S.C. 1938. GOODMAN v. NAPIER HARBOUR BOARD. MYERS, C.J.

Board(10)—or in the Public Authorities Protection Act, 1893 (Imp.), (*13 Halsbury's Complete Statutes of England*, 455). Section 248 of the Harbours Act, 1923, says that:

> No plaintiff shall recover in any action commenced against a Harbour Board or person for anything done *in pursuance of this Act* unless such action is commenced within three months after the act is committed, and unless notice has been given to the defendant one month before such action is commenced . . .

It is true that the defendant Board was not bound to do the work the subject-matter of the present contract, but it has power to construct "harbour works," and s. 126 of the Act requires that every contract shall specify the work to be done or executed, the materials to be furnished, the price to be paid for the same, the time or times within which the work is to be completed, *and the penalties to be suffered in case of non-performance thereof*. By s. 169 the Board had to obtain the sanction of the Governor-General in Council before commencing the work the subject-matter of the contract, and I should be disposed to think that in exercising its remedy of enforcing its remedies under the contract the defendant Board was engaged in a public duty—see per *Lord Shaw of Dunfermline* in *Bradford Corporation* v. *Myers*(11), and was doing something in pursuance of the Harbours Act. I am merely expressing my present view as it may perhaps be of assistance to the parties, but as I have already said I do not categorically answer the second question; and, if my answer to the first question had been different, I should have thought it necessary to give more consideration to the second.

Costs of argument, fixed at twenty guineas, to be paid by the plaintiff to the defendant.

First question answered in defendant's favour.

Solicitors for the plaintiff: *Gifford and Robinson* (Napier).

Solicitors for the defendant: *Sainsbury, Logan, and Williams* (Napier).

(10) [1933] N.Z.L.R. 902; G.L.R. 614; aff. on app. [1936] N.Z.L.R. 1016, J.C.

(11) [1916] 1 A.C. 242, 264.

1939.

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

S.C. WANGANUI. 1937. *Aug. 26, 27; Dec. 2.* SMITH, J.

C.A. WELLINGTON 1938. *Oct. 3, 4, 22.* MYERS, C.J. CALLAN, J. NORTHCROFT, J.

TE HEUHEU TUKINO - - - APPELLANT
PLAINTIFF

AND

AOTEA DISTRICT MAORI LAND BOARD - - - - - RESPONDENT
DEFENDANT.

Natives and Native Land—Treaty of Waitangi—Cession of Rights by Native Owners—Compromise by Legislature of Difficulties arising out of Transactions between Native Owners and other Parties—Statutory Direction to Maori Land Board to pay in Discharge of Claims of a Company against Native Owners Sum approved by the Native Minister—Payment so authorized made by Statute a Charge upon the Lands of such Natives—Whether such Statutory Provision invalid by Treaty of Waitangi or New Zealand Constitution—New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), ss. 72, 73—New Zealand Constitution Amendment Act, 1857 (20 & 21 Vict., c. 53), s. 2—New Zealand Provincial Government Act, 1862 (25 & 26 Vict., c. 48), s. 8—Statute Law Revision Act, 1892 (55 & 56 Vict., c. 19), s. 1 and Schedule—Native Land Act, 1873, s. 4—Native Purposes Act, 1935, s. 14.

In 1906 a majority of the owners of land in the Taupo West County entered into an agreement with the Tongariro Timber Co., Ltd., to which they gave certain timber-cutting and other rights over such land. Such agreement after modification, at the desire of the Natives themselves, was given the force of law by s. 37 of the Maori Land Laws Amendment Act, 1908, which authorized the Maniapoto-Tuwharetoa District Maori Land Board to execute it on behalf of the Native owners. The Egmont Box Co., Ltd., became entitled under an agreement with the Tongariro Timber Co., Ltd., to certain timber-cutting and other rights over part of the said land. This cession by the Natives themselves of certain of their rights in the land was of importance to the development of the country; and the doubts and difficulties that arose between the Natives of the Maori Land Board for the time being representing them, on the one hand, and the companies, on the other, led to the intervention of the Legislature.

