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The battle for control of the coast - Maori vs The Crown

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Introduction

The old "hornetÕs nest" of Maori land rights and control over resources has once again been stirred up with a Maori Land Court decision that has the potential to challenge some fundamental assumptions regarding the CrownÕs rights of ownership to the foreshore and seabed. Late last year, in the Marlborough Sounds Interim Decision Judge Hingston held that Maori, in some cases, still had customary rights to the foreshore and seabed.

The purpose of this paper is to, first, set out the relationship between Maori customary rights and the CrownÕs ownership of land in New Zealand and, secondly, explain the Marlborough Sounds decision and the reasoning of Judge Hingston. Thirdly there will be some commentary on the potential impact of the decision. The Crown is appealing the decision and the appeal will probably be heard within the next few months.

Maori customary rights

It is a fundamental principle of our law relating to land ownership that the Crown, as sovereign, is the paramount owner of all land in New Zealand. In legal terms this is referred to as the CrownÕs radical title.

However the CrownÕs acquisition of sovereignty over New Zealand did not legally put an end to the pre-existing property rights ("customary rights") of Maori. In fact the common law, through the doctrine of customary (or aboriginal) rights (or title), attempts to recognise and protect customary rights. The position of customary rights at common law is that they are a "burden" upon the CrownÕs radical title. An analogy can be drawn with a mortgaged house. When you mortgage your house you have the legal ownership (title) to the house but that ownership is ÔburdenedÕ by the rights of the mortgagee (bank). Those rights can not be disregarded when, for example, you sell the house.

In general terms, Maori customary rights are collective in nature being rights that belong to whanau, hapu or iwi. They are rights to use and occupy land rather than rights to exclusively own land (as under the common law). Another distinctive feature is that together with the rights to occupy areas and use resources there is a reciprocal obligation to sustainably manage those resources (kaitiakitanga).

Along with the radical title, the Crown also gained the exclusive right to extinguish Maori customary rights either through legislation or by Maori freely consenting to sell the land to the Crown. It is important to realise that these common law principles are not unique to this country. They have been developed and applied throughout the common law world, particularly in North America, and there is now a substantial body of case law from our Court of Appeal which leaves little doubt that they apply in New Zealand.

The Treaty of Waitangi/Te Tiriti o Waitangi ("the Treaty") was, in some

ways, merely declaratory of the common lawÕs treatment of customary rights. Under the Treaty (Article II) Maori were to retain the "full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession". Clearly, Maori customary rights were recognised and protected to the extent that Maori wished to retain those rights.

Furthermore, Article II also gave the Crown the exclusive right to purchase land that Maori no longer wanted to possess. A settler could only obtain good title (legal ownership) to land if there had been a Crown grant (purchase from the Crown). Between 1840 and 1865 large areas of Maori land were acquired by the Crown by way of direct negotiations between Crown agents and the Maori customary owners. The important point to note is that once the land was purchased by the Crown customary rights, in general, were extinguished.

An important change in policy occurred in 1865 with the establishment of the Maori Land Court (or Native Land Court as it was then called). The purpose of the Maori Land Court ("the Court") was to convert Maori customary rights to land into something that was a close as possible to the ownership of land according to the common law. Essentially that was a conversion from the land ÔownedÕ by the iwi (or hapu or whanau) to the land being owned by an individual (or individuals). Once that was done, any customary rights were extinguished, and purchasers could obtain good title to land by purchasing the land directly from the customary Maori owners. The role of the Court in extinguishing Maori customary title was one of the central issues in the Marlborough Sounds Decision.

In summary therefore, Maori customary rights exist, until they are extinguished, as a burden on the CrownÕs radical title. For the most part, customary Maori title to land in New Zealand has been extinguished, although, possible exceptions appear to be title to the foreshore and the seabed.

The Marlborough Sounds Decision

That brings one to the Marlborough Sounds Decision in which Judge Hingston was asked to give an answer to the following question:

> "É whether since the signing of the Treaty of Waitangi in 1840 Maori customary rights to the foreshore and the seabed in and around the Marlborough Sounds... have been extinguished".

