

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

Present at the hearing:-

LORD TEMPLEMAN
LORD MUSTILL
LORD WOOLF
LORD LLOYD OF BERWICK
SIR THOMAS EICHELBAUM

[Delivered by Lord Woolf]

The Maori language (Te Reo Maori) is in a state of serious decline. It is an official language of New Zealand, recognised as such by the Maori Language Act 1987. It is "a highly prized property or treasure (taonga) of Maori" (Cooke P. [1992] 2 NZLR 576, at p. 578 in the Court of Appeal) and it is also part of the national cultural heritage of New Zealand.

It is because they recognise the serious risk which exists of Maori not surviving as a living language that the appellants have commenced these proceedings and have pursued this appeal. They are deeply concerned as to the possible effects on the survival of the Maori language of the restructuring, which commenced in 1988, of New Zealand broadcasting. Prior to 1st December 1988, when it was dissolved, Radio and Television New Zealand was operated by the Broadcasting Corporation of New Zealand. After the Broadcasting Corporation was dissolved its assets were temporarily vested in the Crown and its operations were carried on by a newly created State enterprise.

State enterprises are statutory organisations created under the State-Owned Enterprises Act 1986 (the "S.O.E. Act"). The S.O.E. Act was passed as part of the reform

of the public sector which, it is contended by the Crown, was necessary because "trading operations in the public sector needed more efficient management, greater accountability and a clarification of the sometimes competing and incompatible social and economic objectives, which they were required to achieve".

These proceedings were commenced on 13th December 1988. The immediate object was to prevent the Crown transferring the assets of the former Broadcasting Corporation to the new State enterprise. The appellants were seeking declarations that to transfer the assets would be unlawful. Although the appellants bring the proceedings in their personal capacity it has not been suggested that they lack standing to do so. This is not surprising since the appellants are manifestly well qualified to advance the arguments relevant to the issues raised in these proceedings.

At first instance the proceedings were heard by McGechan J. On 3rd May 1991, he gave the first of two judgments. He declined to grant the relief claimed in respect of the radio assets. Those assets were then transferred by the Crown to the State enterprise with the consent of the appellants and they are no longer in issue in the proceedings. However the judge adjourned the claim in respect of the television assets to give the Crown the opportunity to submit a scheme designed to protect the Maori language in the event of the assets being transferred. McGechan J. gave his second judgment on 29th July 1991. Having considered the proposals submitted by the Crown during the adjournment, he granted a declaration permitting the transfer of the television assets. On 30th April 1992 the Court of Appeal, by a majority (Richardson, Hardie Boys and McKay JJ., Cooke P. dissenting), dismissed the appeal.

Before the Board, the argument for the appellants is based entirely on section 9 of the S.O.E. Act. The appellants have not attempted to challenge or avoid the decision of the Privy Council in *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] A.C. 308 where it was held that the Treaty of Waitangi ("the Treaty") was not normally directly enforceable by legal action.

Section 9 and the Principles of the Treaty.

Section 9 is in the following terms:-

"Treaty of Waitangi - Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

This is not the first case in which section 9 has been relied on in support of Maori interests and the New Zealand Court of Appeal has had to consider whether proposed action by the Crown was in accord with the principles of the Treaty. On this appeal particular importance was attached to the

judgments in the case of *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641. In that case the Court of Appeal gave directions and granted declarations with the object of preventing transfers of land which could prejudice Maori claims pending the preparation of a scheme which would protect such claims. Reliance was also placed on *Tainui Maori Trust Board v. Attorney-General* [1989] 2 NZLR 513, where the Court of Appeal granted relief to the Board in respect of mining rights and *Te Runanga o Muriwhenua Inc v. Attorney-General* [1990] 2 NZLR 641, in which fishing rights were considered. Although the emphasis in the judgments in those cases differs, collectively they provide a valuable insight as to the manner in which section 9 has to be approached and as to what is meant by "the principles" of the Treaty. The same can be said of the previous judgments in the present case. They have provided their Lordships with considerable assistance in formulating their own views as to the proper approach to section 9 and the "principles" of the Treaty.