Then followed a long series of enactments relating to the transactions between the Natives and the companies, for the purpose of bringing about a compromise in the interests of all concerned. This legislation culminated in s. 14 of the Native Purposes Act, 1935, which directed the Aotea District Maori Land Board, the statutory agent of the Native owners, to pay to the Egmont Box Co., Ltd., in discharge of its claims, a sum approved by the Native Minister, which, by the section, was, upon payment, made a charge upon the Native owners' land and the revenue therefrom.

In an action brought by the appellant, on behalf of the Native owners against the respondent Board, claiming a declaration of negligence and/or a breach of duty by the Board, and an order requiring the Board to indemnify the Native owners and their lands against the payment of £23,500 approved by the Native Minister, and paid by the Board to the Egmont Box Co., Ltd., in accordance with the said section, judgment was given for the Board.

S.C. 1937. TE HEUHEU TUKINO v. AOTEA DISTRICT MAORI LAND BOARD.

On appeal therefrom, it was argued by appellant's counsel, *inter alia*, that the charge made upon the lands of the Natives by virtue of s. 14 of the Native Purposes Act, 1935, was invalid by reason of the Treaty of Waitangi and s. 72 of the New Zealand Constitution Act, 1852.

Held, per Curiam, That s. 14 of the Native Purposes Act, 1935, although a compromise imposed by Parliament on the interested parties, including the Native owners, was the adjustment of difficulties arising out of a cession by the Natives themselves, and therefore contravened neither the Treaty of Waitangi nor the New Zealand Constitution Act, 1852.

Per *Myers*, C.J., and *Northcroft*, J., 1. That the Court could not go behind the Native Purposes Act, 1935, to see whether or not the Legislature was imposed upon, or had acted upon some mistaken view of either the facts or the law concerning the respective rights *inter se* of the parties concerned.

Lee v. *Bude and Torrington Junction Railway Co.*(1) and *Labrador Co.* v. *The Queen*(2) applied.

2. That a treaty becomes enforceable only as part of the municipal law if and when it is made so; and that had not been done in the case of the Treaty of Waitangi, although the Treaty, in certain ways, had received legislative sanction.

Tamihana Korokai v. *Solicitor-General*(3) and *Waipapakura* v. *Hempton*(4) referred to.

3. That the words "as hereinafter mentioned" in s. 72 of the New Zealand Constitution Act, 1852, were referable to s. 73 thereof; and, in view of the subsequent Imperial legislation repealing the latter section, s. 14 of the Native Purposes Act, 1935, was not *ultra vires* the New Zealand Legislature.

(1) (1871) L.R. 6 C.P. 576.
(2) [1893] A.C. 104.
(3) (1912) 32 N.Z.L.R. 321; 15 G.L.R. 95.
(4) (1914) 33 N.Z.L.R. 1065; 17 G.L.R. 82.

ACTION, in which the plaintiff, the Chief of the Ngatituwharetoa in a representative capacity, claimed a declaration of right against the defendant and an indemnity.

On December 23, 1908, a deed of agreement for the sale of timber on an area of land between Taumarunui and Lake Taupo and for the construction of a railway was entered into between the Maniapoto-Tuwharetoa District Maori Land Board on behalf of certain Native owners, on the one part, and the Tongariro Timber Co., Ltd. (hereinafter called "the Tongariro Co."), of the other part. The making of this agreement was authorized by s. 37 of the Maori Land Laws Amendment Act, 1908. The defendant, the Aotea District Maori Land Board (hereinafter called "the Board"), shortly afterwards substituted for the Maniapoto-Tuwharetoa District Maori Land Board. On September 9, 1914, the Tongariro Co. entered into an agreement with the Egmont Box Co., Ltd. (hereinafter called "the Egmont "Co."). Thereunder the Egmont Co. agreed to provide moneys necessary for certain railway construction within defined periods. The agreement dealt also with certain timber-cutting rights which

S.C. 1937. TE HEUHEU TUKINO v. DISTRICT MAORI LAND BOARD.

the Egmont Co. had acquired. This agreement was authorized by s. 5 of the Native Land Claims Adjustment Act, 1914. When the War ended, the Governor-General in Council was authorized by s. 32 of the Native Land Amendment and Native Land Claims Adjustment Act, 1919, to approve and consent to certain new arrangements between the Tongariro Co. and the Egmont Co., and a new agreement of October 23, 1919, was approved. It was provided by the statutes of 1914 and 1919 that the cancellation of the agreement between the Tongariro Co. and the Board should not have the effect of cancelling the agreement between the Tongariro Co. and the Egmont Co., but that on such cancellation the agreements of 1914 and 1919 should be deemed to have been made between the Board and the Egmont Co. and that the Egmont Co. should thereafter have against the Board and the Native owners of the lands affected all the rights which the Egmont Co. previously had against the Tongariro Co.

