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IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M 430/86

IN THE MATTER of the Water and Soil Conservation Act 1967

BETWEEN HUAKINA DEVELOPMENT TRUST

Appellant

A N D WAIKATO VALLEY AUTHORITY

First Respondent

A N D R P & S J BOWATER

Second Respondents

Hearing: 10 November 1986

Counsel: Miss S Elias for appellant
R Wilson for first respondent
B M Stainton for second respondents

Judgment: 2 June 1987

JUDGMENT OF CHILWELL J

Huakina Development Trust appealed to this Court, pursuant to section 162 of the Town & Country Planning Act 1977 (the Planning Act), against the decision of the Planning Tribunal dated 9 May 1986 (Decision No C 19/86) which confirmed the decision of the first respondent, given in terms of the Water and Soil Conservation Act 1967 (the Water Act), to grant to the second respondents for a period of ten years the right to discharge up to 7.5 cubic metres of treated dairy shed water and waste per day to an

unnamed tributary of the Kopuera Stream subject to conditions. The Trust also appealed to this Court against the decision of the Planning Tribunal dated 6 August 1986 (Decision No C 46/86) by which the Tribunal ordered the appellant to pay to the second respondents the sum of $420 for costs on a solicitor/client basis.

The findings of fact made by the Tribunal are as stated in this and the next succeeding paragraph. In 1985 the second respondents purchased a dairy farm near Mercer. The previous owner had been discharging untreated dairy shed effluent from a milking shed indirectly into the Kopuera Stream which eventually flows into the Waikato River : it was a discharge of untreated effluent in an uncontrolled way.

The first respondent had been endeavouring to rectify this situation without success. When the second respondents took possession of the property they were advised of the first respondent's concerns. Acting on advice from the first respondent's officers, proposals were immediately put in train for the construction of a two stage anaerobic/aerobic pond treatment system, to be located near the shed in accordance with standards established by the Ministry of Agriculture and Fisheries for this type of effluent treatment system. The second respondents forthwith applied for a water right to deal with the effluent. At the time, the second respondents were milking 140 cows, and, using a formula devised by the

first respondent, a 7.5 cubic metres per day figure was assessed as the effluent from 150 cows. The appellant objected in terms of section 24(4) of the Water Act. It was the only objector. A tribunal of the first respondent considered the application in November 1985. It recommended that the application be granted subject to conditions. The first respondent accepted the recommendation. The terms of the proposed grant were:-

> "That a right be granted to RP & SJ Bowater for a period of ten years to discharge up to 7.5 cubic metres of treated dairy shed water and waste per day to an unnamed tributary of the Kopuera Stream at or about map reference NZMS 260 S12 953347 on property Pt allotment 152, 174 Koheroa Parish Blk II Maramarua SD, subject to the General Conditions of the Board and to special conditions as follows:-
>
> a) An aerobic(sic)/aerobic pond treatment system shall be installed to the dimensions specified in conditions c) and d) by 31 May 1986.
>
> b) The rate of flow of influent to the anaerobic pond shall not exceed 7.5 cubic metres per day and the influent loading shall not exceed 13.5 kg BOD_5 per day (150 cows).
>
> c) The anaerobic pond shall have a surface area of not less than $423m^2$ a total volume of not less than $643m^3$ and a depth between 3.6 and 4.0m.
>
> d) The aerobic pond shall have a surface area not less than $650m^2$ and a depth between 1.1 and 1.5m.
>
> e) The anaerobic/aerobic pond system shall be operated and maintained to the satisfaction of the Authority.
>
> f) The anaerobic/aerobic pond system shall be desludged as necessary and in particular within one month of receipt of notice in writing from the Authority to do so."

In its notice of appeal to the Planning Tribunal the appellant alleged that the first respondent's decision did not give adequate consideration to the pollutant effect of the proposed discharge on the Kopuera Stream and the Waikato River; also that the pollution would detrimentally affect a very valuable tribal resource, which provides both physical and spiritual sustenance. The appellant sought cancellation of the decision.

In the absence of contrary evidence from the appellant the Planning Tribunal accepted the evidence of Mr Bowater that the water running into the artificial drain from his milking shed appeared quite clear and fresh and that a maori person went there regularly to collect watercress, apparently for human consumption, notwithstanding the presence of the effluent. The Tribunal also accepted the evidence of a senior field officer of the first respondent confirming the technical details of the application and the capacity of the design to cater for effluent from 200 cows and, in the absence of cross examination and of contrary evidence, but after questioning by the Tribunal, the Tribunal accepted his opinion for the purposes of section 21(3A) of the Water Act that the classification standards for class D waters (which applied to the point of discharge into natural water) would be met; in particular the concentration of solids in the proposed discharge is likely to be 30 grams per cubic metre which, in his opinion, would be "substantially free" in terms of section 21(3A)(c). The

Tribunal recorded that in the end Mrs Minhinnick , who appeared as agent for the appellant, accepted that bringing the presently uncontrolled discharge under control through a water right would benefit the receiving waters the quality of which is the concern of the appellant.

The Planning Tribunal observed that, notwithstanding the concession made, Mrs Minhinnick advanced argument which had been put to the Tribunal on several previous occasions based on Article The Second of the Treaty of Waitangi and the spiritual values which, so the Tribunal said, she and her people hold dear so far as the waters of the region, including the waters of the Waikato River and its tributaries, are concerned. Apparently treating the appellant and Mrs Minhinnick as identified in interest, the Tribunal rejected her submissions:-

> "The answers to the propositions put by Mrs Minhinnick have been given in earlier decisions of the Tribunal - see Minhinnick v Auckland Regional Water Board, Decision No: A116/81; Minhinnick v Waikato Valley Authority, Decision No: A66/84; Minhinnick and Another v Auckland Regional Water Board, Decision No: A119/84; and the further reference to Minhinnick v Auckland Regional Water Board, Decision No: A116/81, in Auckland Maori Council v Manukau Harbour Maritime Planning Authority 9 NZTPA 167, at p. 172. In particular, we draw attention to a passage from the Tribunal's decision in Minhinnick v Waikato Valley Authority (supra), at page 3, where it repeats what it had to say about these matters in its earlier decision Minhinnick v Auckland Regional Water Board, Decision No: A119/84, at page 8, where it states:

> "To the extent that it is possible to do so, the cultural attitude of the Maori people to the waters of the estuary have been taken into account and have been provided for. The Act does not provide for their spiritual relationship with those waters to be taken into account. Indeed we cannot see how the law could do so."

We agree with the previous decisions as regards these matters, and have nothing further to add. If the appellant had adduced evidence alleging detrimental affects to water quality arising from this proposed discharge - which would be a proper matter to consider on such an application - see Keam v Minister of Works and Development [1982] 1 NZLR 319, recently affirmed in Auckland Acclimatisation Society (Inc) v Commissioner of Crown Lands 11 NZTPA 33 - we would have been able to adjudicate on those matters in the way the Court of Appeal has said is proper in such cases. But no such evidence was adduced by the appellant. Indeed, the burden of the evidence on this aspect of the matter clearly favours the granting of the application. The benefits to be obtained far outweigh the detriments. The uncontrolled discharge is now to be controlled, and improved as to its quality.

If the appellant, and others like minded, want spiritual values, as they perceive them, to be weighed in the balance in cases under the Water and Soil Conservation Act, they will have to persuade Parliament to change the Act. We appreciate, as Mrs Minhinnick pointed out, that the Waitangi Tribunal has recommended changes - see its report concerning the Manukau Harbour - also recently referred to by the Tribunal in a case involving the same appellant as the present, Huakina Development Trust v Auckland Regional Water Board 11 NZTPA 123, at 125. But the Government, to whom that Tribunal reports and makes its recommendations, has not yet acted. It is not for this Tribunal to act in its place.

Having regard to the foregoing, and applying the balancing test to the facts of this case, we are in no doubt at all that the water right applied for should be granted. Accordingly, the appeal is disallowed and the respondent's decision to grant the right is confirmed." (at 5 & 6)

The Planning Tribunal impliedly invited the parties to make application for costs. The second respondents accepted the invitation. After considering

written submissions the Tribunal observed that, while it is unusual to make an award which amounts to a full indemnity, there is nothing in section 147 of the Planning Act to prevent it. It awarded the sum of $420 claimed for the principal reason that the concerns pursued by the appellant "were not legitimate ones, as the law stands". The modest amount claimed and awarded may, in part, be explained by the fact that the second respondents, by arrangement with the first respondent, did not appear on the application when it was heard by the first respondent's tribunal, nor before the Planning Tribunal when the appeal was first called but, in view of the attitude of the Tribunal, properly adopted and expressed about leaving the handling of the appeal to the first respondent, the second respondents were represented by counsel at the Tribunal hearing who accepted his instructions on short notice. It was common ground at the hearing in this Court that the Tribunal had made the award on a solicitor/client basis.

The error of law alleged in the notice of appeal against the decision confirming the grant of the water right is that the Planning Tribunal did not correctly apply the policies and objects of the Water Act in respects which fall into two broad categories:-

A Maori Values

(1) In ruling that Article The Second of the Treaty of Waitangi was not a proper matter to be considered on an application pursuant to section 21 of the Act.

(2) In ruling that the spiritual values and cultural relationship of Maori people to the waters of the region, including the waters of the Waikato River and its tributaries, are not proper matters to be considered on an application pursuant to section 21.

(3) In ruling that only if the appellant had adduced evidence alleging detrimental effects to water quality arising from the proposed discharge would the Tribunal have been able to adjudicate upon detrimental effects.

(3A) In ruling that "the concerns being pursued by the appellant were not legitimate ones, as the law stands".

B Onus Upon Applicant

(4) In ruling that it was relevant for the Tribunal to take into account, as a factor in favour of the granting of the application, that untreated effluent was being discharged by the second respondents without the controls of a water right.

(5) In ruling that there was evidence before the Tribunal on which it could be satisfied that the conditions imposed by the first respondent were sufficient to meet the tests prescribed in section 21(3A).

(6) In ruling that it was a relevant consideration in the exercise of the Tribunal's functions that the appellant had adduced no evidence alleging detrimental effects to water quality or contradicting the evidence given by witnesses for the first and second respondents.

The question of law stated to require resolution is whether the above rulings (1) to (6) are correct tests and considerations in the administration of the Act.

The standing of the appellant was not in issue before the Planning Tribunal or on this appeal. The Court was informed by appellant's counsel that the appellant is a body set up under the Tainui Trust Board pursuant to the Charitable Trusts Act 1957. Among its objects are to protect, nurture and safeguard, for the benefit of a number of tribes called Te Puaha Ki Manuka, all water ways, rivers, lakes, harbours and coast lines etc. In order to carry out such objects the trustees are given power to take actions through Courts and Tribunals. Counsel for the appellant stated that part of the function of the Trust is to support the heritage of the Tainui (the tribes more closely connected with the Waikato area), that it has been particularly concerned with the observance and recognition of the special relationship of the Tainui people to the Waikato River. I was referred to three important findings of the Waitangi Tribunal - that relating to fishing grounds in the Waitara district (WAI 6), that relating to the Kaituna River (WAI 4) and that relating to the Manukau Harbour and environs (WAI 8). I have read the reports. It suffices to make the preliminary observation that the Waitangi Tribunal has found that "taonga" which are water systems may be detrimentally effected, in Maori cultural terms, where there is no physical damage which can be scientifically established. In the Manukau report the Waitangi Tribunal accepted that "taonga" means more than objects of tangible value:-

> "A river may be a taonga as a valuable resource. Its "mauri" or "life force" is another taonga. We accept the contention of counsel for the claimants that the "mauri" of the Waikato River is a taonga of the Waikato tribes. The mauri of the Manukau Harbour is another taonga." (at 95)

That statement represents the kind of submission made by the appellant to the Planning Tribunal. Considerations such as those, and the Treaty of Waitangi itself, formed the basis of the appellant's objection and the submissions made in this Court.

Unlike the Town & Country Planning Act 1977, which in section 3(1)(g), specifically directs that the relationship of the Maori people and their culture and traditions with their ancestoral land are matters of national importance, there is no specific reference in the Water Act to Maori values. It is noted, however, that, in 1983 when the constitution of the National Water and Soil Conservation Authority was changed, one of the 13 members appointed by the Governor General includes an appointee to represent the interests of the Maori people in relation to natural water.

