

Maori customary title to foreshore and seabed

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In *Ngati Apa v Attorney-General* (CA 173/01, 19 June, 2003) the Court of Appeal (Elias CJ, Gault P and Keith, Tipping and Anderson JJ) held that the Maori Land Court has jurisdiction to investigate customary title to the foreshore and to the seabed of internal waters and of the territorial sea and that that title is recognised at common law until lawfully extinguished. In these matters it overrules in two respects its previous decision *In re the Ninety-Mile Beach* [1963] NZLR 461. There Gresson P and North and TA Gresson JJ had held, first, that, once the Maori Land Court investigated customary title to high water mark no such title remained to be investigated in the foreshore beyond. That decision has been argued to apply to the same effect where the Crown has purchased Maori customary coastal land to high watermark. In both cases foreshore (and, it would follow, the seabed beyond low watermark) would be vested in the Crown free of customary rights and title. Secondly, the *Ninety-Mile Beach* Court, possibly obiter, regarded the customary title not as legally binding on the Crown at common law but as depending on its grace and favour.

In *Ngati Apa* the Court also held that certain statutes, vesting foreshore or seabed in the Crown (or referring to them as so vested), had not extinguished customary title therein, because clear intention to do so had not been shown in the relevant provisions.

The *Ngati Apa* decision follows several recent decisions of the Court of Appeal which have recognised, in line with decisions of the Privy Council and of the highest Courts in Australia, Canada and the United States, that the radical title claimed by the British Crown in the land of its common law colonies was burdened by the property rights of the native peoples, which rights had to be respected until lawfully extinguished. The Court in *Ngati Apa* has shown that this general principle applies to the foreshore and the seabed of the internal waters of New Zealand and also (perhaps more controversially) to the seabed of the twelve (formerly three) mile New Zealand territorial sea.

It is satisfactory, especially to the present writer, that the decision justifies the doubts expressed about the *Ninety-Mile Beach* decision in *Laws NZ, Water*, paras 10 (fn 9) and 18. See also FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999), pp 133-135 ("Land under water as customary land").

The present article considers some only of the many significant aspects of the case. The judgments rely on a wide range of important authorities, of which not all are mentioned here.

THE SPECIFIC CASES

The appellants, iwi of the northern part of the South Island, had applied for an order of the Maori Land Court (hereafter, with its Native Land Court predecessor, "the Land Court") under s 131 of Te Ture Whenua Maori Act 1993 declaring that certain land under water in the Marlborough Sounds is Maori customary land. The land, fully described by Gault P in para [94], comprises the foreshore and the bed of harbours, estuaries and other indentations of the sea, within the definition of "bay" in s 2(1) of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977: see *Laws NZ, Water*, paras 5 and 7. The case covers also part of the bed of the New Zealand territorial seas that extend to 12 miles beyond the internal waters. (See s1(3) and (4) and s 3 of that Act and *Laws NZ, Water*, para 3.)

In brief, the question whether the Land Court had jurisdiction to determine the application had gone from the favourable decision of Judge Hingston in that Court, on case stated by the Maori Appellate Court to Ellis J in the High Court, from whose unfavourable decision, [2002] 2 NZLR 661, the applicants had appealed.

OVERRULING NINETY-MILE BEACH

The Court of Appeal's view in the *Ninety-Mile Beach* case, that Maori customary title to land existed only, in North J's words (p 468), "wholly on the grace and favour" of the Crown and as provided for in Maori (Native) land legislation, has long been under question. It was far from the widely accepted understanding of the nature of property rights of a native people who have been colonised by the British Crown, one firmly established by what is now a long line of cases beginning with the judgment of Chief Justice Marshall in the US Supreme Court in *Johnson v M'Intosh* (1823) 8 Wheaton 543, *R v Symonds* (1847) NZPCC 387, *Re "The Landon and Whitaker's Claims Act 1871"* (1872) NZ 2 CA 41, continuing through to the Court's own decisions in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 and *Te Runanga o Te Ikawhenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 and to decisions of the High Court of Australia and of the Supreme Court of Canada. (See, among many, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *R v Sparrow* [1990] 1 SCR 1075.)

That understanding is that the native customary title, until lawfully extinguished, encumbers the radical title claimed by the Crown on the assumption of sovereignty in every colony to which the common law applies. That the line of cases supporting it includes at least two in the Privy Council, *Nireaha Tamaki v Baker* [1901] AC 561; NZPCC

371 and *Amodu Tijani v Secretary, Southern Rhodesia* [1921] 2 AC 399. This enabled Elias CJ to hold (para [13]) that the *Ninety-Mile Beach* case was “contrary to other and higher authority”, so that the Court’s decision is “not a modern revision, based on developing insights since 1963”. The concurring judgments of Keith and Anderson JJ (jointly) and of Tipping J are equally clear on the point. The judgment of Gault P appears to be not entirely at one with the others. One may infer that he concurs in the overruling so far as the common law status of Maori customary title is concerned but accepts the conclusion of the *Ninety-Mile Beach* Judges on the effect of the Land Court’s investigating that title to the high watermark boundary. See paras [120] – [122].