Between the years 1916 and 1920, the Crown acquired certain freehold interests from the Native owners in the lands subject to the deed between the Tongariro Co. and the Board, but not in the lands subject to the contract with the Egmont Co. The Crown became entitled to approximately two-fifths of such lands.

In the year 1930 the Board cancelled the agreement between itself and the Tongariro Co., and s. 18 of the Native Land Amendment and Native Land Claims Adjustment Act, 1930, was passed. This section recited the cancellation and then authorized the Board to enter into a new contract with the Egmont Co., incorporating such of the terms of the agreement of October 23, 1919, as the Board and the Egmont Co. should mutually agree upon with such other terms as were in the Board's opinion, but subject to the approval of the Native Minister, fair, reasonable, or equitable, although not strictly in accord with the agreement of October 23, 1919. If any dispute were to arise as to what terms were to be included in the contract, the decision of the Native Minister was final, save that if the Egmont Co. were dissatisfied with the Native Minister's decision the parties were left to their respective rights and obligations under the agreement of October 23, 1919, and the various statutory provisions affecting the same. Negotiations continued from 1930 until 1934 without any settlement having been reached. Neither the Board nor the Egmont Co. took legal proceedings to ascertain from the Court their rights under the existing agreement. The Board took the attitude that if any action were to be taken it preferred that the Egmont Co. should take it; while the Egmont Co. expressed the view that if a price

New Zealand Maori Council v Attorney-General

Court of Appeal Wellington
29, 30, 31 October, 1 November 1991; 30 April 1992
Cooke P, Richardson, Hardie Boys and McKay JJ

Constitutional law—Treaty of Waitangi—Maori language—Whether Court could pass judgment as to whether the Crown had adequately performed its Treaty obligations in respect of Maori language—Whether it could offer guidance on carrying out of obligations—Whether transfer of assets could be prevented in order to put pressure on Crown to adopt policies regarded as more appropriate for achieving compliance with the Treaty.

Administrative law—Judicial review—Exercise of power to transfer Crown assets to State enterprises pursuant to State-Owned Enterprises Act 1986—Whether power to review legislation or to direct on matters of policy—Proper function of the Court—State-Owned Enterprises Act 1986, ss 9 and 23.

A series of statutes was enacted to restructure New Zealand broadcasting. Under the Broadcasting Amendment Act (No 2) 1988 it was intended by the Crown to transfer to the State enterprises Radio New Zealand Ltd and Television New Zealand Ltd assets formerly vested in the Broadcasting Corporation of New Zealand. Though no Maori claim was made to ownership of the airwaves, the New Zealand Maori Council and others claimed that the proposed sale of broadcasting assets would be contrary to the principles of the Treaty of Waitangi and accordingly s 9 of the State-Owned Enterprises Act 1986 because it would not adequately safeguard Maori language, and in fact would restrict or impair the ability of the Crown to provide such protection. A declaration was sought that the proposed transfer, without adequate inquiry as to the extent of the Crown's Treaty obligation to protect the Maori language and culture through broadcasting and without establishing any adequate system or process to achieve the protection of the Maori language and culture through broadcasting, was unlawful. The Crown accepted that the Maori language and culture were taonga, and hence entitled to the protection of the Crown in accordance with article 2 of the Treaty.

In the High Court two judgments were given. In the first, McGechan J, being satisfied with the Crown's proposals regarding radio, declined to make the declaration sought in respect of broadcasting assets to be transferred to Radio New Zealand Ltd, but he adjourned the application in respect of the assets to be transferred to Television New Zealand Ltd to enable the Crown to submit a scheme of protective reservations as to transmission and production facilities. In a second judgment he considered the protective scheme approved by Cabinet and submitted by the Crown in response to the first judgment. The scheme indicated a clear commitment to positive action. McGechan J held that this scheme would allow the transfer of assets to proceed consistently with the Crown's obligations under the Treaty. A declaration was made that the Crown might transfer the assets.