Those asking the question were Te Tau Ihu Iwi (eight iwi of the northern South Island) who were becoming increasingly disenchanted with consultation by the Marlborough Regional Council over resource consents for marine farming. In short, Te Tau Ihu Iwi wanted their customary rights recognised - potentially giving them a right to have control over activities on the foreshore and seabed. The Crown on the other hand argued that any Maori customary rights had been extinguished - leaving the Crown with the exclusive right to control activities on the foreshore and seabed.

So while, on the surface, the arguments were about customary rights, the battle directly challenged the CrownÕs sovereignty and right to exclusively control the foreshore and seabed.

By way of background it is helpful to briefly examine the jurisdiction of the Maori Land Court in this matter. The Court gains its power from the Te Ture Whenua Maori Land Act 1993. Under that Act the Court has

the jurisdiction to determine and declare any land to be (amongst other things) "Maori customary land" which is defined as being land held in accordance with Maori customary values and practices (tikanga Maori). Once such a declaration is made the Court then has the jurisdiction to investigate the title to the land and determine the relative interests (rights) of the owners of the land.

The Foreshore

For the purposes of this paper the foreshore can be regarded simply as the area of land between high water mark and low water mark. The argument before Judge Hingston regarding the foreshore centred upon whether a 1963 judgement of the Court of Appeal was binding on the Court. That decision, the Ninety Mile Beach Decision, saw the Court of Appeal declining to recognise Maori customary rights to the foreshore along Ninety Mile Beach in Northland. Judge Hingston drew on two principles from the Ninety Mile Beach Decision which were relevant to the case before him:

* Where the title to land which bordered the coast had been investigated by the Court then customary title to the foreshore was extinguished. The legal title to the foreshore either vested in the Crown or the owners of the adjacent land depending upon whether the Crown agreed that the title was to be high water mark or low water mark respectively.
* If legislation is to extinguish customary rights then the legislation must clearly reflect a plain intention to take away these rights. In short, customary rights cannot be extinguished by a "side wind".

With regard to the first of these principles the Crown argued that it should be extended to situations where the title to the land (adjacent to the foreshore) had not been investigated by the Court. In essence the Crown was arguing that, upon the acquisition of sovereignty last century, the Crown assumed title to the foreshore and any customary rights to the foreshore were immediately extinguished. Judge Hingston was not convinced by the Court of AppealÕs rationale for the first principle and accordingly refused to extend it to situations where title had not been investigated by the Court. In support of this conclusion His Honour stated that, to extend the first principle would be contrary to the principle that Maori should not lose their customary rights by a side wind. Furthermore it was inconsistent with the doctrine of customary rights to argue that the Crown assumed title to the foreshore merely by acquiring sovereignty over New Zealand.

Therefore, in Judge HingstonÕs view customary rights to the foreshore had not been extinguished unless:

* the Court had investigated title to adjoining land above the high water mark; or
* they had been included (extinguished) in any sales of adjoining land; or
* they had been extinguished by clear and unambiguous legislation.

The Seabed

With regard to the seabed the Crown argued that any Maori customary rights had been extinguished by legislation. There are a number of statutes which purport to vest ownership of the seabed in the Crown. With regard to the Territorial Sea (low tide mark to the 12-mile limit) the Territorial Sea and Exclusive Economic Zone Act 1977 states that ownership of the bed of the Territorial Sea is vested, "subject to the

grant of any estate or interest therein", in the Crown.

It was argued by Te Tau Ihu Iwi that the 1977 Act did no more than declare the CrownÕs position at common law (that the Crown gained a radical title which did not extinguish customary Maori rights). The phrase "subject to the grant of any estate or interest therein", indicated that the Crown took a title to the seabed which was burdened by other rights (including customary rights). Accordingly, that Act did not extinguish Maori customary rights where they existed. Judge Hingston agreed with this argument. His Honour again stressed that where a statute was being used to extinguish customary rights, it was necessary for the statute to be unambiguously directed towards that end, and the 1977 Act did not pass that test.

Accordingly, His Honour concluded that with respect to Maori customary rights to the seabed:

* the radical title to the seabed had vested in the Crown; but
* that title was still subject to Maori customary rights.