The effect of section 21(1) of the Water Act is to extinguish all rights which riparian owners previously had at common law to take, divert or discharge natural water and to substitute in place of common law rights certain statutory rights, and in particular, the right to apply to a Regional Water Board for a water right, such as the right to dam a river or stream or to divert or take

natural water or discharge natural water or waste into natural water. See C E Stanley v South Canterbury Catchment Board (1971) 4 NZTPA 63. It was correctly observed in that case that the Water Act does not spell out in specific terms the matters to be taken into account in granting or rejecting applications for a water right. Hence, by judicial authority, there has developed the principle that what the Water Act calls for when a decision is to be made to grant or refuse a water right is a balancing of the advantages which would follow from the exercise of the water right against the disadvantages which would follow from that exercise. The ultimate decision must be the one which best accords with the objects and purposes of the Act in the circumstances of the case. See Keam v Ministry of Works and Development [1982] 1 NZLR 319, Auckland Acclimatisation Society (Inc) v Sutton Holdings [1985] 2 NZLR 94 and the subsequent decision of the Planning Tribunal in the latter case reported sub nom Auckland Acclimatisation Society v Waikato Valley Authority (No 2) (1985) 11 NZTPA 168.

The application for the grant in this case was made by the second respondents in terms of sections 21 and 24 of the Water Act. Section 24(4) empowers any person to lodge an objection:

> "... on the ground that the grant of the application would prejudice its or his interests or the interests of the public generally."

The appellant's objection was accordingly based on that subsection. That provision was considered by Cooke J in Metekingi v Regional Water Board [1975] 2 NZLR 150 as providing an extraordinarily wide range of objections. It appeared to the Judge that the subsection would exclude submissions or evidence which plainly had no connection with the purposes of the Act.

> "But I do not think that any further implied limitation could reasonably be suggested." (at 156)

It is the extraordinarily wide objection provision which, so the appellant contends, enabled it to raise, and to have determined by the Planning Tribunal, the objection that the grant of the water right would be offensive to Maori culture and contrary to the spirit of the Treaty of Waitangi. The Tribunal plainly considered that spiritual values and some cultural values were factors incapable of being taken into account in the balancing exercise.

There is a similarity between the position of the appellant in the present case and that of the appellant in the Metekingi case. The issue in that case was whether or not the loss of 700 acres of farm land for primary production purposes was a factor to be taken into account against the advantages arising from the grant of a water right to create an artificial lake. The issue turned on the meaning of "soil conservation", an expression not defined in the Water Act. The Town & Country Planning Appeal Board, rejecting the appellant's objections, held

that soil conservation did not mean land conservation. On appeal to the Administrative Division of the Supreme Court, Cooke J held that Parliament had deliberately left the expression unrestricted by express definition and had deliberately conferred very wide rights of objection:-

> "The Court would only be justified in treating the suggested concept as exclusive, and in limiting the grounds of objection, if there were a clear or necessary implication to that effect in the statute." (at 160)

Adverting to the right of objection the Judge observed that, unless the provisions of section 24(4) of the Water Act were given the liberal interpretation which he considered had been deliberately provided by Parliament, the appellant's would have had no legal forum where they could advance the contentions held by the Appeal Board to be irrelevant.

SUBMISSIONS ON MAORI VALUES

In reliance upon the authority of Keam and Metekingi, counsel for the appellant submitted that it should only have been deprived of the opportunity to present argument based on Article The Second of the Treaty of Waitangi and upon tribal cultural and spiritual concerns if they plainly had no connection with the purposes of the Water Act. Counsel's submissions then developed along the following lines. A proper interpretation of the functions and powers of the National Water and Soil Conservation Authority and the Regional

Water Boards, in the context of the long title to the Water Act, lead to the conclusion that although water quality is an important concern so too is the conservation, allocation and use of natural water : the Act is also concerned with aspects of water which are not measured solely by its physical properties but with values which are aesthetic as well : an examination of the functions of the Authority and the Regional Water Boards establish that water is regarded as a national asset with competing and extremely variable demands and that, in the end, it is to be used to the best advantage of the country and the region. See sections 14 and 20, and in particular, 20(5)(c) which requires Regional Water Boards to promote the conservation and most beneficial uses of natural water within the region. In applying the principles expounded in the judgments in Metekingi and Keam, with particular reference to their being no express guidelines, it was submitted that the Water Act does not expressly exclude the concerns of the Maori people which, while based on cultural and spiritual considerations, are no more metaphysical than other express considerations such as "scenic characteristics". The ultimate test turns upon an assessment of the public interest. In the absence of express exclusion, no matter which reflects the public interest in regard to natural water can be said to be excluded, nor should an implication of exclusion be lightly adopted, because the Water Act expressly recognises multiple use and a variety of values in relation to water.

Founding upon those submissions counsel for the appellant developed two sub branches of the appellant's case - one based on the Treaty of Waitangi and one on Maori values. So far as the Treaty is concerned, counsel submitted that whether or not it is capable of conferring enforceable rights in New Zealand law it occupies a fundamental place of some constitutional significance in the New Zealand legal system; it is part of the fabric of New Zealand law and therefore part of the context in which the Water Act requires interpretation and application. Counsel cited some 17 authorities, which are reviewed later in this judgment, commencing with the judgment of Chief Judge Fenton in Kauwaeranga of 1870 reprinted in (1984) 14 VUWLR 227 to the most recent judgment of Williamson J in Te Weehi v Regional Fisheries Officer (1986) 6 NZAR 114. Counsel contended that although the Treaty was once described by Prendergast CJ as a "simple nullity" it has been referred to in the authorities cited in a way which gives the lie to the oft quoted phrase. Moreover, Parliament has on a number of occasions plainly recognised and referred to the Treaty - for example, the Native Lands Act 1862, the Fish Protection Act 1877, and the preliminary note, attributed to Sir John Salmond, appearing in Volume 6 of the 1931 reprint of the statutes under the title Natives and Native Land.

More recently in 1975 Parliament enacted the Treaty of Waitangi Act which expressly refers to the Treaty in the long title and in the preamble, the latter

being deemed by section 5(e) of the Acts Interpretation Act 1924 to be part of the Treaty of Waitangi Act intended to assist in explaining its purport and object. Moreover, apart from clear language used in various parts of the Act, the Maori and English versions of it were enacted in the first schedule, thereby bringing into operation section 5(h) of the Acts Interpretation Act that every schedule is deemed to be part of the Act. The submission was that whatever status the Treaty had in New Zealand law before 1975 it acquired a new status. What that status is will be a matter for determination, but counsel referred to statements by the Honourable M Rata, Minister of Maori Affairs, in moving the introduction of the Bill and its second reading saying, on the latter occasion:-

> "The Government believes that both the recognition and promotion of the full meaning of the Treaty should be given statutory recognition."

Counsel contended that the Treaty can today be referred to as part of the context in which New Zealand legislation is to be interpreted in much the same way as in Fletcher Timber Ltd v Attorney-General [1984] 1 NZLR 290, the Court of Appeal interpreted rule 163 of the old Code of Civil Procedure in the light and context of the Official Information Act 1982 and as the House of Lords in Erven Warnink BV v J Townend and Sons (Hull) Ltd [1979] 2 ALL ER 927 ruled that the common law action of passing off was varied by the policies of certain enactments in related fields. Again in Van Gorkom v Attorney-General [1979] 1 NZLR 535 Cooke J had regard to evolving community

notions about sex discrimination in interpreting the Education (Salaries and Staffing) Regulations 1957 and in R v Uljee [1982] 1 NZLR 561 the Court of Appeal was influenced by the Misuse of Drugs Amendment Act 1978 in deciding that a constable's evidence of a solicitor client privileged conversation, which he overheard by accident, was inadmissible. Reference was also made by counsel to several authorities in which the Courts have paid regard to international treaty obligations as an aid to the interpretation of municipal legislation.

Counsel contended that the Treaty is part of the context in which the Water Act is to be interpreted and applied because of its historic status and of contemporary public policy and recognition and for the reasons appearing in the authorities where Courts have resorted to extrinsic aids. The point was also made that a statute, such as the Water Act, which focuses on the public interest and gives a right of objection to the grant of a water right on the grounds of public interest, is a situation in which the Treaty can be consulted as part of the fabric of New Zealand law, particularly so where, as here, a judicial tribunal is required to achieve a balance in terms of the use of a natural resource. In the event that the Court does not accept that the Treaty is part of the fabric of New Zealand law, counsel submitted that it is nevertheless a proper aid to interpretation and application of the relevant provisions of the Water Act.

The Treaty of Waitangi aside, counsel for the appellant submitted that the relevant provisions of the Water Act should be interpreted to permit deeply held beliefs (religious in character) of distinct sections of the community to be given expression in judicial hearings in which the object of the belief is directly in issue. I was referred to such cases as Mullick v Mullick (1829) 1 Knapp 245; 12 ER 312, where the Privy Council, on appeal from Calcutta, paid careful attention to Hindu customs and useage in regard to appropriate expenditure in the obsequises of a Hindu of particular caste and fortune followed by Cooper J in New Zealand in the Public Trustee v Loasby (1908) 27 NZLR 801 who paid careful attention to the custom among Maori people in regard to the appropriate expenditure of a tangi following the death of a chief or person of importance. In the interesting case of Mullick v Mullick (1925) LR 52 Ind App 245 the Privy Council held that a family idol had a personality of its own. Accordingly, in a dispute within the family concerning the custody of the idol, it was directed that the idol should represented by a disinterested next friend appointed by the Court. Counsel also referred to the United Nations Declaration On The Elimination Of All Forms Of Intolerance And Of Discrimination Based On Religion Or Belief, of which Article 4 states:-

> "1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, politcal, social and cultural life.

> 2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter."

Counsel observed that the equivalent provision of the European Convention on human rights was taken into consideration by the Court of Appeal in Ahmad v Inner London Education Authority [1978] 1 ALL ER 574 in the interpretation and application of the Education Act 1944 (UK). Founding this part of the appellant's case on the above examples, counsel submitted that if the Tainui people cannot express their concern in hearings affecting the object of their beliefs then the legislation must be viewed as intolerant of their beliefs - an intention which should not be imputed to Parliament without clear language.

Counsel concluded the Maori Values branch of the case on appeal with the proposition that Maori concerns are relevant to the Water Act; for the Court so to find will not have the consequence, as the Planning Tribunal suggests, that hearings will become unmanageable; what is a matter of belief will be a question of fact and not a question of law as indicated by the Planning Tribunal in Minhinnick v Environmental Defence Society Incorporated (Decision No: A 119/84) where the Tribunal said:-

> "The Act does not provide for their spiritual relationship with those waters to be taken into account. Indeed we cannot see how the law could do so." (at 8)

In addition to the examples where matters of religious and like belief were taken into account, counsel referred to Tamihana Korokai v Solicitor-General (1912) 32 NZLR 321 and Te Weehi v Regional Fisheries Officer (supra). An indication of the way in which the Tribunal weighs comparative values under the Planning Act is to be found in the judgment of the Tribunal in Auckland Acclimatisation Society v Waikato Valley Authority (No 2) (supra). Counsel stressed that under the Water Act the question will still be one of balancing advantages and disadvantages; Maori concerns will not inevitably prevail; matters which will be significant will be the extent to which there is competition with other needs or beliefs and the significance of the "taonga" itself.

The case for the first respondent was that the Water Act is neutral in terms of priorities - see Mahuta v National Water and Soil Conservation Authority (1973) 5 NZTPA 73 and that the Planning Tribunal has in various decisions recognised Maori values in regard to water mixing and the use of traditional fishing grounds, a point which is exemplified by the Court of Appeal in North Taranaki Environment Protection Association Inc v Governor-General (unreported; 5 March 1982; CA 6/82) [1982] Recent Law 147 upholding a decision of the Planning Tribunal in terms which emphasised the patient hearing and consideration of the submission made on behalf of Maori interests : the Tribunal has encountered difficulties in the absence of legislation providing expressly for

consideration of Maori cultural and spiritual values, but these have not been ignored and have been dealt with to the limit of its jurisdiction within the context of the Water Act, in particular sections 20(5)(c) and 20(6) as is apparent from the Minhinnick decisions and, in particular, the decision about cooling water for New Zealand Steel Ltd (Decision No A 116/81) in which the Tribunal said:-

> "In that the Act specifically requires that environmental considerations be taken into account, some Maori traditional concerns are now specifically provided for. But some Maori concerns are cultural and spiritual; they go beyond the mere physical environment. We have concluded there is nothing in the Act which will allow us to take those purely metaphysical concerns into account. To the extent that spiritual and cultural values are incorporated in technical and factual considerations, they are recognised under the Act, but no further. May we add that other sections of the community also have spiritual values, many of which are not recognised, indeed are trampled on by the community at large. But the strength of spiritual values is that they are personal; that they are still valid to the individual though rejected by others." (at 5)

In the present case the Tribunal indicated a willingess to apply the benefit detriment test enunciated in Keam (supra) when competing factors exist but, in the absence of evidence of detrimental effects to water quality arising from the proposed discharge of the second respondents, found itself obliged to follow the further opinion of Cooke J in that case (at 323) that a weighing of the advantages and disadvantages is not required if there are no significant disadvantages. None were proved.

