Maori customary title

Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust [2003] NZCA 117

Elias CJ, Gault P, Keith, Tipping, Anderson JJ, 19 June 2003

Issue

This decision arises from a stated case in which the High Court of New Zealand's opinion was sought on eight questions including the following questions on whether:

- the Maori Land Court has the jurisdiction under the Te Ture Whenua Maori Act 1993 to determine the status of foreshore or seabed and the waters related thereto;
- the law of New Zealand:
    - recognised Maori customary title to all or part of the foreshore (the intertidal area); and
    - prior to the enactment of the Territorial Sea and Fishing Zone Act 1965 (NZ), would have recognised any Maori customary title to part or all of the seabed and 'the waters related thereto' (that is, both the 'inland waters' of harbours and bays and territorial waters); and
- certain legislation extinguished any Maori customary title to the foreshore and/or seabed.

Background

The Maori applicants sought a declaration from the Maori Land Court that certain land below the mean high water mark in the Marlborough Sounds is 'Maori customary land': see s. 18(1)(h) of the *Te Ture Whenua Maori Act 1993* (NZ). In the event that the land was not Maori customary land, a declaration that the Crown held the land in a fiduciary capacity for their benefit was sought.

Case stated

Following an objection to the application on the ground that it could not succeed either at common law or under statute, Maori Land Court Judge Hingston made an interim finding that the legislation relied upon did not have the effect of extinguishing any customary property that the applicants might establish. This decision was appealed to the Maori Appellate Court which, after some hesitation, agreed to state a case for the opinion of the High Court on points of law which could substantially determine the applications.

Justice Ellis heard the stated case and held that land below the low water mark in New Zealand was beneficially owned by the Crown at common law and declared so by statute. Accordingly, it was held not to be Maori customary land. In relation to foreshore land between the high and low water marks (the intertidal area), his Honour found that any Maori customary property in the foreshore had been extinguished once the contiguous land above high water mark had lost the status of Maori customary land, either by Crown purchase or a vesting order made by the

Maori Land Court where the sea was described as the boundary—at [7]. An appeal against that decision was brought by the Maori applicants.

The decision of the High Court on the appeal in relation to the case stated deals only with the initial question of whether the Maori Land Court has jurisdiction to consider the substantive issues. It did not resolve whether such title existed in relation to the area under consideration — the foreshore and seabed of the Marlborough Sounds. On the former point, the court unanimously allowed the appeal and held that the Maori applicants must be permitted to go to hearing in the Maori Land Court. The question of whether certain legislation would have had the effect of extinguishing Maori customary title to those areas was also considered.

Chief Justice Elias was critical of the case stated, noting that:

> [T]he questions as eventually framed are ... not helpful and ... it is impossible to resolve many of the legal points raised in them in advance of determination of the facts. It is as well to keep in mind...that, when considering questions of customary property ... [a]bstract principles fashioned a *priori* are of but little assistance, and are as often as not misleading—at [5], quoting *Amodu Trjani v Secretary Southern Nigeria* [1921] 2 AC 399 (*Amodu Trjani*) at 404 per Lord Haldane.

Maori customary land

Maori customary land is defined in s. 129(2)(a) of the *Te Ture Whenua Maori Act 1993* as land that is 'held by Maori in accordance with tikanga Maori'. In earlier Maori land statutes, it was defined as lands 'owned by Natives under their customs or usages'. The Privy Council affirmed that the common law recognised pre-existing property after a change in sovereignty in *Amodu Tijani* at 407 to 408. Such property is not the creation of the Treaty of Waitangi or of statute, although it was confirmed by both. It was property in existence at the time Crown colony government was established in 1840—at [14] to [15].

A succession of court decisions, beginning with *R v Symonds* (1847) NZPCC 387, reflect a continuing tension in the common law between the notion of the Crown's 'radical title', 'sovereignty' and the survival of Maori customary title—see Elias CJ at [21], Gault P at [102], Keith and Anderson JJ at [136] to [138] and Tipping J at [183].

The present position is that the radical title of the Crown is subject to the existing native rights, which cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statute—Elias CJ at [29], referring to *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20 at 23 to 24 per Cooke P.

Extinguishment

Elias CJ stated that the fact that New Zealand has assumed the continued existence at common law of customary property until it has been extinguished was of significance in this appeal. The Chief Justice identified three ways in which it can be extinguished:

- by sale to the Crown;
- through investigation of title by the Land Court and subsequent deemed Crown grant; or
- by legislation or other lawful authority—at [47].

The Solicitor-General accepted the above principle in relation to land above the high water mark. However, it was argued that a different approach should be taken to the intertidal zone and the seabed. This difference was said to arise both at common law and because of legislation vesting such lands in the Crown—at [48].

In relation to the common law, any prerogative of the Crown as to property in the intertidal area and seabed does not apply in New Zealand if displaced by local circumstances. In the case of New Zealand, the prerogative is displaced by any Maori custom and usage recognising property in those areas unless it has been lawfully extinguished. The determination of the content of any Maori property right is in application of the Maori tikanga (customary values and practices). That is a matter for the Maori Land Court—at [49].