From these judgments the Maori Council appealed. The aim was to ensure a Maori content in mainstream broadcasting, this being argued to be essential if

and would no longer be able to discharge its duty under the Treaty in respect of the protection of the language. The Maori Council argued its case on the basis of capacity. The primary issue was whether the proposed transfer would be contrary to the principles of the Treaty because of its effect on the capacity of the Crown to fulfil its Treaty obligations.

Held: 1 (per Richardson, Hardie Boys and McKay JJ, Cooke P dissenting) Section 9 of the State-Owned Enterprises Act 1986 is a fetter on executive action, not on legislative power or the policies expressed in legislation (see p 600 line 18, p 588 line 36).

2 The Court did not have either the power or the responsibility to review the restructuring legislation, nor to direct the Crown on matters of policy. Its power was limited to restraining any exercise by the Crown of its powers under the State-Owned Enterprises Act 1986 in a manner inconsistent with the principles of the Treaty of Waitangi. It was not the role of the Court to make the policy decisions as to the particular manner in which the Crown was to carry out its Treaty obligations (see p 598 line 9, p 598 line 29).

3 The Court's concern was only with the steps which the Crown proposed to take in the exercise of the powers conferred on it by the State-Owned Enterprises Act 1986. Those actions were to be looked at in the context of their legislative and policy framework and to be measured, not against some standard formulated by the Court, but against the principles of the Treaty itself (see p 598 line 36).

4 The new structures were achieved by legislation and were not able to be challenged in these proceedings. It was only the proposed transfer of ownership of the assets which could be challenged. The transfer would not diminish the Crown's present capacity to protect the Maori language. The only difference from the present situation, once the assets had been transferred, would be that the Crown would be less able to reconsider the present structures and revert to a more direct control over either one or all of the television channels (see p 602 line 33, p 586 line 54, p 588 line 36).

5 The assets were not themselves the subject of actual potential Treaty claims. They were assets used by the Crown for broadcasting purposes, and in this way had become linked to the Crown's discharge of its Treaty obligation to protect the Maori language. The Crown's proposals involved a commitment to enter into a contract with Television New Zealand and Radio New Zealand prior to the transfer of assets to them which contract would guarantee access to the transmission and production facilities for Maori broadcasters. The particular assets were not essential for Maori broadcasts. They were substitutable, at least to the extent that funds were made available (see p 602 line 55, p 586 line 47).

New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (HC & CA) distinguished.

6 The Court's proper function was to identify the principles of the Treaty for the purpose of construing s 9 in order to determine whether or not the proposed transfer of assets would infringe that section. Treaty rights could not be enforced in the Courts except in so far as they had been given recognition by statute. The transfer of assets could not be restrained merely because the Crown had already restructured broadcasting in a way which might have diminished its capacity to comply with the Treaty and as a means of putting pressure on the Crown to adopt policies regarded as more appropriate for achieving such compliance (see p 603 line 11, p 586 line 54, p 588 line 52).

Appeal dismissed.

142 Court of Appeal [1989]

New Zealand Maori Council v Attorney-General

Court of Appeal Wellington
10, 20 March 1989
Cooke P, Richardson, Somers, Casey and Bisson JJ

Practice and procedure—Judgments and orders—Reservation of leave to apply for further orders—Court of Appeal made declarations regarding transfer of State assets to State-owned enterprises, and, in case anything unforeseen should arise, reserved leave to apply (see [1987] 1 NZLR 641)—Crown subsequently proposed to sell forestry rights but not ownership of the land—New Zealand Maori Council applied for further declaration pursuant to leave reserved—Whether Crown's proposal was an unforeseen event—Whether Council's application came within scope of leave reserved.