In regard to the Article The Second of the Treaty of Waitangi, counsel for the first respondent contended that the Water Act is so worded as to ignore any Maori perception of the Article; the Court is obliged to interpret and apply the Act as it is written; the Treaty has no effect as an instrument of law as was not so long ago confirmed by the Privy Council in Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] A.C. 308; [1941] NZLR 590. He proferred the view that it was probably because of such judicial views and political pressure that the Treaty of Waitangi Act was enacted in 1975 in an attempt to give Maori treaty rights some form of status but it is significant that, at the end of the day, the Waitangi Tribunal can only make recommendations to the Crown and that the Court should heed the opinion, expressed more than once by that Tribunal, that the Water Act is deficient in relation to Maori spiritual and cultural values and the recommendation made, more than once, by it that the Water Act be amended to enable Regional Water Boards and the Planning Tribunal to take account of those values.

Counsel noted the significant recognition given to certain Maori values in sections 3 and 4 of and in the Second Schedule to the Planning Act and the judicial emphasis accorded to those values by the Planning Tribunal in the L.P.G. wharf terminal case of Auckland District Maori Council v Manukau Harbour Maritime Planning Authority (1983) 9 NZTPA 167. Per contra the Water Act is

lacking in recognition of such values, there is no specific recognition of any Maori relationship with water resources, the long title identifies a multiple use philosophy for the use of water which is a developed philosphy of decades of standing and the product of a time when present day environmental and sociological values were not as emphatic as they are today. For example, section 21(3) specifically makes provision for the carrying away of waste as one of the functions of natural water. He submitted that it is possible to regard the Water Act as inconsistent with Article The Second of the Treaty of Waitangi and, accordingly, a case for the intervention of Parliament to implement the recommendations of the Waitangi Tribunal and enact specific provision for the recognition of Maori interests. But, as matters stand, the Water Act takes no account of the cultural and spiritual concerns of Maori people in relation to water and the Planning Tribunal has gone as far as it can within its jurisdiction to recognise Maori concerns in relation to the physical, in contrast to the metaphysical, environment as is illustrated by the Planning Tribunal decision in the slurry pipe line application of New Zealand Steel Ltd in, Minhinnick v Waikato Valley Authority (Decision No A 66/84). The principal concern expressed by the Tainui people in that case was the mixing of the waters of the Waikato River with those of the Manukau Harbour. To a criticism made by Mrs Minhinnick of the Planning Tribunal's cooling water decision in 1981, the Tribunal emphasised that it held

Maori "rights" in regard to water and fishery matters to be relevant but the Water Act did not allow it to take account of "Maori metaphysical beliefs".

In summary, counsel for the first respondent contended that Article The Second of the Treaty of Waitangi is not a proper or relevant consideration in an application pursuant to sections 21 and 24 of the Water Act because it is not incorporated into a consideration of an application for a water right; the criteria to be satisfied are those set out in section 21(3), the provisions of the long title to the Act and the benefit detriment test in Keam. Counsel submitted that those matters were properly considered in the Planning Tribunal's decision, which was correct in law. He submitted that the Act makes no provision for metaphysical or cultural values adopted by any particular culture, that such values are not capable of any quantification and should not be required to be judicially quantified in the absence of clear statutory criteria : it is difficult to see how they could be. In terms of the benefit/detriment test, and the balancing required, the appellant was obliged to set out the effect of the discharge on her values in terms of the criteria in the Act; without such evidence, it was not possible for the Planning Tribunal to make a finding in her favour. The principal evidence was the first respondent's. The first respondent has recommended treatment processes which it recommends to farmers and are approved by the Ministry of Agriculture &

Fisheries. By policing and persuasion the first respondent has got the river under control by comparison with the days of untreated discharges. It is regarded as a clean river by international standards. It is preferable, as the Tribunal found, that a discharge be made subject to conditions rather than remain an uncontrolled discharge; conditions can ensure the attainment of proper water quality standards and compliance with the mandatory classification standards. The only evidence adduced was that of the first and second respondents there being no evidence produced by the appellant. The Tribunal could only rule on the evidence before it. It considered that evidence to be of probative value. It is a specialist tribunal with expert knowledge of this type of case. It should be assumed it approached this application in the light of that knowledge.

Counsel for the second respondents contended that the principles of the Treaty of Waitangi cannot, in the absence of express statutory direction, be implemented by the Courts; the Crown is the sole arbiter of the justice of meeting any Treaty obligations. He submitted that those propositions have been established by a clear line of authority from Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72 to In Re The Bed of The Wanganui River [1962] NZLR 600 and In Re The Ninety-Mile Beach [1963] NZLR 461. Counsel's second contention was that even if the Treaty is incorporated into New Zealand law or available for interpretation purposes, any rights,

in terms of water use, were extinguished by section 21 of the Water Act. So far as the Treaty of Waitangi Act is concerned, he contended that it merely echoes the legal position established by the line of authority to which he referred because the Act gives no rights to any Maori : it merely empowers the Waitangi Tribunal to make recommendations to the Crown. Moreover, it would be difficult for Regional Water Boards and the Planning Tribunal to resolve the conflicts between the two language versions of the Treaty, to determine the priority of claims and supply reasons for decisions. He referred to the complex issues which have faced the Waitangi Tribunal appearing in its published reports in regard to the interpretation of the Treaty and the determination of complex issues in regard to Maori mythology, genealogy and sociology and to Maori concerns generally. He submitted that if Regional Water Boards and the Planning Tribunal had to undertake that type of inquiry it would be difficult for them to keep a balanced view of the relative merits of water right applications and it would be necessary to place specialists in Maori concerns and values on the Boards and the Planning Tribunal. For example it was said in the Waitangi Tribunal report on the Manukau Harbour:-

> "It is difficult to over-estimate the importance of the Waikato River to the Tainui tribes. It is a symbol of the tribes' existence. The river is deeply embedded in tribal and individual consciousness. Like Manukau it has its taniwha or guardians, but unlike Manukau, there is a taniwha at each bend. The river has its own spirit. It is addressed in prayer and oratory as having a

> life form of its own. The spirits of ancestors are said to mingle and move with its currents." (at 72)

This type of consideration could so overshadow water right applications of farmer applicants, such as the second respondents, that it would become nigh on impossible for them to satisfy a Regional Water Board or the Planning Tribunal that detriments of that type would not arise.

SUBMISSIONS ON THE ONUS UPON THE APPLICANT

Counsel for the appellant contended, on the authority of Auckland Acclimatisation Society Inc v Sutton Holdings Ltd, supra, that an application for the grant of a water right is an application for a privilege as is further demonstrated by the decision of the Town and Country Planning Appeal Board in C E Stanley v South Canterbury Catchment Board, supra, where it was stated that long standing farming practices may have to yield to the public interest, such as requiring a farmer to accept a piped supply of water instead of drawing water from a stream on his property. Counsel submitted that because a water right is a privilege, there is an onus on an applicant to satisfy the Planning Tribunal that the benefits of the right outweigh its detriment and there is no similar onus on an objector to demonstrate detriment. Reference was made to Annan v National Water & Soil Conservation Authority (1982) 9 NZTPA 369 where the

Tribunal disallowed an application for the building of a high dam which would cause valuable land to be flooded because there was insufficient evidence that a second aluminium smelter was likely to be built at Aramoana. Moreover, it was submitted, the Planning Tribunal has an independent obligation under the Water Act to ensure the public interest favours the granting of the application; the primary tribunal and the Planning Tribunal on appeal do not simply adjudicate between the parties as in civil litigation; this flows from the nature of the application (for a Crown privilege) and is made explicit by the particular powers conferred upon the Boards which use their own expertise. Section 24(6) empowers the Boards to require the attendance of any person whose evidence might assist while section 24(11) gives the Boards the powers of a Commission of Inquiry and section 150 of the Planning Act gives the Planning Tribunal the same powers.

In the present case the Planning Tribunal stated that it was encumbent upon the appellant, as objector, to call evidence alleging "detrimental effects to water quality arising from this proposed discharge" and that, without evidence to the contrary or reason to doubt the evidence it received from the first respondent's officer, it was obliged to accept his evidence. Counsel for the appellant submitted that the burden of proof on an appellant does not arise because the Planning Tribunal has to be satisfied that it is a proper case to grant a privilege to an applicant. In this case the approach of

the Tribunal was contrary to the scheme of the Water Act which places a heavy responsibility on the Tribunal; the fact that the appellant adduced no evidence is irrelevant.

Counsel contended that it was a wrong approach for the Planning Tribunal to reach the point of satisfaction about the benefits in a proposed water use unless it finds the evidence compelling in regard to detriments : on a matter upon which the Tribunal must be satisfied pursuant to section 21(3A) in regard to classified water, it is not sufficient to accept an opinion expressed by a witness, the officer of the first respondent, because it has "no evidence to the contrary, and no reason to doubt him on this".

Counsel submitted that, whether or not there was evidence on which the Planning Tribunal could have been satisfied on section 21(3A) matters, the ultimate issue for determination was whether the benefits of the right sought outweighed its detriments. It was submitted that the Tribunal appeared to have relied entirely on the irrelevant fact that the second respondents were presently discharging effluent without authority: an application for the grant of a water right should be measured in terms of its own merit. Since there is no right to continue the unauthorised discharge, it cannot be a factor favouring the making of a grant. Counsel submitted that an assumption of its relevance is tantamount to an assumption that there is a right to discharge waste, subject to

standard controls aimed at ensuring that section 21 (3A) matters are taken into account whereas, by section 26(H)(1), section 21(3A) is concerned with minimum standards. See Rangiora Borough v North Canterbury Catchment Board (1974) 5 NZTPA 129 at 134 where the Town and Country Planning Appeal Board said:-

> "But because a classification is a declaration of a minimum standard of water quality it is proper, on the grant of a right to discharge waste, to impose conditions which have the effect of requiring something more than the mere maintenance of that minimum standard, if the attaining of the objects of the Act and the circumstances of the case so require. That was in fact done in the case of Mahuta v National Water and Soil Conservation Authority (1973) 5 NZTPA 73."

It was submitted that in the present case, the Planning Tribunal did not, in terms of its consideration, get past regularising the unauthorised discharge in considering the benefits to arise from the grant of the right. Although the use of natural water to carry away waste is recognised by the Act, there is no presumption in favour of that use. Is was said in Mahuta:-

> "The Waikato River system is important nationally. The uses of the river water are well known. They include hydro-electricity generation, public and industrial water supply, waste disposal and recreation. The river supports a considerable wildlife population." (at 77)

It was also recognised in that case that the River will eventually be drawn upon to supplement the public water supply to Metropolitan Auckland. In Auckland

Acclimatisation Society v Sutton Holdings Ltd (supra) the Court of Appeal held that all criteria are of equal value with no presumption applied to any one of them.

On the basis of the statements made in Mahuta counsel observed that it is clear that the Waikato Valley river system is under pressure. It was submitted that, in those circumstances, no assumptions as to appropriate use are warranted; applications for use need to be measured against the alternatives such as alternative methods of dairy shed effluent disposal. In another context, (as already noted), the Planning Tribunal has held that farming methods may have to be changed, in the public interest (C E Stanley v South Canterbury Catchment Board (supra).

Counsel for the appellant contended that the for foregoing reasons the Planning Tribunal misdirected itself in terms of its functions and failed properly to address the public interest aspect of the application and the objection. In particular:-

(a) It placed significance upon the fact that the evidence adduced by the second respondents was not challenged by cross-examination or evidence in rebuttal.

(b) It accepted evidence on matters it was required to be satisfied about pursuant to

section 21(3A) on the basis that there was no reason to doubt the evidence.

(c) It took into account an irrelevant consideration when, in evaluating the benefits flowing from a grant of the application, it weighed in the balancing exercise the fact that the second respondents were discharging untreated effluent illegally.

The contrary submissions of counsel for the first respondent on this part of the appeal were summarised when I dealt with the first branch of the appellant's case.