Three of the judges saw no reason to conclude that the outcome was any different in relation to the seabed. Interests in such areas were known under the laws of England and included interest that had arisen by custom and usage. Such interests have also been created by Crown grant in New Zealand and have been recognised in reports of the Waitangi Tribunal and certain legislation as possibly existing in relation to seabed areas—Elias CJ at [51] and Keith and Anderson JJ at [133]. The other judges did not directly discuss the issue.

Overruling earlier case

There existed the 'authority' of *In Re the Ninety-Mile Beach* [1963] NZLR 461 (*In Re the Ninety-Mile Beach*), where it was held that any Maori customary property in the foreshores (that land which lies between the high and low water marks) was extinguished once the contiguous land above high water mark had lost the status of Maori customary land. (The jurisdiction of the Maori Land Court was also challenged on the basis that the reference to 'land' in s. 129 of the *Te Ture Whenua Maori Act* did not include the intertidal or seabed areas.)

It was found that *In Re the Ninety-Mile Beach* was wrong in law and should not be followed, based as it was on a premise that the Crown had acquired the property of land in New Zealand along with its sovereignty. The reasoning in a strong line of New Zealand authority from *R v Symonds* onwards, Canadian cases and *Mabo v Queensland* (No. 2) (1992) 175 CLR 1 was preferred. These are cases that clearly separate the notions of sovereignty and Crown ownership of property—at [84], [87], [158] and [215] per Elias CJ, Keith and Anderson JJ, with Tipping J agreeing.

Decision

It was found that:

- the Maori Land Court had jurisdiction to determine the status of foreshore and seabed;

- as to the nature of any surviving Maori customary rights in those areas, their Honours held this was a matter for factual determination by the Maori Land Court. The evidentiary matters to be considered included the nature of the traditional customs and usages in the foreshore and sea, the terms of any sale or vesting of land contiguous with the foreshore, the effects of certain area-specific legislation conferring freehold interests extinguishing customary property rights—at [90], [124], [182] and [216] per Elias CJ with the concurrence of Gault P, Keith, Anderson and Tipping JJ.

Specific legislation

The question for the High Court then was whether Parliament had extinguished any property rights that Maori may be shown to have had. The following legislation was considered:

- *Harbours Act 1878* and *Harbours Act 1950* (NZ);
- *Territorial Sea and Fishing Zone Act 1965* (NZ);
- *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977* (NZ);
- *Foreshore and Seabed Endowment Revesting Act 1991* (NZ);
- *Resource Management Act 1991* (NZ).

None of this legislation was found to appropriate Maori property or cause any extinguishment of customary property rights—see at [60], [72], [76], [154] and [170]. However, Tipping J was of the view that the *Resource Management Act 1991* (NZ) may 'represent a formidable barrier' to the existence of any 'as of right' activity within the coastal marine area which may be said to derive from the establishment of the status of Maori customary land—at [192].

Objection to jurisdiction

In response to the jurisdictional objection raised by one of the respondents, Elias CJ referred to the various dictionary definitions of 'land' and found that, while these were not conclusive, many were wholly consistent with the intertidal area and seabed being 'land' for the purposes of the *Te Ture Whenua Maori Act*—at [55].

In any case, if the Maori Land Court did not have jurisdiction to hear matters relating to such areas, then the High Court did and could refer questions of Maori tikanga for the opinion of that court. Thus, it did not seem a 'sensible or intended result' that the Maori Land Court did not have jurisdiction to decide Maori property matters in relation to such areas—at [55] and [56] per Elias CJ. See also to Gault P at [110], Keith and Anderson JJ at [173] to [179] and Tipping J at [188].

The appeal was allowed with costs.

Comment

Their Honours noted the limited significance of their rulings, being no more than the preliminary finding on a limited number of questions of law. They stressed the final outcome was a matter for the evidence. In any case, there are notable differences between New Zealand and Australian native title law, mainly reflecting the much

longer statutory overlay and existence of the Treaty of Waitangi in the New Zealand context.

Further, it appears accepted in Australian jurisprudence that the Crown does not have radical title to offshore areas. In *Commonwealth v Yarmirr* (2001) 208 CLR 1, it was said that:

> [I]t is of the very first importance to bear steadily in mind that native title rights and interests are not created by and do not derive from the common law. The reference to radical title is, therefore, not a necessary pre-requisite to the conclusion that native title rights and interests exist. The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests co-exist. ...
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> It is, however, not right to say ... that native title rights and interests cannot exist without the Crown having radical title to the [relevant] area. This contention gives the legal concept of radical title a controlling role. The concept does not have such a role. It...is no more than a tool of analysis which reveals the nature of the rights and interests which the Crown obtained on its assertion of sovereignty over land.
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> It by no means follows that it is essential, or even appropriate, to use the same tool in analysing the altogether different rights and interests which arose from the assertion of sovereignty over the territorial sea. In particular, it is wrong to argue from *an absence of radical title in the sea or sea-bed* to the conclusion that the sovereign rights and interests asserted over the territorial sea are necessarily inconsistent with the continued existence of native title rights and interests. The inquiry must begin by examining what are the sovereign rights and interests which were and are asserted over the territorial sea. Only then can it be seen whether those rights and interests are inconsistent with the native title rights and interests which now are claimed—at [48] to [50] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, footnotes and references removed, emphasis added.