The Treaty records an agreement executed by the Crown and Maori, which over 150 years later is of the greatest constitutional importance to New Zealand. It was entered into on 6th February 1840. The English and the Maori texts differ as the preamble to the Treaty of Waitangi Act 1975 (the "1975 Act") acknowledges. The differences do not affect the outcome of this case and so it is sufficient to set out the English text and point out that in the first Maori Council case, referred to above, the judgment of Cooke P. sets out at pages 662/3 a "reconstruction" in English of the Maori text which was accepted by the parties to be accurate for the purpose of that case. The English text set out in the 1975 Act is in the following terms:-

"HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant

Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof 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; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified."

The obligations of Her Majesty, the Queen of England, under the Treaty are now those of the Crown in right of New Zealand.

While the second article refers to "other properties", the Maori text uses the word "taonga" and in the reconstruction of that text the word "taonga" is translated as treasures. It is accepted that those treasures include the Maori language.

Both the 1975 Act and the S.O.E. Act refer to the "principles" of the Treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.

Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.

The present state of the Maori language.

In the course of his first judgment McGechan J. carefully surveyed the substantial evidence before him as to how the Maori language came to be in its present state and the steps by way of education and broadcasting on the radio and television which had been taken to retard its decline. His assessment has been largely accepted by the parties and the Court of Appeal and for that reason it should be set out in some detail since their Lordships' conclusions have to a substantial extent been based on that assessment.

In relation to education the judge refers in particular to the language nests (Kohanga Reo) movement started in the 1980s, as a result of which pre-school Maori children "in increasing numbers, for a small fee but with State assistance, were learning basic Maori language in a total immersion environment, with the rapidity of which the very young are so capable". He describes the initiatives which had occurred in respect of radio, but acknowledges that while modest progress had taken place the efforts were limited, "as commonly is the case in New Zealand society, by financial constraints". For television, mention is made of an unsuccessful attempt, supported by the Broadcasting Corporation of New Zealand, to obtain for the Maori language the available third channel. In addition the judge draws attention to a group known as Iwi Tv Trust which had been established with the object of promoting Maori controlled production and transmission of television programmes based on Maori language and cultures. The judge also mentions proposals by the New Zealand Maori Council, the fact that little was achieved to ensure the use of one of the UHF frequencies which the Government had indicated would be reserved for television by non-commercial and Maori broadcasting (here once more there was a problem over resources) and a suggestion that TV3, the third and non-mass viewing TVNZ channel, should be used for this purpose which proved to be unacceptable. The result is that the contribution of television has been, in the words of the judge, "slight, both relatively and absolutely" without there being "any immediate prospect of more".

The effect of this failure to achieve any material exposure of the Maori language on television was serious for a language which was being suffocated by the enveloping effect of the English language and contemporary culture. The loss of fluent native speakers among the elderly was not being compensated for by "the gain of many slightly skilled and less interested speakers among the young". The judge concluded that if the trend continued Maori would be "a living language ... no more". The situation was fast approaching where Maori would be the "preserve of a very small elite with a heavy academic concentration". Such a "survival like church Latin" would not be "a survival". There was a real prospect of the use of Maori sinking below the point "where revival and maintenance is impracticable". This situation, said the judge, is very damaging to Maori

culture since the language is the "core" of that culture. Urgent action is required. Broadcasting, particularly on television, would be of the greatest importance in strengthening the language. Together with home use and education it is one of a "trio of major influences" on the viability of the language. Since the other influences are weak, this increases its importance. According to the judge the influence of television could be twofold. It could result in the language being heard by a mass audience which is important in itself. In addition its use, especially on television, could give the language status which would be of assistance in making it credible and even fashionable with the young people whose support is crucial to providing Maori with a viable future.

The obligations of the Crown, Maori and State enterprises.