Counsel for the second respondents in opening his submissions referred to the unfortunate position in which the second respondents have found themselves; they had purchased a dairy farm in good faith not appreciating that the first respondent was carrying out a programme to control previously uncontrolled farm land discharges into the river system, of which there are a large number, that they had immediately, and at their cost, complied with the requirements of the first respondent, they made an application which they understood would be granted without any call upon them to support it because they agreed to the proposed treatment system and the conditions sought and they understood their application would be processed by the first respondent. It was for that reason they did

not appear when the application was heard by the tribunal appointed by the first respondent nor at the first call of the appeal before the Planning Tribunal. They were called upon at the last minute to instruct counsel and now find themselves in the middle of litigation of some constitutional importance. When Mr Bowater gave evidence at the appeal hearing he was able to speak about the apparent clarity of the effluent, about the Maori person who grew watercress in the effluent and about the physical aspects of his proposed treatment system. The technical evidence was given by an officer of the first respondent. Two preliminary points were made by counsel. The first was that the provisions of sections 21(3A) and 26(H) are important because they provide minimum standards for this Class D classified water and for conditions to ensure compliance with the result that, in the circumstances of this case, the issue is not so much whether or not the water right should have been granted but whether or not conditions could be imposed to satisfy the classification requirements in a reasonable and practicable way. The second point was that the Planning Tribunal did have evidence from Mr Bowater and an officer of the first respondent the material parts of which are recorded in the decision of the Tribunal : this Court should concentrate upon the evidence there recorded and not upon issues about which no evidence was given.

Adverting to the appellant's case, counsel for the second respondents relied upon the benefit detriment

balancing test in Keam and in particular upon the direction of Cooke J that a weighing of advantages and disadvantages is not required if there are no significant disadvantages. He submitted that in the present case the benefits lay in treating otherwise untreated effluent, which is a common feature of applications for the grant of water rights. Moreover, it is not necessary to look for alternative methods of effluent disposal because the Water Act provides for the very type of grant in issue here which should be, and was in fact and in law, dealt with on its merits. Furthermore, the Act does not deny finding practical commonsense ways of purifying existing unauthorised discharges. Counsel submitted that in applying the Keam approach the Planning Tribunal properly rejected metaphysical factors and properly applied the criteria of the Water Act and the principle that there is no presumption of a preference for any of the criteria. Given that there is no presumption of a preference in the criteria, counsel submitted that it suffices for an applicant for the grant of a water right to establish a benefit arising from the grant; that is sufficient for the Regional Water Board, or the Planning Tribunal on appeal, to make the grant; only where a detriment is shown on the evidence is there a requirement to balance the benefit and the detriment.

It was submitted that in the present case the evidence established that compliance with the conditions in regard to treatment would produce a satisfactory

discharge: there was no countervailing evidence. Counsel observed that it must be to the benefit of receiving waters that effluent from an existing discharge is given purifying treatment, that the appellant supplied no evidence of detriment to the river system or to the quality of the water by the conditional grant and, moreover, raised spiritual and cultural issues by way of submission only. Unlike Te Weehi v Regional Fisheries Officer, supra, where evidence was given to the point in issue - Maori fishing rights -, there was no evidence at all in the present case about Maori cultural and spiritual values in relation to anything; there was no evidence about how a private discharge from a small farm some distance from the tributary and the River would affect the spiritual and cultural value of the waters. Counsel submitted that there is a certain irony arising from the efforts of the second respondents, which have been directed at benefitting the quality of the receiving waters, and the continuing objection by the appellant, notwithstanding Mrs Minhinnick's concession that bringing the presently uncontrolled discharge under control by the grant of a water right in fact benefits the quality of those same receiving waters.

Counsel for the second respondents concluded his argument on the case with the submission that, in the absence of clear statements in the legislation, this Court may be seen to be legislating rather than interpreting and applying the Water Act if it adds spiritual values to the criteria hitherto accepted as relevant.

THE TREATY OF WAITANGI

The Treaty of Waitangi was signed by Lieutenant-Governor William Hobson, on behalf of Her Majesty Queen Victoria on 6 February 1840. 39 Maori chiefs signed the English version. Over 500 signed the Maori version. Putting aside the consensus ad idem argument as to what exactly was agreed by both sets of parties, the English and Maori versions of Article The Second read:

"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."

"KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wahaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona."

The Maori version translates into English as:

> "Here's the second: Here's the Queen of England arranges and confirms to the chiefs, to all the men of New Zealand the entire chieftainship of their lands, their villages, and all their property.
>
> But here's the chiefs of the Assemblage, and all the chiefs besides, yield to the Queen the buying of those places of land where the man whose land it is shall be good to the arrangement of the payment which the buyer shall arrange to them, who is told by the Queen to buy for her." McLintock, Crown Colony Government in NZ (1958) 416.

Another translation is:

> "This is the second. The Queen of England agrees and consents [to give] to the Chiefs, the Hapus, and all the people of New Zealand the full chieftainship [RANGATIRATANGA] [of] their lands, their villages, and all their possessions but the Chiefs of the Confederation and all the other Chiefs give to the Queen the purchasing of those pieces of land which the owner is willing to sell, subject to the arranging of payment which will be agreed to by them and the purchaser who will be appointed by the Queen for the purpose of buying for her." (Professor J Rutherford)

The Waitangi Tribunal, empowered by s 5(2) of the Treaty of Waitangi Act 1975, to have exclusive authority, in exercising any of its functions under the section, to determine the meaning and effect of the Treaty, has translated the crucial passage:

> "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa"

literally as:

> "the highest chieftainship of their lands homes and prized possessions." Finding of the Waitangi Tribunal on the Manukau Claim 91

The crucial word "taonga" was interpreted by the Waitangi Tribunal (supra at 96):

> "'Taonga' means more than objects of tangible value. A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga. We accept the contention of Counsel for the claimants that the mauri of the Waikato River is a taonga of the Waikato tribes. The mauri of the Manukau Harbour is another taonga."

The English version of the Preamble to the Treaty specifically states the Crown is anxious to protect Maori rights and property:

> "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 authorize 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."

In addition Article The Third of the English and Maori versions provide:

> "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."

> "KO TE TUATORU
>
> Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani."

When rendered into English and the Maori version reads:

> "Here's the third: This, too, is an arrangement in return for the assent of the Governorship of the Queen. The Queen of England will protect all the native men of New Zealand. She yields to them all the rights, one and the same as her doings to the men of England." McLintock, supra, 416

Another translation is:

> "This is the third. This is the arrangement for the consent to the governorship of the Queen. The Queen will protect all the Maori people of New Zealand, and give them all the same rights as those of the people of England." (Professor J Rutherford)

The combined effect of the promises in the Preamble and Articles The Second and The Third have been interpreted by the Waitangi Tribunal:-

> "The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them. The possessory guarantees of the second article must be read in conjunction with the Preamble (where the Crown is "anxious to protect" the tribes against the envisaged exigencies of emigration) and the Third Article where a "royal protection" is conferred. It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights." Finding of the Waitangi Tribunal on the Manukau Claim, supra, at 95.

What was said in respect of fisheries in that case could apply equally to water in this case (supra at 95):

> "The protection of fisheries must accord with the Maori perception of those fisheries. It must be recognised that those disruptions of fisheries that offend cultural or spiritual values, as for example the discharge of animal wastes to the waters of the fishery is as offensive as a physical disruption that reduces the quantity or quality of the catch. The guarantee of undisturbed possession or of rangatiratanga means that there must be a regard for the cultural values of the possessor."

THE STATUS OF THE TREATY OF WAITANGI

The Treaty of Waitangi contains promises which the Crown is obliged to perform, in exchange for legal accession to the territory. Putting aside the question whether the treaty was one of cession or not, on its face, the treaty imposes obligations on the Crown vis a viz the Maori people to act in accordance with the Treaty. Whether one sees the Treaty as a bilateral agreement recognising the rights of the tangata whenua (the original people here) in exchange for kawanatanga ("governorship" or in the English version "sovereignty") or as a unilateral declaration of a sovereign nation's intention to be bound, the Treaty has a status perceivable, whether or not enforceable, in law. In the Kauwaeranga Judgment (1870) reprinted (1984) 14 VUWLR 227, 242, Chief Judge Fenton said:

> "There is probably no case of a colony founded in precisely the same manner i.e. by contract with [Maoris], the Crown of England obtaining the sovereignty or high domain, and confirming and guaranteeing to the aborigines the useful domain or the use and possession of all the lands."

Even in the judgment of Prendergast CJ in Wi Parata v The Bishop of Wellington, supra, which took the view that the Treaty was a nullity, the Chief Justice said at 78-79:-

> "So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, jure gentium, vested in and devolved upon the Crown under the circumstances of the case . . . . [T]he Sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the native title, assumes on the other hand the correlative duty, as supreme protector of the aborigines, of securing them against any infringement of their right of occupancy . . . . The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation."

This accords with earlier authority. In R v Symonds (1847) NZPCC 387, 391 Chapman J affirmed the obligations upon the Crown arising under the Treaty in respect of customary land rights when he said:-

> "The legal doctrine as to the exclusive right of the Queen to extinguish the Native title, though it operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the Natives to deal among themselves, as freely as before the commencement of our intercourse with them, is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. But this necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible from the evil consequences of the intercourse to which we have introduced them or have imposed upon them."

The Court of Appeal In re "The Lundon and Whitaker Claims Act 1871" (1872) 2 NZCA 41 re-asserted the Crown's "solemn engagements":-

> "The Crown is bound both by the common law of England and by its own solemn engagements to a full recognition of Native proprietary rights. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands." (at 49)

In Mangakahia v The New Zealand Timber Company Ltd (1881) 2 NZLR (SC) 345, a case which concerned the character of a memorial of ownership granted to native owners under the Native Lands Act 1873, Gillies J refused (at 350) to accept the proposition that the Treaty was a simple nullity:-

> "Theoretically the fee of all lands in the colony is in the Crown, subject nevertheless to the "full, exclusive and undisturbed possession of their lands", guaranteed to the natives by the Treaty of Waitangi which is no "simple nullity", as it is termed in Wi Parata v The Bishop of Wellington ..."

In Nireaha Tamaki v Baker (1901) NZPCC 371 at 373; [1901] AC 561 the Privy Council took the view that the Lands Claim Ordinance 1841 which declared the title of the Crown subject to the "rightful and necessary occupation and use" of the Maori inhabitants:

> ... was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself however be sufficient to create a right in the Native occupiers cognizable in a Court of Law."

To a submission made in reliance upon Wi Parata v Bishop of Wellington, supra, that, in respect of a native title not extinguished according to law, there is no customary law of the Maoris of which the Courts of law can take cognizance the Judicial Committee said:-

> "... this argument goes too far, and ... it is rather late in the day for such an argument to be addressed to a New Zealand Court." (at 382)

In Mueller v Taupiri Coal Mines (1900) 20 NZLR 89 (CA) Edwards J took the view that the Treaty did not deny proprietary rights to the Maori people but rather guaranteed them. In so doing, there was a presumption that the Crown would properly respect its obligations as had been done by the whole of the legislation relating to Native lands. He cited (at 123) a passage from the judgment of Prendergast CJ in Wi Parata (at 78) where it was said:-

> "Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect and cause to be respected all Native "proprietary rights"."

Edwards J (at 123) considered that Gillies J had misinterpreted the "simple nullity" remark of Prendergast CJ.

> "This passage simply denies any operation to the treaty as a cession of the sovereignty : it does not deny that it declared the existence of the proprietory rights of the Natives, although it puts those rights upon a higher footing than if they stood upon the treaty alone."

In Hohepa Wi Neera v The Bishop of Wellington (1902) 21 NZLR 655, 670 the Court of Appeal accepted the view of the Privy Council in Nireaha Tamaki v Baker (supra) that the Lands Claims Ordinance 1841 "was a legislative recognition of the rights guaranteed by the Crown by the Treaty of Waitangi".

In Wallis v Solicitor-General (1903) NZPCC 23 the Privy Council upheld the cy-pres doctrine in respect of a gift of the land the subject of the Wi Parata litigation for a charitable purpose which did not eventuate. In the course of the judgment the Committee said (at 26):-

> "As the law then stood under the treaty of Waitangi, (i.e. the time of the gift), the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased, subject only to a right of pre-emption in the Crown. It was not until 1852 that it was made unlawful for any person other than Her Majesty to acquire or accept land from the Natives : New Zealand Constitution Act, 1852, c. 72, s 72."

In Baldick v Jackson (1910) 30 NZLR 343; (1910) 13 GLR 398 Stout CJ held inapplicable to New Zealand a statute of Edward II claiming the right to whales as part of the Royal Prerogative. Recognising the significance of both the common law and the Treaty of Waitangi the Chief Justice said at (344-345):-

> "... it would have been imposible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interferred with - they were to be left in undisturbed possession of their lands, estates, forests, fisheries etc."

