

DECIDING THE CASE: RECOLLECTIONS

Rt Hon Sir Maurice Casey

The case was heard by five judges of the Court of Appeal, being described by the President in his judgment as "perhaps as important for the future of our country as any that has come before a New Zealand Court."⁵⁵ Certainly it was recognised as crucial by the many Māori who packed the courtroom, usually almost empty with only counsel and perhaps a few interested parties in attendance. They came from far and wide, so many that they had to organise themselves into shifts, taking turns to sit in the courtroom far too small to hold them all. The emotional charge was palpable, from the waiata at the start of the day to the splendid singing in Māori of the hymn "How Great Thou Art" as we left the bench at the end.

Concern about the case was manifested well beyond the centre of power in Wellington. At the time it was heard my wife was attending a meeting of the Māori Women's Welfare League in Taranaki on behalf of the National Council of Women. One senior member urged them to descend on the court and add their support to those backing the *Lands* case, which would be a far better use of their time than the topics they were discussing. My wife told me that a determined woman then spoke, and in a passionate address claimed they could expect nothing from a court made up of elderly pakeha with their old boy networks and old school tie mentality, and she singled out Sir Gordon Bisson as an

⁵⁵ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 651 (commonly referred to as the *Lands* case).

example. Nothing could have been wider off the mark than her criticism of him. Sir Gordon was the only one of us to set out the Treaty in Māori in his judgment, and he cited in an impartial way historical accounts of Māori understanding and reactions to it at the time of signing. I offer this as an example of the stereotyping of people on either side of the debate which can undermine rational discussion of Treaty issues.

Sir Ivor has referred to the need for the Judges to gain a sufficient understanding of the complexities surrounding the Treaty in assessing the background of the legislation. In spite of some expectations that the court would make far-reaching pronouncements on the place of the Treaty in our legal framework, we only had to deal with two basic questions of statutory interpretation concerning the State-Owned Enterprises Act 1987. The first was whether section 27 protecting Māori land claims was a sufficient compliance with section 9 prohibiting the Crown from acting in a manner inconsistent with the Treaty's principles; and secondly, if section 27 did not constitute such compliance, then did section 9 override it in a way allowing the court to intervene. Central to these questions was the ascertainment of the principles of the Treaty relevant to the protection of Māori ownership in their land afforded by its Second Article. To this end we were given in Sir Ivor's words "a mountain of material" to read, which even included the unbound galley-proofs of Claudia Orange's *The Treaty of Waitangi* published later that year.⁵⁶ In the preface to her subsequent *Illustrated History* published in 2004 she made a comment that I think all members of the court would endorse – "As any commentator approaches the present, the story inevitably becomes more opaque, the issues more densely tangled."⁵⁷

In separate judgments the Court was unanimous in holding that section 9 was a firm declaration by Parliament overriding the rest of the Act. Further, that for claims lodged after 18 December 1986, section 27 did not afford an appropriate remedy for any Treaty breach, because the land affected might have been on-sold to private buyers, and thus put outside the power of the Crown to return it to the claimants. The Court described the relationship between the Crown and Māori under the Treaty as a partnership requiring each to act towards the other reasonably and with the utmost good faith, imposing the quasi-fiduciary duty on the Crown of active protection of Māori interests in their land. Accordingly a declaration was made that the transfer of assets to State enterprises would be unlawful without consideration of whether it

⁵⁶ C Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin & Department of Internal Affairs, 1987).

⁵⁷ C Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2004).

would be inconsistent with the principles of the Treaty. Directions were given for the preparation of a scheme of safeguards. Pursuant to this amending legislation, section 27B was agreed upon by the parties providing for a memorial to be placed on the title of Crown land under transfer. If that land became the subject of a binding recommendation by the Waitangi Tribunal for its return, it had to be bought back by the Crown for this purpose. However, it would seem from press reports twenty years on⁵⁸ that this well-intentioned amendment is not working, and that there is widespread dissatisfaction among Māori over the lack of progress.

I share Sir Ivor's concern at the way the Court's reference to "Treaty partnership" became understood in some quarters as involving a sharing of assets. It seems clear to me that the term "partnership" was used in the judgments as shorthand for the fiduciary relationship and obligations arising under the Treaty between the Crown and Māori. With hindsight it may have been preferable to adopt some other expression of these concepts. At one point in my judgment I called the relationship "something in the nature of a partnership", but I think that is still open to similar misunderstanding.

Finally I can confirm Sir Ivor's recollection that in all our discussions on the case the essential issue was one of statutory interpretation, and that Baragwanath J's rather flattering assessment of us as the common law protectors of the rights of vulnerable minorities was not something affecting our approach at all. To me, the Māori perception of themselves was far from that of helpless victims requiring the court's special protection. They came to it with all the confidence of citizens in a powerful case seeking a remedy for what they saw as a gross injustice, and were proved right.

⁵⁸ C Masters, 'Govt Widens Landcorp Inquiry To Look At All State-Owned Properties' *Weekend Herald*, 10 March 2007.