As already indicated, this assessment by the judge of the state of the Maori language is accepted, in general, by the Crown. It is also accepted by the Crown that in this situation the principles of the Treaty impose a continuing obligation on the Crown to take such steps as are reasonable to assist in the preservation of the Maori language by the use of both radio and television broadcasting. The Crown urge that this is not their obligation alone and in this they are correct. Under the Treaty the obligation is shared. Maori are also required to take reasonable action, in particular action in the home, for the language's preservation.

The Crown contends that it is fulfilling its obligations and in any event the transfer of the assets by vesting them in the State enterprise would not be inconsistent with the principles of the Treaty; inconsistency with those principles being the only matter which the appellants are entitled to raise in these proceedings. Whether the Crown is correct in this contention is a question which is central to the outcome of this appeal. The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty.

The S.O.E. Act apart from section 9.

To determine the answer it is necessary to return to the S.O.E. Act and examine provisions to which their Lordships have not yet referred. Section 4(1) reads:-

"Principal objective to be successful business - (1)
The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be -

- (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
- (b) A good employer; and
- (c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so."

Miss Elias, on behalf of the appellants, submits that as the principal objective of a State enterprise under section 4 is to operate as a successful business this is inconsistent with it becoming voluntarily involved in a non-commercial activity such as promoting the Maori language on television. However what can amount to operating "as a successful business" has to be determined in the context of the three requirements set out in subparagraphs (a), (b) and (c) of section 4(1). There is nothing to suggest that those subparagraphs are not to be treated as being of the same weight. The creation of profit is of no greater importance than the other objectives identified in the subsection. The language of (c) makes it clear that, as long as the State enterprise has the necessary financial resources, it is perfectly entitled to be involved in a loss or non-profit making activity. Therefore, subject to any financial constraints, it would not be inconsistent with section 4 for the State enterprise to encourage the use of the Maori language by broadcasting television programmes in that language. By doing so the State enterprise would be exhibiting "a sense of social responsibility" and would be "having regard to the interests of the community". Section 4 with its reference to "successful business" reflects the general intent of the Act that the performance of State enterprises should be efficient and business like. While in the foreseeable future there is little prospect of Maori broadcasts being profitable, there is no reason why they should not be presented in an efficient and in a business like manner.

Section 7 states:-

"Non-commercial activities - Where the Crown wishes a State enterprise to provide goods or services to any persons, the Crown and the State enterprise shall enter into an agreement under which the State enterprise will provide the goods or services in return for the payment by the Crown of the whole or part of the price thereof."

The terms of this section provide an example of the Crown being able to exercise a degree of control over the activities of the State enterprise and even though the Crown has to make some payment for such activities it is not without significance that the payment may be limited to "part of the price". It must not be overlooked that in practice it is inevitable that the Crown would have to bear a substantial

proportion of the costs of any Maori language broadcast whether or not the assets are transferred.

The primary change which will result from the transfer of the assets is that they will cease to be under the direct control of the Crown. But this will not bring about as significant a change as Miss Elias argues. Although, under the Act, a State enterprise is structured so that it is separate from the Crown, as its title indicates, it remains very much the Crown's creature. Ministers may hold shares in the State enterprise (section 10); except for certain redeemable preference shares and equity bonds a shareholding Minister cannot permit shares in the State enterprise to be transferred to anyone other than a shareholding Minister (section 11); Ministers may also give to the Board of a State enterprise directions, with which the Board is required to comply, inter alia, as to the objectives and the nature and scope of its activities which should be set out in its statement of corporate intent (section 13); in addition Ministers have responsibilities to the House of Representatives in respect of State enterprises (sections 6 and 17); the Board of directors of a State enterprise are accountable to Ministers, in particular as to the preparation and amendment of its statement of corporate intent and its annual report (sections 6, 14 and 15) and when assets or liabilities of the Crown are transferred to a State enterprise, the transfer does not entitle any person to terminate, alter or in any way affect the rights or liabilities of the Crown or the State enterprise under any Act or agreement (section 23 - "agreement" and "rights" are given an extremely wide meaning by section 29. An "agreement" need be no more than an understanding which is not enforceable in law and "rights" includes powers, privileges etc.). Finally under section 23, upon transferring assets to the State enterprise, or authorising it to act on behalf of the Crown, or upon granting rights in respect of Crown assets, the Crown can impose conditions on the State enterprise.