In Tamihana Korokai v Solicitor-General, which involved a claim to the bed of lake Rotorua, the Court of Appeal determined that whatever rights were conserved to the Maoris by the Treaty of Waitangi they were fully recognised by the Native Lands Act 1862, an Act which recited the Treaty and was enacted with the specific purpose of giving effect to it. (See Edwards J at 351).

In Waipapakura v Hempton (1914) 33 NZLR 1065 a full Court followed Wi Parata v The Bishop of Wellington and Nireaha Tamaki v Baker in coming to the conclusion that, unless statutorily recognised, Maori fishing rights were incapable of recognition in a Court of law; the Treaty was not of itself sufficient to create such rights cognizable in a Court of Law. The Privy Council took a similar view in Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308 where it observed:-

> "It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law." (at 324)
>
> "As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native

> lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments." (at 327)

In Inspector of Fisheries v Weepu [1956] NZLR 920 FB Adams J accepted that the Treaty of Waitangi preserved customary rights so long as they were unextinguished:

> "Giving the matter the best consideration I can, I am satisfied that "existing Maori fishing rights" includes, if it does not mean, customary fishing "rights" (including rights incidental to customary ownership of the lands on which the fishing is done) that are for the time being within the protection of the Treaty of Waitangi. The expression may or may not include the fishing rights of Maori freeholders as such in respect of lands that were formerly their customary lands - a point on which I express no opinion. But, in my opinion, its meaning goes no further, and rights once protected by the Treaty but which have become merged in a freehold title not vested in the parties claiming the rights, are not saved by s 77(2), and are subject to both Parts of the Act." (at 923)

In both In re the Bed of the Wanganui River, supra, and In re Ninety Mile Beach, supra, the Court of Appeal addressed claims for Maori ownership of land - viz, to the bed of the Wanganui River and to the foreshore of the Ninety Mile Beach between mean high and mean low water mark. In the first case the investigation of title and issuing of separate titles under the relevant legislation and in the second case investigation of title under the relevant legislation had the effect, so it was held, of extinguishing customary rights. In the first case, adverting to the Treaty, Turner J said:-

> "Upon the signing of the Treaty of Waitangi, the title to all land in new Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom. This obligation, however, was akin to a treaty obligation, and was not a right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty of Waitangi itself. The process of recognition and guarantee was carried into effect by a succession of Maori Land Acts." (at 623)
>
> "The clear result appears to me to be that the titles resulting from the investigation of successive riparian areas were titles with all the incidents of English freehold riparian rights ..." (at 624)

In the latter case, following a similar theme, North J said (at 473):-

> "I am of the opinion that once an application for investigation of title to land having the sea as one of its boundaries was determined, the Maori customary communal rights were then wholly extinguished. If the Court made a freehold order or its equivalent fixing the boundary at low-water mark and the Crown accepted that recommendation, then without doubt the individuals in whose favour the order was made or their successors gained a title to low-water mark. If, on the other hand, the Court thought it right to fix the boundary at high-water mark, then the ownership of the land between high-water mark and low-water mark remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi."

In Keepa v Inspector of Fisheries [1965] NZLR 322 the Court considered the issue of Maori customary rights preserved under the Treaty of Waitangi. Hardie Boys J held that customary Maori fishing rights were extinguished when title was granted or a freehold order was made in

respect of land bordering the sea at that place. The Judge referred to the Privy Council decision in Nireaha Tamaki v Baker where, in interpreting the meaning of words in a section of the Native Rights Act 1865 which recognised Maori rights under the Treaty of Waitangi, the Judicial committee said (at 383) (quoted at 324):

> "... the Supreme Court [is] bound to recognise the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law . . ."

That citation caused the Judge to reflect that the issue before him was a troublesome one because the dictum would apply to a fishery proved to exist before the Treaty. He said (at 328):

> "The point which caused me difficulty is therefore answered in dealing with the main contention. The point of time when any customary fishing rights on the foreshore between high and low water mark at a particular place (if ever they existed) are extinguished, is when title is granted or a freehold order made in respect of the land bordering the sea at that spot. Thereafter the Maori has no greater fishing rights than his pakeha neighbour."

In the recent case of Te Weehi v Regional Fisheries Office, supra, Williamson J was faced with the question whether or not section 88(2) of the Fisheries Act 1983, (which is plainly derived from Article The Second of the Treaty of Waitangi) provided a defence to an alleged fishing offence. Section 88(2) reads:

> "Nothing in this Act shall affect any Maori fishing rights."

This subsection recognises Maori rights protected under Article The Second of the Treaty, and guaranteed by it. The Judge applied the previously cited dictum of Stout CJ in Baldick v Jackson, supra, in coming to the conclusion that customary rights retained by Maori tribes under the Treaty of Waitangi remain in being and are enforceable unless specifically and explicitly extinguished. Statutory protection was not necessary to preserve such rights (see at 123).

This review of the authorities invites the conclusion that the Treaty is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the Courts by virtue of the Treaty itself. Notwithstanding the more general observations of Williamson J in Te Weehi v Regional Fisheries Officer, supra, to the effect that customary rights retained by the Maori tribes under the Treaty of Waitangi remain in being and are enforceable unless speficially extinguished, it was a case in which New Zealand municipal law specifically recognised the fishing rights in issue "Nothing in this Act shall affect any Maori fishing rights". The prosecution was based on the Fisheries Act 1983. The defendant was able, by calling relevant evidence, to bring himself within the exception provided for in section 88(2) because he was exercising a Maori fishing right. Te Weehi aside, the authorities also show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect

recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976 both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand Society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

AIDS TO STATUTORY INTERPRETATION

The New Zealand Courts have on occasions shown willingness to look at Acts of Parliament on a cognate subject matter basis so that the interpretation of a given Act is kept in harmony with the general public policy of other similar legislation.

Several Acts may be held to form a comprehensive statutory scheme especially where they are expressly linked; Rotorua District Council v Bay of Plenty Catchment Commission [1979] 2 NZLR 97 and R v Menzies [1982] 1 NZLR 40 (CA).

The Water Act is expressly linked to the Planning Act by section 4 of the latter:-

> "4. Purpose of regional, district, and maritime planning - (1) Subject to section 3 of this Act,

> regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, of every part of the region, district, or area.
>
> (2) The general objectives of regional, district, and maritime schemes shall be to achieve the purposes specified in subsection (1) of this section.
>
> (3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967."

Both specifically and generally the Planning Act gives recognition to Maori concerns. Section 3(1)(g) directs that in the preparation, implementation and administration of regional, district, and maritime schemes "the relationship of the Maori people and their culture and traditions with their ancestral land" is to be recognised and provided for as a matter of national importance. More generally the section also directs other matters to be recognised as matters of national importance such as "The conservation, protection, and enhancement of the physical, cultural and social environment" (subsection (a)), "The wise use and management of New Zealand's resources" (subsection (b)), "The preservation of the natural character of the coastal environment, and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development" (subsection (c)), "The avoidance of encroachment of urban development

on, and protection of, land having a high actual or potential value for the production of food "(subsection (d)) and "The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities" (subsection (f)). Maori values would seem to be catered for in these matters of declared national importance and also in section 4 (1) and (2). The first schedule to the Act, which lists matters to be dealt with in regional schemes, makes provision, in paragraph 9, for regional cultural facilities and amenities including "Marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses". Also the second schedule, which lists matters to be dealt with in district schemes, makes provision in a general way for "social, economic, spiritual, and recreational opportunities and for amenities appropriate to the needs of the present and future inhabitants of the district, including the interests of children and minority groups" and for "The relationship between land use and water use" (paragraph 9) while specific provision is made for "marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses" (paragraph 3).

Within the Planning Act there is, therefore, a significant degree of statutory material to preserve Maori values. The enlightened decision of the Planning Tribunal in Auckland District Maori Council v Manukau Harbour Maritime Planning Authority, supra, involving the LPG wharf terminal at Onehunga is an illustration of how the

Tribunal approaches Maori values in terms of the Planning Act. The Planning authority is the ultimate judicial authority in regard to matters within its jurisdiction under the Planning Act and the Water Act, subject only to the determination of questions of law by the High Court and the Court of Appeal.

There is room for the view that the two Acts, and if there is added the Soil Conservation and Rivers Control Act 1941, the three Acts comprise a comprehensive statutory scheme which exhibit a general public policy available in the interpretation of any one of them. Thereis no need for the statutes to be expressly linked. An example in that category is Christchurch City Corporation v Malvern County [1975] 1 NZLR 660. The express terms of one statute may provide a useful analogy for the interpretation of another statute in order to ensure that the two statutes are consistant. Weir v Hellaby Shortland Ltd [1975] 2 NZLR 204.

In Auckland Acclimatisation Society Inc v Sutton Holdings Ltd, supra, the Court of Appeal recognised that the Planning Act and the Water Act must operate in conjunction as they were complimentary to each other:-

> "In general the Planning Act controls land use, the Water Act water use. Both sets of controls have to be complied with. Section 4(3) of the Planning Act, by requiring regard to be had to the principles and policies of the Water Act, recognises that they must operate in conjunction." (Cooke J at 100)

The Court recognised the need to balance the advantages and disadvantages of proposals and reviewed that process:-

> "For us the main difficulty arising from the case stated appeal is how to dispose of the case in the light of the revised answers to the questions asked. What was required of the Tribunal, when in effect hearing the water right applications de novo under s 25, was a weighing of the advantages and disadvantages of the proposals. (In that process the Tribunal were entitled to give weight to the conclusions of the Waikato Valley Authority, but were in no way bound by them.) In principle the same kind of balancing exercise - easy enough to state, hard enough to perform - was called for as was approved by this Court in Keam v Minister of Works and Development [1982] 1 NZLR 319 (preserving thermal area or allowing geothermal water to be extracted for testing and possible industrial use) and as was directed by the High Court in Metekingi pp Atihau-Whanganui Incorporation v Rangitikei-Wanganui Regional Water Board [1975] 2 NZLR 150 (preserving farm land or artificial lake for electricity generation) and in Gilmore v National Water and Soil Conservation Authority (1982) 8 NZTPA 298 (orchards or inundation for electricity). The Tribunal has shown its ability to accomplish these exrecises with impartiality and expertise in Keam 7 NZTPA 11, Metekingi 5 NZTPA 340, Annan 7 NZTPA 417, 8 NZTPA 369, and other cases." (Cooke J at 101)

There is a strong implication in the judgment (at 99) that the grant of a water right is a privilege. In Keam it was in effect held that, except in a case where there is no reasonable possibility of a disadvantage, the onus was on the applicant to satisfy the primary tribunal and the Planning Tribunal on appeal that the benefits of the right would outweight the detriments. Implicitly there is no similar onus on the objector to demonstrate detriment.

A statute may be invoked by a Court in interpreting the scope of another statute or a common law rule even though the statute in question is not directly related. See Erven Warnick BV v J Townend & Sons (Hull) Ltd, Fletcher Timber Ltd v Attorney-General and R v Uljee all previously discussed in his judgment.

In the Fletcher Timber case, concerning the extent of public interest immunity, the Court of Appeal refused to follow a decision of the House of Lords. One of the grounds was the contemporary movement towards open government in New Zealand:-

> "This has found statutory expression in the Official Information Act 1982 which states as the first of the purposes expressed in its long title that it is "an Act to make information more freely available"." (Woodhouse P at 296)

Similarly in R v Uljee, in a case concerning client-solicitor privilege, the Court of Appeal noted that Parliament had expressly provided for absolute privilege in some regards under the Inland Revenue Department Act 1974, and the Misuse of Drugs Amendment Act 1978. The rule reflected "important public purposes" (at 571) recognised by statute and indicated a general public policy.

The Treaty of Waitangi Act 1975 provides for the observance and confirmation of the Treaty's principles by establishing the Waitangi Tribunal to inquire into and make recommendations upon any claim by a Maori that he, or

a group of Maoris of which he is a member, is likely to be "prejudicially affected" by any legislative or Crown act, policy or practice inconsistent with the principles of the Treaty (section 5(1)(a) and section 6). Section 6 has retrospective effect to 6 February 1840. For the purposes of the Act the Waitangi Tribunal has "exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them" (section 5(2)). In the case of a well-founded claim the Tribunal has the power to recommend to the Crown that action be taken to compensate for or remove the prejudice and to prevent other persons from being similarly affected in the future. The recommendation may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take (section 6(3) and (4)). This statutory recognition of the Treaty, as part of the fabric of New Zealand society, is further enhanced by the preamble and by the definition of the word "Treaty" which means the Treaty of Waitangi as set out in English and in Maori in the first schedule. The preamble states:-

> Whereas on the 6th day of February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand: And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles."