In summary Judge Hingston noted that the case law "clearly demonstrates that customary title rights (where they exist) cannot lightly be disregarded". The principle of not extinguishing customary rights by a "side wind" permeates Judge HingstonÕs judgement. That is understandable given the vulnerability of customary rights and the relative ease by which they can be extinguished through clear and unambiguous legislation.

It must be remembered that Judge HingstonÕs decision is an "interim determination" which dealt solely with questions of law. Judge Hingston was merely stating his opinion that, as a matter of law, there has not been a general extinguishment of customary rights to the foreshore or seabed. His Honour could not go on to declare the foreshore and seabed Maori customary land because the relevant evidence had not been put before him in order to make the following necessary questions of fact:

* Did Te Tau Ihu Iwi recognise and exercise customary rights over the foreshore and seabed of the Marlborough Sounds before 1840 (when the Crown acquired sovereignty)?
* Have the customary rights to particular areas of the foreshore and seabed been extinguished by legislation or voluntary sales?
* What customary rights of Te Tau Ihu Iwi now remain?

In response to the decision of Judge Hingston the Crown had two choices: either enact legislation that clearly and unambiguously extinguished the customary rights; or appeal the decision. Perhaps because the first option may not have been politically expedient, the Crown chose to appeal the decision to the Maori Appellate Court. That appeal should be heard within the next few months.

Some thoughts

As mentioned above, Judge Hingston appeared to be concerned with the vulnerability of customary rights. While that may be a valid concern, His Honour did not deal with the underlying rationale for not recognising customary rights. In the Ninety Mile Beach Decision the Court of Appeal observed that "at this late stage in the period in the development of New Zealand" claims of customary rights to the foreshore and seabed, if well founded, would have "startling and inconvenient results". Thus there is a tension between a desire to recognise and protect customary rights and a concern over the ramifications of such recognition. One must not underestimate the unenviable position the Court, as an arm of government, has in attempting to deal with this tension. In fact it may be inappropriate that any court be placed in a

position to determine these issues given their fundamental importance. Instead they may be best dealt with at a constitutional level.

One of the ramifications of recognising Maori customary rights to the foreshore and seabed is the effect on the coastal permit provisions of the Resource Management Act 1991 (RMA). It is unlawful to undertake most activities in the "coastal marine area" (essentially the foreshore and territorial sea) unless there is express permission in the regional coastal plan or one has been granted a resource consent. It is also unlawful to occupy any space in the coastal marine area without express permission either from the regional coastal plan or a resource consent. Accordingly, there is an implied assumption in the RMA that the Crown or Regional Council has the sole rights to control, and allocate space in, the foreshore and seabed. The Marlborough Sounds Decision fundamentally challenges this assumption and has the potential to seriously disturb the present regime used to control and manage our foreshore and seabed. This is what some may term a "startling and inconvenient" result.

No matter how successful they will be in proving that customary rights to the foreshore and seabed still exist, it is highly unlikely that the Court will vest full ownership to those areas in Maori. Any result will involve a balancing between recognising the customary rights and the "startling and inconvenient results" which may eventuate. Perhaps the solution will be found in some power sharing arrangement whereby the coastal marine area is managed in a way that recognises and provides for any Maori customary rights. And one cannot discount the possibility of a Ôpan-MaoriÕ Crown Settlement similar to the Sealords Deal which would no doubt include an express extinguishment of all Maori customary rights to the foreshore and seabed. However, given the continuing problems regarding the distribution of the assets from the Sealords Deal it is probable that Maori are going to be wary of such a settlement.

As a final point, newspaper reports have made bold statements to the effect that the Marlborough Sounds Decision "could give Maori control over the countryÕs coastline". However, it must be remembered that the Marlborough Sounds Decision is an interim determination. Furthermore Judge Hingston held that customary rights may exist only where the title to adjoining land had not been investigated and determined, or where they had not been extinguished by legislation or voluntary sales. So there will be substantial portions of the coastline where the rights have been extinguished. Where the rights still remain it is unlikely that they will equate with a sole right to own and control the coastline. That is something substantially less than giving Maori control of New ZealandÕs coastline.

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