The combined effect of the statutory provisions to which reference has been made demonstrates that after transfer the Crown can exercise a substantial degree of indirect control over the manner in which the assets are employed. If the Crown in order to fulfil its obligations under the Treaty wishes to promote more Maori language television and is prepared to accept the cost implications of what it wishes to achieve then in reality it will be able to bring this about even after the transfer of the assets. It is unlikely that a State enterprise will seek to frustrate the Crown once the Crown has made its attitude clear. Even if it did so and the Crown found that its powers under the S.O.E. Act were inadequate, it would remain open to the Crown to seek the necessary legislative powers to intervene to achieve its objective. The transfer of the assets will not therefore substantially undermine the ability of the Crown to fulfil its obligations under the Treaty. The power of control will be less

direct and immediate than before but the only significant difference that the transfer will make is that it will be more difficult for Maori to bring pressure to bear on the Crown to fulfil its obligations under the Treaty by the use of the courts.

The purpose of section 9 is not, however, to provide a lever which can be used to compel the Crown to take positive action to fulfil its obligations under the Treaty. The section operates indirectly in relation to the issues in this case. It prevents the transfer of the assets when this would be inconsistent with the principles of the Treaty. Nonetheless the existence of section 9 can have the effect of facing the Crown with the option of either taking the steps which will result in it meeting those obligations or being unable to take the action which it wishes of transferring the assets. In this case, pending the outcome of these proceedings, the Crown has overcome the problem of being prevented from transferring the assets by, instead of transferring the assets, informally permitting them to be used by the State enterprise (a situation about which the appellants do not complain, presumably because it does not involve loss of control of the assets by the Crown).

The Broadcasting Commission.

The Crown has also been able to delegate the responsibility for promoting Maori culture to the Broadcasting Commission created by the Broadcasting Act 1989. The Commission is funded by charging the public a broadcasting fee, by appropriations from Parliament and by its revenue producing activities. From the time it began its operations, the Commission has been required by a ministerial direction to devote not less than 6% of that fee to Maori broadcasting. In the year 1989/90 7.2% was in fact allocated to Maori television broadcasting and in the year 1992/3 \$4.75 million was spent on Maori television programmes, including Maori language programmes, and a further \$3.35 million was used to fund programmes which did not present the Maori in a stereotyped manner or which were produced, directed or written by a Maori. It is not disputed that this scale of funding is insufficient to achieve what is necessary to re-establish the Maori language.

The judgments at first instance and in the Court of Appeal.

McGechan J. came to the conclusion that, in the past, the Crown had failed to comply with its Treaty obligations by not carrying out adequate investigations and consultation. The need for "Maori language to be heard on television, in prime time, and within a programme format which will be watched, by youth in particular" had not been met. He therefore considered that options should be kept open so that, if possible, a solution should be found. He contemplated a number of options. A separate Maori UHF channel, with its own production and transmission facilities. He had doubts whether the necessary finance would be available for this. Another solution was for increased Maori

language programmes to be inserted into one or other of TVNZ's programmes. (TV3 was not considered because it "was lost beyond the pale"). This, the judge thought, had the disadvantage that it could result in a backlash with possible racist overtones. It would therefore require careful introduction over a period of some years; there would be problems of financing and it might carry "the dreaded risk that a viewer will switch to another channel, and then stay with that other channel for the rest of the evening". In addition to the gradual introduction of more Maori language programming over forthcoming years on existing TVNZ channels at times when it will be heard (which would involve this being accompanied by the increasing dedication of the television facilities necessary for the purpose), there might be at some point in the future the development of a dedicated Maori production house and Maori language UHF channel. He considered that the reservation of a UHF channel already went a considerable way, but if there were to be a blanket release of all the assets this could result in the reservation being an empty right. As the decision as to what course to take in these circumstances was for the Crown, the judge adjourned the hearing and the question of the release of the television assets and directed:-

"... the Crown promptly should make the necessary inquiries and proposed reservation arrangements, seek agreement from Maori if available, and whether or not agreement is available, come back to this Court for a declaratory release of the TVNZ assets concerned subject to any proper reservations."

