated and that the sale to British Gas would no longer take place. The Government stated that it would consider other offers and intended to continue with the sale. The Government then concluded the contract with Fletcher Challenge on 3 March 1988, whereby the Crown's shares in Petrocorp would be sold to Rossport Investments, a wholly owned subsidiary of Fletcher Challenge Limited. Settlement of the sale falls due on 31 March 1988.

The four applicants named above filed proceedings in this Court on 7 March 1988. By their amended Statement of Claim filed a week later, they seek to review the decision to sell the shares under the provisions of the Judicature Amendment Act 1972. The essence of their claim is that the Taranaki Maori people are prosecuting a claim before the Waitangi Tribunal. Their claim relates to tribal lands running south from Mokau on the West Coast of the North Island, encompassing all lands commonly known as the Taranaki region, to and including parts of the lands in Wellington and areas of land in the northern portion of the South Island and the Chatham Islands. They claim that much of this land was wrongly taken from them by confiscation or purchase, contrary to the provisions of the Treaty of Waitangi. In particular, they rely on Article 2 of the Treaty.

The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975 and it is expressly empowered to enquire into and make recommendations upon any claim submitted to the Tribunal under Section 6 of the Act. The Taranaki claim is such a claim.

Section 6 of the Treaty of Waitangi Act 1975 defines the jurisdiction of the Waitangi Tribunal. Sub-section 3 provides:

> "If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future."

Sub-section 4 provides:

> "A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take."

It is plain that the powers of the Tribunal are limited to making recommendations to the Crown. The Crown is not obliged to accept the recommendations, but of course such can have substantial political significance.

The applicants maintain that they may be able to obtain a recommendation from the Waitangi Tribunal that substantial relief be granted to them by way of compensation. Indeed they maintain it is likely. They also maintain that they are likely to obtain recommendations that the relief take the form of a transfer of land and money by way of compensation. They maintain that they are likely to receive recognition from the Tribunal that their rights include rights to petroleum gas and other minerals beneath the surface of the land as being a natural incidence and consequence of the rights guaranteed to them under the Treaty of Waitangi.

Petrocorp is a large commercial enterprise which owns some land in the Taranaki District and in particular, in Waitara. It has contractual rights to a supply of petroleum gas and it has other rights necessary for its operation. The applicants' claim that any recommendation for compensation that may be made by the Waitangi Tribunal could include not only the Crown's shares in Petrocorp, but also the assets of that company, including land and licenses. They maintain that direct access to Petrocorp's assets could be obtained by the Crown as the majority shareholder, that is the Crown could oblige Petrocorp to dispose of its assets to the Maori claimants.

The applicants' claim that the decision to sell the shares will result in the shares themselves and access to Petrocorp's assets being removed as a possible form of compensation. They seek therefore to prevent the sale and seek a review in this Court of the Government's decision to sell the shares.

The cause of action relied on by the Plaintiff, although not stated in so many words in the pleadings to date, is that the sale of the shares in Petrocorp involves the exercising of a "statutory power of decision" as defined in Section 3 of the Judicature Amendment Act 1972. The definiton reads:

> "Statutory power of decision" means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting -
>
> (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> (b) The eligibility of any person to receive, or to continue to receive, a benefit or license, whether he is legally entitled to it or not."

"Statutory power" is defined by the same section as follows:

> "Statutory power" means a power or right conferred by or under any Act (or by or under the constitution or other instrument of incorporation, rules, or bylaws or any body corporate) -
>
> (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or

(b) To exercise a statutory power of decision; or

(c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or

(d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or

(e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person)."

In this case it is common ground that there are two statutory powers involved. First, the Ministry of Energy Act 1977. Section 15 provides:

"Participation in operations - (1) The Minister may from time to time, on behalf of the Crown, either alone or jointly with any other person or persons, carry on any business relating to exploration for or the discovery, production, processing, supply, distribution, uses, or conservation of energy, sources of energy, products from energy or sources of energy, minerals and mineral products; and in particular but without limiting the generality of this section may -

(a) ...

(b) Subscribe for, purchase, or otherwise acquire, and sell or otherwise dispose of shares, stocks, or interests, and otherwise participate in, any body corporate, firm, partnership, or joint venture (whether established before or after the commencement of this Act) having power to engage in any such business;

(c) Exercise all of the rights and powers of the Crown as the holder or any shares, stocks, and interests in any such undertaking; and

..."