The law as established in *Ngati Apa* raises the question of the boundaries of New Zealand and the consequent reach of the New Zealand common law. It is possible to argue that, at common law, the boundaries of the colony ceased at low watermark, except for the internal (or enclosed) waters of bays, harbours etc which have always been regarded as territorial in the sense that the colony included them. (See *Ngati Apa*, paras [131] and [175] (Keith and Anderson JJ) and discussion in *Laws NZ, Water*, para 2.) If that is so, common law recognition of Maori customary rights might not have extended over the bed of the three mile territorial sea, calculated from low watermark (or from straight lines drawn across the mouths of harbours, bays and estuaries) and originally claimed by the British Crown under customary international law. Let alone would it extend to the enlargement of the territorial sea from three to 12 miles, provided for by s 3 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977.

Here the recent judgments in the High Court of Australia in *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113 (not referred to in *Ngati Apa*), involving similar territorial seas legislation, are in point. A dissenting minority (McHugh and Callinan JJ) held that aboriginal rights did not extend into the Australian 12 mile territorial sea, on the ground that Australian common law ceases at low watermark (though again with the exception of the bed of internal waters). For the five majority Judges, however, the common law recognition of aboriginal title extended, though in qualified form, over the territorial sea.

The Judges in *Ngati Apa* did not discuss this question. They appear to have assumed that, whatever the position in colonial times, the New Zealand common law and hence the recognition of Maori customary title under it, extended to the three mile territorial seabed, and now to its enlargement to twelve miles. Though full comparison of the two cases cannot be attempted here, the New Zealand Judges’ assumption appears consistent with the opinions of the majority in *Yarmirr*. As to the foreshore and the bed of internal waters, the New Zealand Judges and all seven of the Judges in *Yarmirr* are in apparent agreement that native title may exist.

IS SEABED “LAND” UNDER TTWMA?

For reasons not discussed here, the Court of Appeal held that it is. Had they held that it is not, then of course the Land Court would have no jurisdiction to entertain the appellants’ application for the land under the Sounds to be declared customary land. That would then have left the questions of customary title to be determined by the High Court in its inherent jurisdiction, including questions of the

scope of such title in particular cases where it is proved. For the rights might not be the approximate equivalent of common law freehold but rather be non-exclusive rights more in the nature of easements or profits a prendre. The jurisdiction of the Land Court to determine such lesser customary rights may need to be clarified by legislation.

IMPACT OF LEGISLATION

If Maori customary title could exist in the foreshore and seabed at common law, there was still the argument that by virtue of statute both were vested in the Crown freed of any such title.

As to the seabed, at least in the case of the internal waters, this was undoubtedly vested in the Crown at common law as part of the wastelands of the colony, subject to any grant of a part of it that the Crown may have made and (in accordance with *Ngati Apa*) to Maori customary title where shown to exist (see *Laws NZ, Water*, para 10). This was the undivided Imperial Crown, until the Crown in right of New Zealand came into existence as a separate entity at some time in the early decades of the twentieth century (*ibid*). By s 7 of the Territorial Sea and Fishing Zone Act 1965 and its successor, s 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, the beds of both internal waters and of the territorial sea are “deemed to be and always to have been vested in the Crown”, subject to any grants of interests in either.

These are declaratory provisions as to the bed of internal waters and possibly declaratory also as to that of the first three miles of the territorial sea. But they are not as to the additional nine miles added by s 7 of the Act of 1977. (For full discussion, see *Laws NZ, Water*, para 10.) The point of concern here however was whether the vesting formula in the successive sections was sufficient to extinguish the customary title. All five Judges decided that it was not. Here the test stated in *Mabo v Queensland* by Brennan J (referring with approval to leading cases in North American jurisdictions and to *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680) as “patently the right rule”, was in effect the one applied: “native title is not extinguished unless there be a clear and plain intention to do so”. So, in the opinion of Keith and Anderson JJ (para [160]), the provisions declared or established the Crown’s radical title to seabeds affected; but that was “not inconsistent with the continuing existence of Maori customary property”.

As to the foreshore, this too had been vested in the Crown at common law, as part of the wastelands of the colony and, in light of the overruling of the *Ninety-Mile Beach* case, Maori customary title could exist in it whether or not such title had been investigated down to high watermark. Here the argument for statutory extinguishment was somewhat weak. Section 9A of the Foreshore and Seabed Endowment Revesting Act 1991, mainly relied on, applied generally to areas of foreshore (and seabed) already vested in the Crown and directed that they be held in perpetuity by it subject to limited provisions for disposal (s 9A (1) and (2)). But in any case the customary title was protected by s 2 (2) (b) of the Foreshore and Seabed Endowment Revesting Amendment Act 1994, under which nothing in s 9A is to “limit or affect...[a]ny interest” in land to which the section applies “held by any person other than the Crown”. (See paras [74] (Elias CJ), [116] (Gault P), [170] (Keith and Anderson JJ) and [202] (Tipping J).)