The Crown then appointed an Officials Committee to investigate and formulate a recommended Crown response. Submissions to the Committee were invited. There was a considerable Maori response. In addition to the options referred to above, the Committee considered others such as VHF, satellite, cable and Sky TV where access was available, and could be guaranteed at reasonable cost in a manner which would be binding on subsequent owners. It also examined access to production facilities. The Committee's Report was endorsed by Ministers and submitted to the Cabinet and (as was agreed for the purpose of the proceedings) the Cabinet then came to a decision based on the Report on 15th July 1991, in the following terms:-

"b ... conditional upon agreement by the Maori applicants to the immediate transfer of the former BCNZ assets to Radio New Zealand (RNZ) and Television New Zealand (TVNZ):

- i agreed that the Crown should enter into contracts with TVNZ and RNZ guaranteeing access to transmission and production facilities and Maori archival material on the most favourable terms and conditions applying to comparable users - these contracts to be signed prior to the transfer of assets from the Crown to RNZ and TVNZ;

- ii authorised a new one-off Payment on Behalf of the Crown within Vote: Communications of \$15,000 in 1991/92 for the purpose of securing the contracts referred to in (b) above;
- iii authorised a new Payment on Behalf of the Crown, within Vote: Communications, in the amount of \$3 million in 1991/92, \$5 million in 1992/93, \$5 million in 1993/94 (all amounts expressed in 1991 dollars), for the purpose of promoting Maori language and the culture in broadcasting, part or all of which could be used to assist in the development of special purpose Maori television;
- iv agreed that the level of funding set out in (d) above (sic; semble 'iii above') should be reviewed before 31 March 1994;
- v agreed that a Maori broadcasting funding agency, Te Reo Whakapuaki Irirangi, should be established to manage and disburse this additional funding, including funding for the access to or development of transmission and production facilities which may be required in the development of Maori television; ..."

Maori interests had very little time to consider the Cabinet decision but although they expected further discussions on the matters causing them concern, which they identified, they indicated they were willing to settle the issue on the basis of the Cabinet decision subject to the following modifications:-

- "(a) Crown contracts with TVNZ and RNZ were to guarantee Maori access to transmission and production facilities' and the broadcasting of Maori programmes on their mainstream broadcasting services'. In the absence of comparable users, charges were to be on most favourable terms consistent with reasonable return. Archival material was to be available on a costs recovery basis. In event of sale of TVNZ or RNZ assets to which access was guaranteed (whether transmission, production, services or archives) and non retention of sufficient capacity, access requirements were to be imposed on new owners. Contracts were to be in a form acceptable to Maori.
- (b) Policies (special purpose Maori television and mainstreaming) were to be decided by 31 August 1992 after Government inquiry, consultation, and discussions attempting to reach agreement. The development of such policies was to include criteria for special purposes television, 'reconsideration of existing legislation', targets for special purpose television and mainstreaming, and funding and delivery mechanisms.

- (c) The Crown would direct the BC to maintain the present level of funding for Maori television and radio, and would review 'the overall level of funding for Maori broadcasting for both radio and television' as part of the policy review required by 31 August 1992, and (if not increased) likewise review before 31 March 1994."

Although this response indicated that there was not an unbridgeable gulf between the parties the Crown declined to accept any modification to its decision. Mainstreaming, which was an important issue, was to be dealt with within the context of the continuing consultations foreshadowed in the Officials Committee Report.

The case was resumed before the judge on 26th July 1991. During the hearing the Crown placed before the Court contracts with TVNZ and RNZ. The contracts gave one Maori broadcaster access to transmission equipment on most favourable terms. In addition there was to be access to TVNZ production facilities.