The second is the Finance Act 1982. Section 2 provides:

"That the Minister of Finance may from time to time on behalf of Her Majesty the Queen exercise any or all Her Majesty's powers as a holder of any shares in Petrocorp".

It is common ground that such rights include the power to sell the shares in question.

It will be seen that these powers are simply expressed and do not contain any directions as to what factors must be considered by Ministers of the Crown when deciding when and how to dispose of the shares.

Following the filing of the application, the applicants also filed several interlocutory applications. So did the three respondents. The latter included an application to strike out the proceedings herein and for costs on the grounds that the applicants' pleadings did not disclose a reasonable cause of action. All motions were set down before me on 14 March 1988. Counsel for all named parties appeared, as did Counsel representing the interests of Fletcher Challenge Limited and Petrocorp. All agreed that the Respondents' application to strike out proceedings should be heard first and at the Applicants' request, this was adjourned until Tuesday 15 March 1988, when I heard full argument. Plainly the matter is of considerable urgency as settlement of the sale is due for 31 March.

The Solicitor-General submitted that the proper approach to an application to strike out was that summarised by the Chief Justice in an unreported decision Poverty Bay Electric Power Board v. Attorney-General and Anor, CP 552/87 (Wellington Registry) dated 5 November 1987. The Chief Justice referred to Rule 186 of the High Court Rules, which enables the Court to strike out the whole or any part of a pleading where it discloses no reasonable cause of action and said:

"The principles which a Court will follow in considering such an application are well settled. Briefly these are:

1. The jurisdiction is to be sparingly employed. It is not to be used except in a clear case where the Court is satisfied it has all the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I refer to Lucas & Son (Nelson Mail) v. O'Brien [1978] 2 NZLR 289,294; Tokaro Properties Ltd v. Rowling [1978] 2 NZLR 314, 317.

2. The plaintiff's case must be so clearly untenable that it cannot possibly succeed. See Takaro Properties Ltd v. Rowling (ante) at 317.

3. The Court will approach the matter on the assumption that the allegations in the statement of claim are factually correct and that they might be expected to be amplified at any hearing of the action. See Gartside v. Sheffield, Young & Ellis [1983] NZLR 37,45.

4. Where an allegation in a pleading depends upon the interpretation of statutory provisions or upon interpretation of the documents, the validity of which is beyond doubt, then the Court can look at the statutes ;and the documents to see whether the allegation in the pleading is factually correct. Just because a pleading states that a particular fact is so, the Court will not be obliged to accept it if, on the basis of unchangeable documentary evidence it is factually incorrect or untenable.

I respectfully adopt the formulation of those considerations. It is important in this particular case to refer to the third matter first. The Solicitor-General was at pains to emphasise that the Respondents make no challenge in the present application to the possible merits of the Applicants' claims, yet to be heard by the Waitangi Tribunal. There was no criticism whatsoever in his submissions of that application or its possible merits, which go to the very heart of the relationship between the Maori people and the Government of New Zealand over the last 150 years, and cover some very difficult aspects of our history as a nation. This Court is therefore to assume for present purposes that the Applicants have a meritorious claim to put before the Waitangi Tribunal and that its recommendation will be that further compensation for past wrongs be given which could possibly include the Crown's Petrocorp shares if they were still held at the time.

The Respondents' application proceeds from what is now an accepted state of the municipal law in New Zealand. It was formulated by Somers J in The New Zealand Maori Council and Latimer v. Attorney-General and Ors (1987) 6NZAR 353, 398:

"The received view of the law is that the Treaty of Waitangi does not form a part of the municipal law of New Zealand as administered by its Courts except to the extent it is made so by statute. This proposition is referred to by the Privy Council in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] AC308, where Viscount Simon L.C. delivering the judgment of the Board said -

It was well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law... So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him... even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactment (pp 324,325,327).

"To the same effect is the statement by Turner J in In re The Bed of the Wanganui River [1962] NZLR at 623, when he observed that the obligation of the Crown under the Treaty of Waitangi ' was akin to a treaty obligation, and was not a right enforceable at the suit of any private person as a matter of municipal law by virtue of the Treaty of Waitangi itself'.

"Notwithstanding some criticisms of these opinions, I am of the opinion that they correctly set out the law. Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament."