LIMITS OF THE DECISION

The Court of Appeal answered (in a modified form) only one of the questions put to it, holding that "The Maori Land Court has jurisdiction to determine the status of foreshore and seabed". Hence it may investigate whether Maori customary title exists in any part of either.

Other questions were not answered, since their determination would depend on facts yet to be found in the Land Court's investigation. The Judges were careful to make clear that the success of the application was by no means assured. For example, as Elias CJ pointed out [para 10], some interests established at common law may be affected by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Further, when the Land Court has made a status order under s 131 of Te Ture Whenua Maori Act 1993 that foreshore or seabed land is Maori customary land, the making of a vesting order leading to a Land Transfer title is likely to be precluded by the restrictions on alienation in s 9A (2) and (3) of the Foreshore and Seabed Endowment Revesting Act 1991.

The Court did not deal in detail with the particular local statutes that had vested small areas of foreshore and seabed in local authorities such as the Marlborough Harbour Board, except to comment generally to the effect that, where these amounted to statutory grants of the fee simple, the customary title in the land would be extinguished.

PROBLEMS, CRITICISMS AND SOLUTIONS

Since the rights that make up customary title may in any particular case not be such as to approximate to a freehold, it is clear from the case that the jurisdiction of the Land Court to determine lesser interests needs to be clarified. That may or not be necessary in this case but at all events the matter will need attending to in the future to make it unnecessary for the High Court to deal with such matters.

That of course was not the problem that has mainly concerned the many critics of the decision, some of whom, having or claiming legal expertise in the matter, have apparently shared the consternation of lay critics, in fearing the loss of the public's recreational "rights" to use of foreshore and sea bed.

In fact, the decision is no judicial novelty and ought to have been expected by the legal critics. The *Ninety-Mile Beach* judgments, in their understanding of the nature of native customary rights, have long been out of line with prevailing authority both here and in comparable overseas common law jurisdictions. The weaknesses of those judgments were pointed out long ago by Sir Kenneth Roberts-Wray in his book *Commonwealth and Colonial Law* (1966), pp 634-636. His views carry authority and are referred to with approval (together with those of New Zealand writers to similar effect) by Elias CJ (paras [81], [85] and [87]; see also para [158] (Keith and Anderson JJ)).

As to the effect of the Territorial Sea legislation, the belief, apparently held by successive Governments (see Sir Douglas Graham, "Crown must lay claim on behalf of all": *New Zealand Herald* 27 June, 2003), that the provisions are "specific" in the sense necessary to extinguish any outstanding customary title, is odd indeed. The specificity or other showing of clear intention has to be directed to the customary rights, not merely to the land to be affected. All in all, the decision was to be expected.

At the time of writing the solutions to the problems perceived to arise from the *Ngati Apa* decision are still under negotiation between Maori and the Crown. One drastic solution, favoured by some, is the passing of legislation to annul the decision. That would be in clear and serious breach of constitutional convention, for which there could be no justification (whatever changes in the law are made for the future in respect of foreshore and seabed outside the

Marlborough Sounds). (Cf FM Brookfield, "High Courts, High Dam, High Policy: the Clutha River and the Constitution" [1983] NZ Recent Law 62.) The skies, after all, will not fall if the application of the iwi proceeds to its conclusion in the Land Court.

As to other matters, public recreational use of the foreshore and

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seabed, not in any case a legal right at common law (*Laws NZ*, Water, paras 14 and 29), can be assured by suitable legislation, whoever "owns" particular parts of that land, whether the Crown, Maori or a private person. As to the public right of navigation, which is a common law right, that, together with the controls of the Resource Management Act 1991, would apply to the customary rights as to the rights of any private owner of foreshore or seabed. Whatever the difficulties, they should not be solved by a wholesale destruction of legal rights, imposed by statute.

CONCLUSION: NGATI APA AND THE TREATY

Ngati Apa v Attorney-General is indirectly relevant to the Treaty of Waitangi in that, though based on the common law, the decision accords with the reservation of rangatiratanga and taonga under art 2 of the Treaty. There was after all no reason to suppose that, either for the Crown or for Maori, the Treaty "stopped at the water's edge". At least the foreshore and the beds of internal waters – of bays, estuaries, harbours etc – must have been within its scope, both for kawanatanga and for rangatiratanga. As to the territorial sea (at least as it has been statutorily extended), the position may be a little less clear. But since the Crown has claimed, and exercises kawanatanga over, the sea and the underlying bed and Maori claim rangatiratanga over both, the Treaty should regulate the relationship between the parties here as it does over land and waters behind the inner limit of the territorial sea.

In sum, the Marlborough Sounds case shows in effect that the common law of Maori customary rights operates within the same boundaries as the Treaty. That should have surprised no one. □