The Acts Interpretation Act 1924, section 5(h) deems a Schedule to an Act, to be part of that Act. Section 5(e) states that the preamble of every Act is deemed to be part of that Act, and is intended to assist in explaining the purport and object of it. If a proper case arises for examining the long title, the long title to the Treaty of Waitangi Act states:-

> "An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty."

The long title to the Water Act, which can be invoked in aid of interpretation if the particular section requiring interpretation is ambiguous, reads:-

> "An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams, and lakes."

In regard to the interests of a person or of the public generally in "natural water" a declared purpose of the Act is "to make better provision" for the "conservation, allocation, use and quality" of that

water. The phrase "conservation, allocation, use and quality" is not necessarily confined to physical characteristics, just as other aspects of the long title refer to aesthetic considerations which are not necessarily confined to metaphysical considerations. Moreover, the Act is for the "promoting and controlling [of] multiple uses of natural water". Thus, if it is legitimate to take account of metaphysical considerations, water may be simultaneously used for physical and metaphysical purposes. That the Courts can cope with metaphysical considerations is illustrated by the 1925 Privy Council judgment in Mullick v Mullick, supra, in which a Hindu idol was held to be a "juristic entity" capable of suing and being sued.

In Keam v Minister of Works and Development, supra, where the Court of Appeal upheld a decision of the Planning Tribunal designed to preserve the scenic and natural features of the Waimangu thermal area, Cooke J said:-

> "As to the criteria to be applied on an application, the 1967 Act, while profuse in its long title and its enumeration in ss 14 and 20 of the functions and powers of the Authority and the Regional Boards, does not specify any list of relevant considerations for deciding applications under ss 23 or 24 and appeals thereafter. There are in s 21(3A) express requirements concerning rights to discharge into natural water that has been classified, but they do not affect the present case. Parliament has pointedly refrained from tying the hands of the administering tribunals by hard-and-fast requirements. Clearly it would be wrong for the Courts to do so. But to give effect to the broad purposes of the legislation, general working rules or guidelines

> can be evolved, as long as they are not elevated into something inflexible.
>
> It is as a useful general test of that kind that I understand the Planning Tribunal's proposition in its decsion in this case that any proposed use of natural water should be a beneficial use, and that the loss which might follow from the taking of the water should be weighed against the benefit which will result from its use. In cases where some adverse effect may follow from the exercise of the right applied for, during the term of the grant, the kind of balancing envisaged by the Tribunal appears to be only a matter of common sense and thoroughly in accord with the purposes of the Act." (at 332)

Just as the criteria to be applied on an application under section 21 are unspecified, other than in the limited terms of subsection (3A), so the grounds upon which a person may lodge an objection are indefinite:-

> "The Authority, Board, public authority, or person may, at any time within 28 days after the date of the public notification of any such application, lodge with the Board an objection to the application on the ground that the grant of the application would prejudice its or his interests or the interests of the public generally. (Section 24(4))

Simply put, the objector must be prejudiced in some way, whether his own interests are prejudiced or those of the public generally. Section 24(4) was considered by Cooke J in Metekingi v Regional Water Board, supra,:-

> "In the present case the appellants claimed that the grant of the application would prejudice their interests and the interests of the public generally. Prima facie they had statutory rights to be heard and to appeal. I am prepared to accept, as were counsel for the appellants, that if their submissions or evidence plainly had no connection with the purposes of the Act, the

> special tribunal and the appeal board would not be bound to hear them. Such an interpretation would avoid a manifest and gross absurdity. But I do not think that any further implied limitation could reasonably be suggested." (at 156)

> "... the rights of objection and appeal given by the material sections of the 1967 Act are extraordinarily wide." (at 156)

The question is whether or not section 24(4) can embrace an objection on the ground that discharge of cowshed effluent prejudices one's interest in the spiritual value of a river or the interests of the public generally in that spiritual value. Customs and beliefs are capable of being established on evidence by the courts. See Mullick v Mullick (1829), Nireaha Tamaki v Baker (1901), Mullick v Mullick (1925), Public Trustee v Loasby (1908), and Te Weehi v Regional Fisheries Officer (1986) all previously referred to.

The Privy Council decision of Nireaha Tamaki involved the interpretation of a statute which recognised customary Maori rights guaranteed by the Treaty of Waitangi, Lord Davey said (at 382):-

> "It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence."

In Public Trustee v Loasby the issue was whether the costs of a tangi could properly be paid out of the estate of a deceased Maori chief. A test as to how a

Court could establish a Maori custom founded on immemorial usage was prescribed by Cooper J:-

> "In considering a question of this nature, dealing with the ancient customs still followed by a race like the Maori people, no decisions in the English courts can be directly in point. One has to consider, I think, three things - 1. The question of fact whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Maori race; and this I find to be proved. 2. Is the custom contrary to any statute of law of the Dominion? The answer is, No statute has forbidden it. 3. Is it reasonable, taking the whole of the circumstances into consideration?" (at 806)

Cooper J found assistance in the judgment of the Privy Council in Mullick v Mullick (1829). That case concerned how much could be reasonably spent on obsequies and religious acts in accordance with the wishes of a Hindu testator. Lord Wynford said:-

> "The interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government; and no person can be happy whose religious feelings are not respected." (at 247)

Thus it may be said that customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence. In that regard a warning note is found in the judgment of Turner J in Re The Bed of the Wanganui River, supra:-

> "... the Judges of the Maori Appellate Court seem to me to have made a proper distinction (to use their own words) between practical realism and

> mere symbolism in the conclusions of fact to which they came. Mr Spratt's references to the mana of the Wanganui River were indeed moving; but I cannot find in the evidence, as contrasted with the persuasive eloquence of counsel, any facts which lead towards the conclusion that the Wanganui Maoris or any section of them ever regarded the ownership of this river bed as a matter distinct and separate from the ownership of its banks." (at 626)

International instruments, whether they be conventions, covenants, declarations or treaties, may be used as aids in the interpretation of statutes. See Police v Hicks [1974] 1 NZLR 763, 766, Van Gorkom v Attorney-General, supra, at 542, 543 per Cooke J, Levave v Immigration Department [1979] 2 NZLR 74, 79, King-Ansell v Police [1979] 2 NZLR 531, 536 per Woodhouse J and at 541 per Richardson J, Ashby v Minister of Immigration, supra, and Department of Labour v Latailakepa [1982] 1 NZLR 632, 635-636.

In Ashby v Minister of Immigration one of the arguments turned on the interpretation of section 14(1) of the Immigration Act 1964. The Court held that because the section was plain and unambiguous there could be no recourse to the International Convention On The Elimination Of All Forms Of Racial Discrimination of 1965 to which New Zealand was a party by ratification. Cooke J said (at 229):-

> "It has been increasingly recognised in recent years that, even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting

> legislation will do their best conformably with the subject-matter and the policy of the legislation to see that their decisions are consistent with our international obligations. . . . . But if the terms of the domestic legislation are clear and unambiguous they must be given effect in our Courts whether or not they carry out New Zealand's international obligations."

Both Cooke and Richardson JJ cited the dissenting judgment of Scarman LJ in Ahmad v Inner London Education Authority, supra, as authority for resorting to such extrinsic sources in a proper case:-

> "Today, therefore, we have to construe and apply section 30 not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on grounds of race, religion, colour of sex. Further, it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations." (at 583)

Similarly in Van Gorkom v Attorney-General Cooke J, concluding that removal expenses for teachers provided by the conditions laid down by the Minister of Education pursuant to regulation 16(9) of the Education (Salaries and Staffing) Regulations 1957 were discriminatory against women, referred to the Universal Declaration Of Human Rights 1948 and the Declaration On Elimination Of All Forms Of Discrimination Against Women 1967. Finding that the conditions did not accord with the

spirit of the United Nations declarations he said (at 543):-

> "Obviously these very general statements are not directed specifically to such narrow questions as removal expenses. Nor are they part of our domestic law. They represent goals towards which members of the United Nations are expected to work. But, in relation to certain social rights enunciated in the United Nations Universal Declaration of Human Rights, the opinion is expressed in 8 Halsbury's Laws of England (4th ed) para 844:
>
> > "They may be regarded however as representing a legislative policy which might influence the courts in the interpretation of statute law."
>
> Adopting that approach, I think that the discrimination against married women in the general conditions does not accord with the spirit of the United Nations declarations."

This conclusion was reached notwithstanding that the New Zealand Government had not ratified the Equal Pay Remuneration Convention 1951 of the International Labour Organisation.

In Department of Labour v Latailakepa Richardson J, interpreting a 1980 amendment to the Criminal Justice Act 1954 prohibiting retrospective imposition of criminal liability, referred to the Covenant on Civil and Political Rights 1966 which had been ratified by the New Zealand Government and also to the Declaration of Human Rights 1948, and the European Convention for the Protection of Human Rights and Fundamental Freedom which were to the same effect as the Covenant.

The force of international instruments may be described as more moral than legal. In Levave v Immigration Department Somers J referred to resolutions of the Council of the League of Nations:-

> "The reports in volumes 200 and 201 of the New Zealand Parliamentary Debates show that the Bill which became the 1923 Act was first introduced into Parliament on 10 July 1923, that is, after the passage of that resolution. In the absence of unequivocal language it is not to be supposed that the New Zealand Parliament would intend to legislate in a manner inconsistent with moral, if not legal, international obligations in this sphere: cf Craies on Statute Law (7th ed, 1971) 69, 463; Corocraft Ltd v Pan American Airways Inc [1969] 1 QB 616, 653 [1969] 1 All ER 82, 87."

Various Conventions and Declarations to which New Zealand is a signatory maintain the right to practice one's religion and to manifest, conserve and develop one's culture. Most obvious is the Declaration On The Elimination Of All Forms Of Intolerance And Discrimination Based On Religion Or Belief to which reference has previously been made. Others include the International Covenant on Economic, Social and Cultural Rights (in particular Article 15 in respect of the conservation, development and diffusion of culture) and the Universal Declaration of Human Rights. These are all recognised in the Human Rights Commission Act 1977 which makes it unlawful in New Zealand to discriminate on the grounds, inter alia, of religion in various circumstances to which the Act applies.

Several conclusions can be drawn: A Treaty as an international instrument may be used in the interpretation of municipal legislation. International instruments, ratified or otherwise, whether they be convenants, conventions or declarations may be used in the interpretation of municipal legislation. International instruments may indicate legislative policy in regard to municipal law. Parliament may be presumed to legislate in accordance with its international obligations, though those obligations are of more moral force than legal force.

The word "interests" and the phrase "the interests of the public generally" are undefined. They cover a wide range of matters within the purport and object of the Water Act. Do they include Maori spiritual and cultural values?

In Auckland District Maori Council v Manukau Harbour Maritime Planning Authority, supra, the appellant contended that the granting of consent for the construction of a wharf for the unloading of LPG (under section 102A of the Planning Act) amounted or contributed to despoilation of the land, fisheries and cultural values of the local Maori people and was contrary to the Treaty of Waitangi and to s 3(1)(g) of the Planning Act. The Planning Tribunal, after declaring that the bed of the Manukau Harbour was no longer Maori ancestral land, stated (at 171):-

"Nevertheless, that does not mean that it would be right for the Tribunal to ignore the value which the Manukau Harbour has in the culture and traditions of the Maori people. Nor does the legal position of the Treaty of Waitangi, as expounded by Turner J in the passage we have quoted, mean that the principles of the Treaty may be excluded from consideration in this appeal.

Although the contents of ss 3(1) and 4(1) of the Act are not expressly made applicable to the administration of s 102A, they are applicable to the preparation of maritime planning schemes, and s 102A provides for interim control in maritime planning areas pending the coming into operation of such maritime planning schemes. Further, the terms of subs (1) of s 102A, which prescribed matters to be had in regard in granting or refusing consent under the section, are wide enough to reflect the principles in s 3(1), and repeat many of the values referred to in s 4(1).

Section 102A(4)(a) requires that, in considering an application under the section, regard be had to "the public interest". By s 2(1) that term embraces all matters which in he circumstances of the case can be of public interest. We consider that in cases where it is relevant, it is in the public interest that the legal obligations of the Crown be observed, whether their source is the Treaty of Waitangi or elsewhere. Even though individual citizens may not be entitled to bring Court proceedings to enforce observance of the provisions of the Treaty, where a proposal which is the subject of an application under s 102A is alleged to be inconsistent with the principles of the Treaty, any objector (whether Maori or Pakeha) should be permitted to bring that matter to the attention of the maritime planning authority, and the Tribunal on appeal. We add that any such allegation, like any other allegation made in such proceedings, would need to be properly established - usually by evidence of probative worth.