On 29 June 1987 in an earlier decision in this proceeding (see [1987] 1 NZLR 641) the Court of Appeal made a number of findings including, first, that it would be inconsistent with the principles of the Treaty of Waitangi for the Crown to implement a sweeping series of transfers of its assets to State enterprises without any consideration being given to the possibility of claims concerning those assets being made to the Waitangi Tribunal or without a reasonable opportunity being given for those possible claims to be investigated; and, second, that the transfer of assets to State enterprises without establishing a system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful. Directions were given regarding the preparation of a scheme of safeguards giving reasonable assurance that lands or waters would not be transferred to State enterprises in a way which might prejudice claims to the Waitangi Tribunal. On 9 December 1987 the Court of Appeal made a Minute (see [1987] 1 NZLR 641, 719) recording that agreement had been reached between Treaty partners represented in the Court by the Government and the New Zealand Maori Council that if land was transferred to a State enterprise and the Waitangi Tribunal later recommended that it be returned to Maori ownership, that return would be compulsory. In the Minute the Court, as a precaution and in case anything unforeseen should arise, reserved leave to apply for further orders. The Treaty of Waitangi (State Enterprises) Act 1988 enacted a scheme to give effect to the agreement referred to in the Minute.

In the course of presenting the budget on 28 July 1988 the Minister of Finance announced the Government's intention to sell the State's commercial forestry assets. In August 1988 the Government established a Forestry Working Group to report to the Minister of Finance and the Minister of State-owned Enterprises as to the most appropriate form in which the forestry assets should be sold, given a requirement that their sales value be maximised. The Forestry Working Group reported to the Ministers in October 1988. On the invitation of the Minister for State-owned Enterprises a national hui was held at Rotorua on 20 January 1989. The Minister sent to relevant Maori groups letters dated 21 December 1988 and 30 January 1989 explaining the purposes of the hui, advising of the Government's proposals for the sale of the Crown's commercial forestry assets but not ownership of the land, and seeking to discuss the issues with Maori interests. The Maori Council believed the Government had already decided how the sale of forestry assets would take place and accordingly on 3 February 1989 it applied to the Court of Appeal for a declaration that the Government's proposal to dispose of forestry assets was inconsistent with the judgment delivered by the Court of Appeal on 29 June 1987. The Crown argued as a preliminary question that the Maori Council's application did not fall within the scope of the leave reserved by the Court of Appeal on 9 December 1987.

Held: 1 The reservation of leave to apply contained in the Court of Appeal's Minute of 9 December 1987 had to be seen in the context of judgments, negotiations and a settlement grappling with a complex issue of major national and constitutional importance. Leave was reserved purely as a precaution in case anything unforeseen should arise. Something unforeseen had arisen. In 1987 and until June 1988 the Court, the parties and Parliament all understood that the intention of the Government was to transfer the forest lands to the State-owned enterprise, New Zealand Forestry Corporation Ltd, but no one concerned drew any distinction between the lands and the trees growing on the lands (see p 151 line 33).

2 To justify an application under the leave reserved the Court must be satisfied that the matter raised was linked sufficiently closely with the judgment to make it unjust to refuse to hear the application. Judged by that test the Maori Council's application was in order, as the Government's changed policy went to the very heart of the issue raised in the 1987 case, namely whether assets including forest lands could be disposed of through the new State enterprises to interests outside the State enterprises without breach of the principles of the Treaty of Waitangi. If the development to sell forestry rights rather than the land had been signalled during the hearing of the 1987 case the main declaration granted by the Court in that case could well have been differently worded. There was accordingly no procedural bar to the Maori Council's application (see p 151 line 53).

Case mentioned in judgment
Cristel v Cristel [1951] 2 KB 725; [1951] 2 All ER 574 (CA).

Interim application
This was an application for a declaration that the Crown's proposal to dispose of Crown forestry assets in the manner proposed in certain documents was inconsistent with the judgment of the Court of Appeal delivered on 29 June 1987 and the agreement the subject of the Court's Minute of 9 December 1987 was unlawful (see [1987] 1 NZLR 641). The Court of Appeal heard argument on the preliminary question whether the New Zealand Maori Council's motion about the forests was within the scope of leave reserved by the Court of Appeal on 9 December 1987.

W D Baragwanath QC and *J M Dawson* for the first plaintiff (the New Zealand Maori Council) and the second plaintiff (G S Latimer).
Solicitor-General *D P Neazor QC* and *Kristy McDonald* for the first defendant (the Attorney-General), the second defendants (the Hon Minister of Finance, the Hon Minister of Energy, the Hon Minister of Lands and the Hon Minister of Forests) and the third defendant (His Excellency the Governor-General in Council).