Having heard further submissions, the judge in his second judgment drew attention to the limits on the Court's powers under section 9 of the S.O.E. Act. He recorded that the Crown is expected to act honourably in relation to Maori and concluded that he was "satisfied from the viewpoint of Treaty principles with the position proposed by the Crown in relation to transmission sites, production facilities (including archives), and the associated matter of access funding". In his detailed explanation for coming to these conclusions the judge expressed his views as to mainstreaming. He indicated that while the developments, which he identified, could in time make this less important because of the danger of the language "slipping away to a point of no return", the issue had to be tackled by him now. However, having taken into account current economic conditions which were resulting in widespread social hardship and his reservations as to the practicability of enforced mainstreaming, he came to the conclusion that he would not be justified in requiring the Crown to provide an "additional major allocation" of the finance which would be needed. He thought that despite the urgency gradualism was the proper course. Introduction on any immediate substantial basis of mainstreaming of the Maori language would go beyond what the court can reasonably require. He however stressed that Maori are "entitled to the protection of judicial observation that immediate and good faith discussion ... is a matter of urgent Treaty obligation" and that this should result in "a suitably programmed approach". The judge then granted a declaration permitting the transfer of the television assets.

Reference has already been made to the fact that the assessment of the judge as to the factual situation was in

general not challenged. In his dissenting judgment Cooke P. went so far as to say: "I respectfully agree with and adopt almost everything said by him in both his judgments", with one exception, that was in relation to the "judicial observation" referred to above. The President commented that that "protection might not prove very substantial" but accepted that "the real point on which this case turns is not the present programme content". As their Lordships understand his judgment, the point on which the case turned, in the opinion of the President, was that "to resign control of both programme content and assets is to leave the Treaty partner's language unprotected by the television system".

The other members of the court each gave their own reasons for agreeing with the conclusion of the judge. Richardson J. only gave a short judgment as he agreed with the detailed judgment of McKay J. Hardie Boys J., in giving his own reasons, made it clear that he fully appreciated the gravity of the problem that faced the Maori language and then added:-

"It should be apparent from the foregoing that my heart would lead me to the same conclusion as the President. I share his grave concern that policies on the development of Maori television are still in the formative stage; and that the overriding market forces philosophy makes it unlikely, certainly in current economic circumstances, that when formulated those policies will meet the need and satisfy the obligation I have been discussing. Yet I cannot escape the conclusion that such considerations as these are not relevant to the Court's task in the particular circumstances of this case."

The difference between the approach of the President and that of McKay J. was as to the significance which they attached respectively to the consequences which followed from the changes which had been made already to the broadcasting structures. The President considered that they made it of vital importance to ensure that assets were not released until some solution was provided which would meet the needs of the Maori language. McKay J. on the other hand, although he accepted that it was questionable whether the Crown now had the capacity to fulfil its Treaty obligations to the Maori language, considered that as the changes had already happened and had been achieved by legislative action, those changes had to be accepted and the result was that the transfer of the assets would make no difference to the ability of the Crown to protect the language. The majority of the Court of Appeal also took into account that the assets involved were "substitutable", that is assets which could be replaced by acquiring other assets of the same nature. They were different from the assets involved in earlier cases where what was being considered was, for example, land which was not substitutable. The land was itself taonga and could not be replaced by land which was not taonga.

The validity of the arguments of the appellants.

Miss Elias naturally strongly supports the reasoning of the President. She argues that the approach of the majority of the Court of Appeal involves "reading down" or qualifying section 9 of the S.O.E. Act as result of the changes introduced by the Broadcasting Act 1989 and by their approach to substitutability; if the majority had not "read down" section 9, they would have concluded on their and the judge's assessment of the facts that section 9 applied to the proposed transfer.

Section 9 is not a statutory provision which requires the Crown to establish, as Miss Elias argues, as precedent fact, that the transfer would not be inconsistent with the principles of the Treaty. The decision in *R. v. Secretary of State for the Home Department ex parte Khawaja* [1984] A.C. 74, on which she relied, was dealing with a different situation where the Crown's conduct would be unlawful except in a case of an illegal entrant so the Crown had to establish that their actions related to an illegal entrant. Here, on the other hand, the conduct of the Crown was only not permitted if it fell foul of section 9; accordingly, the onus was on the appellants to show that the transfer was not permitted in the normal manner. But, as is usually the situation, the outcome of this case does not depend on any question of onus of proof. Equally the Solicitor General and the majority of the Court of Appeal (if this is what they were saying, which is by no means clear) were mistaken in suggesting that as the question of the manner in which the Crown chooses to fulfil its obligations under the treaty is a matter of policy the court has no power to intervene unless the court is satisfied that the policy is unreasonable in a *Wednesbury* sense. The question is a matter on which the court must form its own judgment on the evidence before the court.