Likewise, even in a case where the provisions of s 3(1)(g) of the Act may not be directly applicable, it is in the public interest, and consistent with the provisions of ss 3(1)(a), 4(1), and 102A(4)(b) of the Act that any objector may bring to the attention of the decision-maker as a ground of objection any respect in which the proposal will be inconsistent with the integrity of the cultural environment, or the cultural, social or general welfare of any section of the people, including the culture and traditions of the Maori people.

> We therefore hold that the existence of a Maori fishing ground can be recognised, and the effect on it of the proposed use or work can be considered, on an application under s 102A of the Act."

Thus Maori cultural values have been held to be a consideration under the Planning Act, a statute said to operate in conjunction with the Water Act (see Auckland Acclimatisation Society Inc v Sutton Holdings Ltd, supra (at 100). The difference is that the Planning Act defines the considerations to be taken into account. The Water Act leaves them undefined. Since the two Acts operate in conjunction, and the Water Act is silent as to relevant considerations, can the latter Act be interpreted to include those kinds of considerations under the Planning Act, including Maori cultural values?

The Planning Tribunal took the view in the Auckland District Maori Council case that, even if the relationship of the Maori people with their land (section 3(1)(g)) was not directly applicable, it would be under various sections 3(1)(a), 4(1) and 102A(4)(b). They read:-

> "3. Matters of national importance - (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:-
> (a) The conservation, protection, and enhancement of the physical, cultural, and social environment."

> "4. Purpose of regional, district and maritime planning (1) Subject to section 3 of this Act, regional, district, and maritime planning, and

> the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social and general welfare of the people, and the amenities, of" every part of the region, district, or area.
>
> "102A Interim control within maritime planning area- (4) Subject to sections 3 and 4 of this Act, in granting or refusing consent to any application under this section, the Maritime Planning Authority shall have regard to-
> (a) The public interest; and
> (b) The likely effect of the proposed use on the existing and foreseeable future amenities of the area, and on the health, safety, convenience and economic, cultural, social, and general welfare, of the people of the area and of any region or district affected by the application."

When read together there is a degree of similarity with the preamble to the Water Act:-

> "An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams, and lakes."

Given a degree of similarity in general purpose between the two Acts, given that the Water Act does not define relevant considerations to be taken into account, given that the Planning Act does take into account Maori cultural values either specifically or as part of the

general public interest, and given the interpretative availability of the Treaty of Waitangi, in the light of the Treaty of Waitangi Act 1975, are Maori cultural and spiritual values a relevant consideration to be taken into account under the Water Act?

JUDGMENT ON THE FIRST BRANCH OF THE APPELLANT'S CASE - MAORI VALUES

In the absence of any record of evidence given on behalf of the appellant before the Planning Tribunal (no evidence at all was given) it is necessary for the Court to have some comprehension of the concept of spiritual values in regard to water as understood by Maori people in regard to specific water resources. In the first of the Minhinnick decisions, given in 1981 on the application of New Zealand Steel Ltd for water rights for cooling water, the Tribunal recorded that Mrs Minhinnick gave evidence of the long association of her hapu with the area from the Manukau Harbour to the Waikato River. She said there are water qualities which are not technical but cultural and spiritual in origin; to the Maori people the water rights of the Waikato are sacred and a tangible symbol of their tribal identity. She said that their spiritual pride would suffer if values important to them were cast aside and if the waters of the Waikato River and Manukau Harbour were thrown together carelessly. She complained that the hurt feelings which Maori have concerning the proposal to mix the spiritual essences of the Waikato with the Manukau are not understood.

Evidence of that kind caused the Tribunal to examine the principles and objectives of the Water Act before concluding that the Act was concerned with physical aspects of the environment and not purely metaphysical concerns. The Tribunal said:-

> "In that the Act specifically required that environment considerations be taken into account, some Maori traditional concerns are now specifically provided for. But some Maori concerns are cultural and spiritual; they go beyond the mere physical environment. We have concluded that there is nothing in the Act which will allow us to take those purely metaphysical concerns into account. To the extent that spiritual and cultural values are incorporated in technical and factual considerations, they are recognised under the Act, but no further. May we add that other sections of the community also have spiritual values, many of which are not recognised, indeed are trampled on by the community at large. But the strength of spiritual values is that they are personal; that they are still valid to the individual though rejected by others." (at 5)

In 1984 Mrs Minhinnick objected to a further application by New Zealand Steel Ltd with regard to the discharge of industrial waste water and storm water. One of the objections was that the proposed discharges would adversely affect the Maori cultural, spiritual, traditional relationships that the Tainui people have with the Waikato River and the Manukau Harbour. The Planning Tribunal again reviewed the principles and objectives of the Water Act and came to the conclusion that the intention of the Act is that the waters of New Zealand be kept at a high standard of quality for the use and benefit of all New Zealand people whatever their ethnic origin. The Tribunal acknowledged the aversion of Maori to the use

of a natural water for the disposal of human wastes but noted that the New Zealand Steel Ltd was discharging those wastes in a different fashion. The applications for water rights did not apply to human wastes. It was in this decision that the Tribunal said:-

> "To the extent that it is possible to do so, the cultural attitude of the Maori people to the waters of the Estuary have been taken into account and have been provided for. The Act does not provide for their spiritual relationship with those waters to be taken into account. Indeed we cannot see how the law could do so. We are disappointed that Mrs Minhinnick takes the view that if the rights now sought by the company are granted, her people will be penalised. The impression we were given by the evidence is that the opposite will be the case; that particular care has been taken to meet the needs of all sections of the community as fully as possible." (at 8)

The third decision involving Mrs Minhinnick was also delivered in 1984. It related to applications for water rights by New Zealand Steel Ltd for the taking and discharging of water for use in a slurry pipe line. Objection was again taken by Mrs Minhinnick that the proposed intake and discharges would adversely affect the Maori cultural, spiritual, traditional relationships that the Tainui people have with the Waikato River and the Manukau Harbour, and hence the heritage of Aotearoa. Evidence was called directed to those issues. The Tribunal asserted again that to the extent that spiritual and cultural values are incorporated in technical and factual considerations, they are recognised in the Act, but no further. On this occasion Mrs Minhinnick referred to recent trends in legislative policy towards greater

recognition of Maori rights. The Planning Tribunal did not accept that there was a valid principle of statutory interpretation which enabled the interpretation of the Water Act to be modified because of any legislative policy perceived in subsequent enactments. To a collateral submission that Maori values should be regarded as important and relevant public interest factors to be taken into account the Tribunal replied that the Act did not leave it open to the decision maker to grant or refuse a right according to what he perceived to be the public interest of the matter; nor did the Act allow the interests of one section of the public to be preferred over the interests of another. The Tribunal adhered to its previous finding in regard to the principles and objectives of the Act:-

> "It is not necessary to give here an exhaustive definition of the considerations relevant to the grant and refusal of water rights. For the purposes of this decision it is sufficient to say that the Act seeks to promote among other things, the conservation, use, and quality of water for the benefit of all New Zealanders; and that it requires that adequate account be taken not only of the needs of primary and secondary industry but also of community water supplies, water-based recreation, fisheries and wild life habitats." (at 4)

In its finding on the Manukau claim the Waitangi Tribunal turned its mind to the unsuccessful arguments of Mrs Minhinnick. The Tribunal expressed the view that metaphysical concern is relevant to the provisions of the Treaty of Waitangi; that the failure of Government to provide for it, in enactments such as the Water Act, is

inconsistent with the principles of the Treaty. The reasoning is based essentially upon the finding that the Maori text of the Treaty guarantees to the Maori people the ownership of all their taonga. Concerning matters metaphysical the Tribunal said:-

> "The values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin. Some societies make rules about noise on Sunday while others protect sacred cows. When Maori values are not applied in our country, but western values are, we presume our society is monocultural. In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values, and a priority when the Maori interest in their taonga is adversely affected. The recognition of Maori values should not have to depend upon a particular convenience as when the meat industry found it convenient to introduce Halal killing practices to accommodate Islamic religious values.
>
> It is to the beliefs of other countries that Professor Ritchie turned to explain the Maori views. He considered the Maori view not unlike that of Hebrew and Islamic people. In Israel Rabbinnical law requires that effluent from human wastes, however purified, be returned to the land. Their effluent treatment plants discharge to the land by irrigation channels. Recycling by irrigation is also practised in Muslim contexts. Both Hebrew and Islamic people believe in a spiritual water cycle. All water begins as a sacred gift from the deity to sustain life. Waste water is defiled water which must be purified by returning it through the cleansing qualities of the earth.
>
> Here, wai maori (fresh water) is also the life giving gift of the Gods (te wai ora o Tane) and is also used to bless and to heal. Separate water streams are used for cooking, drinking and cleaning (which explains why no Maori will wash clothes in a kitchen). Waste water is purified by return to the earth, ritualistic purification or, with the exception of water containing animal wastes, by mixing with large quantities of other pure water.

> Wai mataitai (salt water) is separate (te wai ora o Tangaroa). It provides food but its domestic use is limited. Conceptually each water stream carries its own mauri (life force) and wairua (spirit) guarded by separate taniwha (water demons) and having its own mana (status). Of course the waters mix. The mauri of the Waikato river flows to the mauri of the sea, but on its landward side the mauri of the Waikato is a separate entity. The Maori objection is to the mixing of the waters by unnatural means, the mixing of two separate mauri, and the boiling processes that discharge "dead" or "cooked" water to living water that supplies seafood.
>
> This objection like so many Maori customs has a sound environmental basis. When the temperature of the water is increased, even slightly, there are ecological consequences on marine plant and fish life.
>
> But the ancient Maori was also a developer of the earth and an exploiter of its resources which necessitated modifications to the natural world. Tohunga (priests) were trained to cope with and placate necessary spiritual infringements and perform purificatory rites. They both caused and cured mate maori (psychosomatic illnes caused by intentional or unintentional breaches of sacred laws) and fixed the utu or koha (payment, satisfaction or accord) necessary to restore the mana of the offended persons or the atua (gods) present in all natural life. Development was achieved through tohunga who had to ensure that it could be done with harmony and balance, equity and justice in accordance with ancient lore." (at 78 and 79)

The extent to which that passage reflects the thinking of the Waitangi Tribunal in contrast to a summary of the evidence is not clear but in its finding on the mixing of waters, Maori values, and development (paragraph 9.3.5.) it becomes obvious that the Tribunal held the views expressed. In paragraph 9.3.5. the Tribunal concluded that the relationship of Maori people their culture and traditions to natural waters was relevant to its inquiries in terms of the Treaty of Waitangi. In developing its conclusions the Tribunal said:-

> "Maori values are not inimical to development. As we said at para 7.2 the Maori is a developer and exploiter of resources. To quote Professor Ritchie the religious rules of maori society are primarily directed to ensuring "that development accords harmony and balance, equity and justice". In this respect Maori ways are not unlike Western ways. It might be considered that Western society, although espousing a religion, is predominantly secular and individualistic in its world-view. Although there is a religious premise for the presumption that human-kind has authority over nature, that view probably springs from the secular and rational characteristics of our society. Maori society on the other hand is predominantly spiritual and communal. The Maori world view emphasises the primacy of nature and the need for man to tread carefully when interfering with natural laws, and processes.
>
> But the difference is basically one of emphasis. Western society, after the large scale modification of the natural environment, has seen the need to impose constraints. It has come to uphold certain values that argue the case for the maintenance of more of the natural environment or higher standards in environmental care. In some quarters the approach is rationalised in the view that nature has its own purpose. Maori society for its part has tempered what might have been a fundamental religious bar with a basic pragmatism, enabling modifications to the environment after appropriate incantations or precautionary steps.
>
> Accordingly in fashioning the world both societies strive to achieve pleasantness, harmony and balance from either a secular or spiritual stand point or a combination of both points of view. In the final analysis the alternative approaches may not be important. The ultimate test may be not what is right, if that is capable of determination, but what is acceptable to the community. The current values of a community are not so much to be judged as respected. We can try to change them but we cannot deny them for as Pascal said of the Christian religion, "the heart has its reasons, reason knows not of". That view alone may validate a community's stance." (at 123 and 124)

For reasons such as those the Tribunal considered that Maori values ought to be provided for in planning legislation and it recommended, at 10.7, that the

applicable principles to be provided in a range of integrated planning statutes should include consideration of the relationship of the Maori their values, culture and traditions to any lands, waters or resources, and the protection of Maori lands and fishing grounds. Specifically the Tribunal recommended that existing legislation be amended forthwith to enable Regional Water Boards to take into account Maori spiritual and cultural values when considering water right applications.