Cur adv vult

The judgment of the Court was delivered by
COOKE P. On 3 February 1989 the New Zealand Maori Council filed in this

S.C. 1941. TARANAKI HOSPITAL BOARD v. BROWN. MYERS, C.J.

good conscience: *Tait* v. *McCallum*(11). The question of jurisdiction here has been raised *in limine*, and if it be held that the Magistrates' Court has no jurisdiction to grant the relief claimed it cannot proceed further.

The writ of prohibition must therefore go.

Writ of prohibition granted.

Solicitors for the plaintiff: *Govett, Quilliam, Hutchen, and Macallan* (New Plymouth).

Solicitor for the defendant, Brown: *G. L. Ewart* (New Plymouth).

(11) (1894) 13 N.Z.L.R. (S.C.) 232.

J.C. 1940. *Nov. 11, 14, 15, 18, 19, 22.* 1941. *April 3.* VISCOUNT SIMON, L.C. LORD THANKERTON. LORD WRIGHT. LORD PORTER.

[IN THE PRIVY COUNCIL.]

TE HEUHEU TUKINO - - - APPELLANT

AND

AOTEA DISTRICT MAORI LAND BOARD - - - - - RESPONDENT.

Natives and Native Land—Treaty of Waitangi—Cession of Rights by Native Owners—Compromise by Legislature of Difficulties arising out of Transactions between Native Owners and other Parties—Statutory Direction to Maori Land Board to pay in Discharge of Claims of a Company against Native Owners Sum approved by the Native Minister—Payment so authorized made by Statute a Charge upon the Lands of such Natives—Whether such Statutory Provision invalid by Treaty of Waitangi or New Zealand Constitution—New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), ss. 72, 73—New Zealand Constitution Amendment Act, 1857 (20 & 21 Vict., c. 53), s. 2—New Zealand Provincial Government Act, 1862 (25 & 26 Vict., c. 48), s. 8—Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63)—Statute Law Revision Act, 1892 (55 & 56 Vict., c. 19), s. 1 and Schedule—Native Land Act, 1873, s. 4—Native Purposes Act, 1935, s. 14.

It is not open to the Courts to go behind what has been enacted by the Legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by some one on whom reliance was placed by it. The Court must accept the enactment as the law unless and until the Legislature itself alters the enactment, on being pursuaded of its error.

Labrador Co. v. *The Queen*(1) applied.

Any rights purporting to be conferred by such a treaty of cession as the Treaty of Waitangi cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.

Vajesingji Joravarsingji v. *Secretary of State for India*(2).

(1) [1893] A.C. 104.

(2) [1924] L.R. 51 Ind. App. 357.

J.C. 1940–41. TE HEUHEU TUKINO v. AOTEA DISTRICT MAORI LAND BOARD.

The New Zealand Provincial Government Act, 1862 (25 & 26 Vict., c. 48), having empowered the New Zealand Legislature to repeal s. 73 of the New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), and providing that no enactment of the General Assembly should be invalid because of repugnancy to s. 73, and the provisions of the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), operating to the same effect, s. 14 of the Native Purposes Act, 1935, is not *ultra vires* the New Zealand Legislature.

Judgment of the Court of Appeal, [1939] N.Z.L.R. 107, dismissing an appeal from the judgment of *Smith*, J., [1939] N.Z.L.R. 112, affirmed.

APPEAL (No. 93 of 1939) from an order and judgment of the Court of Appeal of New Zealand, dated October 22, 1938, which dismissed an appeal from the judgment of the Supreme Court of New Zealand (*Smith*, J.), dated December 2, 1937, whereby judgment was entered for the defendant, the present respondent Board. Both judgments are reported [1939] N.Z.L.R. 107, where the facts are fully set out.

M. H. Hampson (of the New Zealand Bar), *Hon. H. L. Parker*, and *James Christie*, for the appellants.

A. T. Dunning, K.C., and *J. Pennyquick*, for the respondents.

Cur. adv. vult.

The judgment of their Lordships was delivered by

VISCOUNT SIMON, L.C. The appellant is the Chief of the Ngatituwharetoa, a Maori tribe, whose members own lands in New Zealand, which were charged by virtue of s. 14 of the Native Purposes Act, 1935, with repayment to the respondent Board of a portion of a sum of £23,500 which had been paid by the latter in terms of the said section to the Egmont Co., Ltd. The appellant instituted the present proceedings on behalf of the tribe and as representing the owners of the said lands against the respondent Board in the Supreme Court of New Zealand.