As to "reading down" section 9 and "substitutability", Miss Elias is correct in contending that neither qualify the test laid down by the section. However the court does not apply the section in a vacuum. As previously pointed out, the court in deciding whether the Crown is acting reasonably takes into account current circumstances. Part of those circumstances is any other relevant legislation. That legislation cannot justify the rejection of the appellants' contentions if the transfer of assets will impair the ability of the Crown to comply with its obligations. On the other hand the policy which is reflected in legislation is one which the Crown is perfectly entitled to adopt, subject to complying with its obligations (which are not directly legally enforceable) under the Treaty, and that policy should not be frustrated by the court unless the statutory prohibition applies. The position is exactly the same in respect of the quality of the assets. If they are readily replaceable this makes it less likely that section 9 will apply since, in the present context, the Crown could, if this is the case,

fulfil its obligations by using replacement assets. The court should however approach these questions with a firm grip on reality. So if, as a matter of practical politics, once the assets are transferred they are most unlikely to be replaced, the fact that theoretically they could be is of little significance.

However the critical issue remains whether the President was correct in his single criticism of the judge's approach. Would the transfer of the assets impair the ability of the Crown to fulfil its obligations? On this issue their Lordships have already set out their approach as to the proper interpretation of the statutory provisions. The position is that in practice the Crown can exert considerable control over the State enterprise. Accordingly, the transfer of the assets will have little, if any, effect on the Crown's ability to fulfil its obligations to preserve the language.

It is no doubt correct that the Crown would use these powers sparingly since it would impinge on the directors' responsibility (as is pointed out in the affidavit of John Chetwin), but the exercise of the powers, in the unlikely event of this being necessary, would be fully justified because of what would be at stake. In this connection it should be noted that the need for intervention is made less likely since the State enterprise's Statement of Corporate Intent already identifies as a subsidiary Objective "serving the People of New Zealand by the presentation of programmes which reflect New Zealand identity and culture" and specifies that Social Objectives are to:-

"reflect and develop ... Maori language and Maori culture, by producing and broadcasting programmes about New Zealand or New Zealand interests and operate in a manner which actively reflects the cultural ... diversity of our society."

Any question which may exist as to the financial commitment of the Crown to carry out its obligation would be unaffected by the transfer of the assets. However in relation to the bona fides of the Crown it is to be noted that the Solicitor General, subject to the variations necessary due to the passage of time, gave their Lordships an assurance that the proposals made by the Cabinet between the two hearings at first instance would still be adhered to by the Crown if this appeal is dismissed. The judge was entitled to take this assurance into account, as can their Lordships in determining the outcome of this appeal, in assessing the reasonableness of the Crown's conduct. The assurance may not be directly enforceable in law and it has to be considered in the context of Maori fulfilling their responsibilities to take such action as is reasonably available to preserve the language, but this does not mean that it is devoid of legal significance. The assurance once given creates the expectation, or to use the current parlance the "legitimate expectation", that the Crown would act in accordance with the assurance, and if, for no

satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review.

In these circumstances their Lordships can see no grounds for differing from the judge's very careful assessment of the facts and issues. Accordingly, the appeal should be dismissed and their Lordships will humbly so advise Her Majesty.

There remains the question of costs. Although the appeal is to be dismissed, the appellants were not bringing the proceedings out of any motive of personal gain. They were pursuing the proceedings in the interest of taonga which is an important part of the heritage of the New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that their Lordships examine and in the circumstances their Lordships regard it as just that there should be no order as to the costs on this appeal.