Somers J went on to say at page 399:

"This is not to suggest that the Courts have ever supposed that the Crown was not under an obligation to have regard to the Treaty, although that duty was not justiciable in this country, at least when the dispute was not with the Crown in respect of its perogative or royal rights. In In re Lundon and Whitaker Claims Act 1871 (1821) 2 NZCA 41 Arney CJ, delivering the judgment of the Court of Appeal said at p 49, 'the Crown is bound both by the common law of England and by its own solemn engagements to a full recognition of Native proprietary right'; in Nireaha Tamaki v. Baker [1894] 12 NZLR 483 (not affected on this point by the appeal reported [1901] AC561) Richmond J for the Court of Appeal said, at p 488, 'The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice', in Baldick v. Jackson (1911) GLR 398 Stout CJ observed of a claim that a whale was a royal fish under a statute of Edward II that it "would have been impossible to claim without claiming it against the Maoris for they were accustomed to engage in whaling, and the Treaty of Waitangi assumed that their fishing was not to be interfered with'; and in In re The Bed of the Wanganui River [1962] NZLR 600, Turner J at p 623 said, 'Upon the signing of the Treaty of Waitangi, the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the

Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom'. In the instant case, however, no difficulty of the kind mentioned in Te Heuheu's case arises. Municipal law, that is to say, s 9 of the State-Owned Enterprises Act 1986, recognises the Treaty of Waitangi by expressly limiting the Crown's power to act under the 1986 Act by reference to the Treaty principles."

In a more narrow compass Cooke P said at pages 360-61:

"Counsel for the applicants did not go as far as to contend that, apart altogether from the State-Owned Enterprises Act, the Treaty of Waitangi is a Bill of Rights of fundamental New Zealand constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in face of the decision of the Privy Council in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] AC308 that rights conferred by the Treaty cannot be enforced in the Courts except insofar as a statutory recognition of the rights can be found. The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty.

"I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State-Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act."

The Solicitor-General submitted that the power to sell shares contained in the two statutes I have quoted was in the widest possible form and similar to other powers to sell shares in companies held on behalf of Her Majesty. He submitted that there was no basis for regarding the sale of the shares as the sale of the company's assets which would be quite contrary to the fundamental distinction between shareholders property in the shares and the company's property in its own assets. He submitted that there was no justification to treat Petrocorp as an instrument of the Crown as it was no longer a state-owned enterprise, nor yet a company owned wholly by shareholders representing the Crown.

He further submitted that on the basis of accepting all the facts contended for by the Applicants, it could not realistically be said that the Ministers' decision to sell the shares could be upset on review, even including a challenge on the grounds of unreasonableness.

Mr Neazor further submitted that the possibility that the Waitangi Tribunal might recommend to the Government that it transfer its shares or some of its shares in Petrocorp to Maori claimants was no more than a possibility and in any event, it could be no more than a recommendation that would not be binding on the Crown. He submitted that the decision to sell was not a "statutory power of decision" within the meaning of the Judicature Amendment Act 1972.

On the other hand Mr Green submitted that the Court should consider the honour of the Crown and the fiduciary relationship between the Crown and the Maori people as Treaty partners. He submitted that the Crown should not contemplate disposing of assets which might deprive the claimants before the Waitangi Tribunal of a particular type of compensation.

He submitted that it is the existence of the Treaty partner relationship which distinguishes this case from any other in which review proceedings of commercial transactions have been sought. He submitted that in interpreting and applying the provisions of the Judicature Amendment Act 1972, I should bear these factors in mind and he relied on a passage in the judgment of Richardson J in CREEDNZ Inc v. Governor-General [1981] 1 NZLR 172 at 197-8:

"Finally, it is important to remember, as Lord Wilberforce reminds us, at p 1047; 682, that there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. The willingness of the Courts to intervene with the exercise of discretionary decisions must be affected by the nature and subject-matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene."

I find great difficulty in accepting Mr Green's submissions in this case where there is no direction in either statute that the Minister or the Courts should have any regard to the provisions of the Treaty of Waitangi. The present situation is in sharp contrast with the case before the Court of Appeal in the New Zealand Maori Council case where the Court was considering the transfer of land in the ownership of the Crown to various state-owned enterprises and where it was expressly provided in the State-owned Enterprises Act 1986 in Section 9 that "Nothing in this Act shall permit the Crown to act in a manner which is inconsistent with the Treaty of Waitangi". That statutory prohibition plainly governed any decision the Crown might make under that Act.

Equally there is plainly no such provision governing the statutory power to sell shares I am now considering. In short, this Court is not empowered to give effect to the provisions of the Treaty when considering the lawfulness or otherwise of the present sale of Petrocorp shares. The Court can only apply the general law applicable to Judicial review of the exercise of a statutory power of decision.