Section 14 of the Native Purposes Act, 1935, which replaced a substantially similar provision in s. 10 of the New Zealand Finance Act, 1934–35, so far as here material, provided as follows:—

14. (1) The Aotea District Maori Land Board (hereinafter in this section referred to as the Board) is hereby authorized, empowered, and directed to accept the offer of the Egmont Box Company, Limited, to release and discharge the Board and the Native owners from all claims and demands of whatever kind arising out of a certain agreement made between the Tongariro Timber Company, Limited, and the said Egmont Box Company, Limited, dated the twenty-third day of October, nineteen hundred and nineteen (including all amounts which the said Egmont Box Company,

Office of the

MINISTER OF CONSERVATION

PARLIAMENT BUILDINGS, WELLINGTON, NEW ZEALAND TELEPHONE (04) 471 9978 FACSIMILE (04) 473 3446

13 June 1994

Bruce Mason
Trustee
Public Access New Zealand (Inc)
P O Box 5805
Moray Place
DUNEDIN

Dear Mr Mason

I refer to your letter of 20 May 1994, in which you request assistance in locating the Privy Council decision in Appeal #14 of 1993, referred to in my letter of 13 May 1994.

Please find enclosed a reference to the appeal.

Yours sincerely

Denis Marshall

Denis Marshall
Minister of Conservation

encl

ADVANCE COPY

Privy Council Appeal No. 14 of 1993

The New Zealand Maori Council and Others — *Appellants*

v.

Her Majesty's Attorney-General and Others — *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER 1993

WEEK ENDING 04/05/2001

■ M1775-SD99 Ireland, K & Langwell, R -v- Attorney-General (Department of Conservation)

Reserves Act 1977 s58 14 pages

Judgment Date: 9/4/2001

Potter J; High Court Auckland

Appearances: Harrison, R QC; Udy, S; Hansen, L; Houghton, G

Keywords: High Court; declatory judgment; historic buildings; historic reserve; conservation

The plaintiffs sought a declatory judgement that the use of buildings on the North Head Historic Reserve for a general administrative office by the Department of Conservation was unlawful. They submitted that s58 of the Reserves Act 1977 permits use of buildings for only two purposes: for residences for officers or servants of the administering body, or for rangers; and where use is necessary for and related to the reserve. The Department submitted that the presence of the administrative office on the reserve provided significant benefits for the reserve, as well as for the region, and this brought the use within the Act.

The plaintiffs contended that the powers granted under s58 must be exercised for the benefit of a particular reserve, not for reserves in general, nor for the administration of the Department on a regional scale. The Court found that this interpretation was correct.

The Department submitted that the historic buildings on the reserve were dilapidated and vandalised at the time it assumed responsibility for the reserve. There was also a fence around them, preventing access to the buildings and to the top of North Head. When the Department needed to find administrative premises, it saw the opportunity to solve two problems. The Court noted that the Department was motivated both by the need for an administrative facility and the need to take action regarding the preservation, protection and enhancement of the reserve and its buildings.

The Court concluded that the establishment of a presence on North Head was within the scope of s58; the provision of administrative facilities for the Auckland Area was not. The issue was therefore whether the presence of an invalid purpose alongside a valid purpose made the Department's use of the buildings unlawful. Applying the principle that "statutory powers are not properly exercised when irrelevant matters are brought to account", the Court concluded that the Department's action was unlawful. Support for that conclusion was given in the general purposes of the Reserves Act (s3). The Court held that it was questionable that World War II buildings comprising a dormitory and officers' quarters would be preserved for the stated purposes if adapted and used as contemporary administrative offices.

The Court commented on the issue of Ministerial consent. The Department submitted that s58(b) applies to both the use of existing buildings and the erection of new buildings, however, the Court concluded that s58(b) is more concerned with permitting and limiting the erection of new structures on a reserve rather than regulating the use of existing structures.

A declaration to the effect that the use by the Department of Conservation of buildings on the North Head Reserve for administrative officers was unlawful was to be made. Costs were awarded to the plaintiffs under category 2B.