At most Mr Green's submissions could have some bearing on the interpretation of a statute in the ways referred to by Cooke J in the passage I have just quoted.

In this case the Applicants can only successfully resist the Solicitor-General's ~~action~~ application if they can show that the sale of shares involves a "statutory power of decision". In terms of the definition I have set out earlier, Mr Green submitted that the decision to sell affected the rights, powers and privileges of the Applicants, and affected their eligibility to receive a benefit whether they are legally entitled to it or not. The second leg of the submission must fail as I cannot see how their eligibility to receive any benefit can possibly be adversely affected by the sale of the shares. Their eligibility to receive some benefit from their claims will in due course be the subject of a recommendation by the Waitangi Tribunal which may or may not be accepted by the Government of the day. It will be a political decision of a high order. What may be affected is the nature of the benefit, not the eligibility to receive it.

In my view the benefit which the Applicants may receive is a favourable recommendation from the Waitangi Tribunal, and to equate this with a present expectation to receive certain shares now held by the Crown is in my view not justified. The distance between these two propositions can only be bridged by a political decision to translate the recommendation of the Waitangi Tribunal into a transfer of the shares. Such a decision is not in my view justiciable or controllable by this Court, it can only be viewed as a possibility.

I now turn to the first leg of the submission. In my view there is no power or privilege of the Applicants affected by the present sale. There remains the consideration of whether the Applicants have a right which is affected by the sale. The sale does not affect the Applicants' right to proceed before the Waitangi Tribunal, nor to obtain a decision from it. It does however preclude a recommendation that the shares be transferred to them as compensation. A right is in common usage a "fair claim" or an "entitlement" to some thing or privilege. It is a difficult word about which to be precise. This difficulty is well captured in the Oxford Companion to Law at page 1070:

> "Right. A much ill-used and over-used word. In a legal context it is a legal concept denoting an advantage or benefit conferred on a person by rules of a particular legal system. In Greek philosophy and Roman law, a right

seems to have been identified with what was right and just. Later, a right was sometimes deduced from the fundamental datum of free will or sometimes seen as essentially based on legal relationships between persons, determined by a rule of law and sanctioned and protected by the legal order, or sometimes as an interest recognised and protected by a rule of legal justice. A distinction has frequently been drawn between natural or moral rights and legal rights. The former are claims which, it is asserted, should by natural justice or principles or morality, be recognised and protected, whereas the latter may or may not have any moral basis but are in fact recognised and protected by the particular legal system in question. Only the latter have substantial legal significance."

In the context of the definition of "statutory power of decision", I consider that only legal rights are to be included, that is rights recognised by the law. In my view the Applicants have no present legal right to a recommendation from the Waitangi Tribunal that they should receive the Crown's Petrocorp shares in compensation for past wrongs and still less a legal right actually to receive them from the Crown. At most there is a present possibility assuming the Crown retains the shares, that they could be transferred by the Crown to the Applicants or other Maori interests.

It seems to me, in the short time I have available for consideration, that the conclusion I have reached is consistent with the decision in the New Zealand Maori Council case. In its simplest exposition, I read the judgments as saying if it were not for s9 of the State-Owned Enterprises Act 1986 which expressly imposed the obligations of the Treaty on the Ministers, the Court would not have been able to restrain the Crown from transferring Crown lands to the State-Owned Enterprises. This may be an oversimplification, but it is in my opinion the essence of my approach to the case before me where there is no such statutory direction. It is therefore not possible for the Court to intervene in the ordinary commerce of the Crown dealing with its own assets pursuant to the most general and unrestricted of statutory powers.

My decision may be seen as placing yet another legalistic obstacle in the way of righting ancient serious and continuing injustices felt by the Taranaki people. That only serves to emphasise the critical distinction between legal rights enforceable by the Courts and claims that can only have a political solution.

I now return to the considerations involved in the Solicitor-General's application. I have proceeded by accepting the factual matters put forward by the Applicants in as favourable light as reasonably possible on the basis that they could not be more favourably established at a full hearing.

I have considered those facts when interpreting the statutory provisions involved and relied on by the Applicants. I have come to the conclusion that the Applicants case is clearly untenable and cannot possibly succeed. I must therefore strike the proceedings out as disclosing no reasonable cause of action.

Costs are reserved.

I conclude by thanking Counsel for their careful and helpful submissions.

[signature] J
....