Implicit in the recommendations is the opinion that the Water Act cannot be interpreted or applied in line with the appellant's contentions in this appeal. The question of statutory interpretation is, of course, a question for this Court. The Waitangi Tribunal was investigating a variety of Maori claims including a claim that the Water Act was inconsistent with the principles of the Treaty. So the Tribunal was not concerned to undertake a considered interpretation of the Water Act but rather to accept it as interpreted by the Planning Tribunal. The expertise of the Waitangi Tribunal lies in its understanding of Maori values in the context of the Treaty of Waitangi as The Tribunal interprets that Treaty. A moments reflection upon the provisions of the Treaty of Waitangi Act, its extremely important statutory functions, the constitution of the Waitangi Tribunal and its reported findings must lead to the conclusion that it is an expert source within is field for instruction in Maori values. While, so far as the present case is

concerned, no report of that Tribunal is in any way binding on this Court, its considered opinions, within the area of its expert functions, ought to be accorded due weight in this Court. The way in which the Waitangi Tribunal has dealt with the concept of Maori spiritual values in regard to water establishes, sufficiently for the determination of this branch of the appellant's case, that those values cannot be dismissed in a general sort of way by referring to them as personal to the individual or as something which the community at large may trample upon, at least not in the context of the indigenous population of this country which places great value upon the principles of the Treaty of Waitangi. Nor should the benefit of all New Zealanders be given a degree of absolute emphasis so as to exclude, in a branch of the law which has an affinity with the Treaty, Maori spiritual values. I do not intend to imply by these remarks any criticism of the Planning Tribunal which has demonstrated commendable insight into issues which have acquired renewed prominence within the last two decades and a real concern for reaching a proper judicial verdict on the evidence and the law contained, as it is, in statutes which are, in some respects, far from easy to interpret and apply.

The answer to the rhetorical questions in the immediately preceding chapter of this judgment whether or not the word "interests" and the phrase "the interests of the public generally" include Maori spiritual and cultural

values must, in my judgment, be that they cannot be excluded from consideration if the evidence establishes the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori. They cannot be excluded for the reason that the Water Act is so deficient in guidelines that the Court has to resort to extrinsic aids. In this case those aids include the Treaty of Waitangi, the Treaty of Waitangi Act, the Waitangi Tribunal interpretations of the Treaty and the Planning Act. Through all those agencies a common theme is found. It follows that, in an application for the grant of a water right under sections 21 and 24 of the Water Act, the primary tribunal and the Planning Tribunal cannot rule inadmissible evidence which tends to establish the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori. In terms of section 24(4) that evidence must be directed to establishing that the grant of the application would prejudice the objector's interests in the spiritual, cultural and traditional relationships of the particular and significant group of Maori with natural water or the interests of the public generally in those relationships. The weight to be given to the evidence in the balancing exercise approved by Keam is a matter for the primary tribunal and the Planning Tribunal on appeal.

THE SECOND BRANCH OF THE CASE FOR THE APPELLANT - THE ONUS UPON THE APPLICANT

My reasons for this part of this judgment are given on the assumption that the Planning Tribunal correctly excluded Maori spiritual, cultural and traditional relationships with natural water.

As previously mentioned, there is a strong implication in the judgment of the Court of Appeal in Auckland Acclimatisation Society Inc v Sutton Holdings Ltd, supra, that the grant of a water right is a privilege:

> "The scheme of the Act means that to refuse the water rights applied for would not be to deprive the land owners of anything. Rather it would be to deny them privileges. There can be no moral claim to or expectation of compensation in the event of refusal." (Cooke J at 99)

In my judgment it is correct to say that when an applicant applies to a Board for any right under section 21(3) his application is not for something to which he is entitled as of right. I accept the proposition that the primary tribunal and the Planning Tribunal on appeal have an obligation under the Water Act to be satisfied that the grant of an application is in conformity with the principles and objectives of the Act; it is not merely a question of adjudicating between the applicant and the objectors because there is an element of public interest

in every application. See for example C E Stanley v South Canterbury Catchment Board, supra, at 72. In the general run of case there will be an initial burden on the applicant to satisfy the primary tribunal and the Planning Tribunal on appeal that the application ought to be granted. For example he will have to establish that if the right is granted it will be used. See Annan v National Water and Soil Conservation Authority and Minister of Energy (No 2), supra, where the applicant in effect faced a non suit situation because he could not establish that the Aramoana Smelter, for which the water right was required, would be or would be likely to be built. It is anticipated that most applications will get beyond such prima facie considerations.

As I understand the Court of Appeal decision in Keam there may be cases, when there is no reasonable possibility of any disadvantages, in which it is not necessary for the primary tribunal to engage in the weighing of advantages against disadvantages. In that situation Cooke J expressed the opinion that it should be enough that the applicant wished to have the right for some legitimate purpose which he considered of benefit to him. That would seem to be a logical consequence of the absence of disadvantages. However, I do not think that the Court of Appeal intended to say that, in those circumstances, the applicant would be entitled to a grant as of right. To advance that proposition would be to overlook the deliberate choice of expression "for some

legitimate purpose". I apprehend that in the general run of case there will be a reasonable possiblity of a disadvantage. In any event, in the present case, the Planning Tribunal did apply the benefit detriment test. It was obliged to do so because the receiving water had a D classification which required that the quality of the receiving quality did not, as a result of the discharge of effluent, fall below the minimum standards prescribed for Class D receiving water.

In a case such as this the primary tribunal and the Planning Tribunal on appeal are required to comply with section 21(3A). It is clear from section 26H and the decision of the Town and Country Planning Appeal Board in Mahuta v National Water and Soil Conservation Authority, supra, that the inquiry extends beyond ensuring the mere maintenance of classified minimum standards:

> "At this point it is relevant for us to say that the techniques of classification is merely an aid towards the maintenance and enhancement of water quality; the standards required by classification are not the only yardstick by which applications to discharge shall be judged.
>
> The objects of the Act require that other matters also be taken into consideration; such matters must include the effect of a proposed discharge on the biota and ecology of the receiving waters." (at 78)

In regard to the obligation of the Planning Tribunal to ensure compliance with section 21(3A) considerations in the present case, the Tribunal set out in its decision the substance of the evidence of the first

respondent's officer. There was no countervailing evidence. His evidence was not challenged in cross-examination. Paying regard to its obligation to be satisfied, the Tribunal which has expertise in these matters, put questions to the witness about his evidence that the proposed discharge would be substantially free from suspended solids - a requirement of section 21(3A)(c). The Tribunal was entitled to accept his evidence. There is nothing in the contentious sentence which raises a question of law - "Again we have no evidence to the contrary, and no reason to doubt him on this".

Having satisfied itself under terms of section 21(3A), the Tribunal turned its attention to the disadvantages of the grant of a water right. It would seem from the decision that the only evidence before it was that of Mr Bowater and the officer of the first respondent. The Tribunal properly observed that if the appellant had adduced evidence of detrimental affects to water quality in terms of what it regarded as appropriate for consideration i.e. relevant, it would have been able to take that evidence into account in the balancing exercise. In stating that no such evidence was adduced the Tribunal made a correct assertion about the absence of relevant evidence. The sentence "But no such evidence was adduced by the appellant" does not carry the implication that the Tribunal was carried to the necessary degree of satisfaction by the mere process of accepting the evidence

of the applicant and first respondent. Nor should it be taken as an expression of an opinion that an objector is obliged to adduce evidence of detrimental affects. Clearly the Tribunal intended to say that such detriments as were implicit in the application or in the evidence which was adduced were outweighed by the benefits.

The crucial issue in this part of the appellant's case, which is inseparable from the matters discussed in the previous paragraph, is the emphasis placed by the Planning Tribunal upon the benefits to be achieved by the control to be imposed upon an uncontrolled discharge i.e. control would improve the quality of the receiving water. The question is whether such a consideration is relevant. In Rangiora Borough Council v North Canterbury Catchment Board, supra, an application was made for a right under section 21(3) to discharge treated sewage effluent from proposed sewage oxidation ponds into a certain river or stream. Dealing with an objection based upon the cumulative detrimental effect of the proposed discharge and other unlawful discharges, the Town and Country Planning Appeal Board held that section 21(3A)(b) required account to be taken of the effect only of lawful discharges:

> "We must presume that the requirements of the Act will be complied with by those who seek to discharge waste, and the provisions of the Act will be enforced against any unlawful discharges." (at 138)

Counsel for the appellant contended that because there is no right to continue an unauthorised discharge it cannot be a factor in favour of granting an application; the application must be considered in terms of its own merit as if there were no discharge in fact. There is merit in that argument. In other branches of the law, such as licensing, the principle contended for is frequently applied. As previously mentioned, there have been observations made in other decisions concerning pressures on the Waikato River. In particular, in the finding of the Waitangi Tribunal on the Manukau claim, it was said:-

> "Today the Waikato adjoins areas that constitute one of the heaviest population concentrations in the country. From Lake Karipiro to the mouth the river provides water at 20 points to industrial developments in river towns and water and sewage outlets to 21 towns. At four points its flow is harnessed for hydro-electricity and at two for coal-fired electricity. The lower reaches are increasingly important for the irrigation of a growing horticultural industry. We were informed that 203 water rights for irrigation have been granted. It is estimated that a massive 90 million litres of animal wastes are generated within the catchment daily and the river is under increasing stress due to difficulties in controlling agricultural run off." (at 72)

Common sense requires approbation of the policy of the first respondent to improve the quality of effluent from unauthorised discharges by bringing them under control subject to appropriate conditions. On the other hand there may be room for the view, as expressed in CE Stanley v South Canterbury Catchment Board, supra, that the public interest may, in some circumstances, demand

that farming practices be changed. Whether or not the time has come for the Waikato River to be relieved of effluent discharge by the adoption of land based methods of treating effluent is not a matter for this Court. It is a matter for the authorities such as those established under the Water Act. The first respondent, as a Regional Water Board, has the functions and powers set out in section 20 of the Water Act, in particular subsection (5)(ca):-

> "The promotion and carring out of measures to safeguard natural water from damage or the risk of damage by or in respect of discharges into natural water of waste, or natural water containing waste, including:-
>
> (i) Measures reasonably conducive to or intended to further or effect the prevention, detection, or control of such discharges not authorised by or under this Act or of discharges otherwise then in accordance with the conditions, restrictions, or prohibitions under which they are so authorised; and
>
> (ii) Measures to neutralise the effects of such discharges and to restore the quality of natural water."

That seems to me to be a clear statutory direction to Regional Water Boards to adopt the very type of policy which the first respondent has adopted in regard to the Waikato River.

It follows, in my judgment, that the beneficial effects of bringing under control an unauthorised discharge is a matter which can be taken into account by the primary tribunal and the Planning Tribunal,

particularly in respect of an application made under sections 21 and 24 of the Act. Accordingly the Planning Tribunal was entitled to take that benefit into account and to say:-

> "The uncontrolled discharge is now to be controlled, and improved as to its quality."

For the reasons given I find against the appellant on the three rulings the subject of this appeal under this branch of the case.

JUDGMENT IN THIS CASE (EXCEPT THE APPEAL ON COSTS)

No evidence was given on behalf of the appellant at the hearing before the first respondent or at the hearing before the Planning Tribunal. The issues raised in the appeal to this Court were raised at those hearings by Mrs Minhinnick by way of submissions when she appeared as agent for the appellant. Each issue requires a necessary foundation of fact, the absence of which would usually be fatal. As is outlined earlier, the second respondents on that ground strongly urged this Court to dismiss the appeal. Counsel's submissions addressed to that ground have given me anxious consideration. In the first of the Minhinnick decisions the Planning Tribunal expressed the clear opinion that evidence about what it termed "metaphysical concerns" was not relevant i.e. the

type of evidence required to lay the foundation for the issues raised on this appeal. The Tribunal adhered to that opinion in the subsequent Minhinnick decisions. When the appeal against the grant of a water right to the second respondents was heard by the Tribunal no restraint was imposed upon Mrs Minhinnick's submissions presented on behalf of the appellant. The Tribunal dealt with them on the same basis as previously. Clearly on that occasion the Tribunal regarded such evidence as irrelevant and therefore inadmissible. While no attempt was made to adduce the requisite evidence and while no specific ruling was sought or given, the reality of the situation is that the Tribunal heard and determined the appeal on the basis that the appellant could not advance the issues which had been ruled out previously. It is really a case of an implied ruling in regared to the relevance and admissibility of evidence. That is the basis upon which I reject the submissions of counsel for the second respondents and upon which I propose to determine the issues of law requiring resolution.

I find that the Planning Tribunal did correctly apply the policies and objects of the Water and Soil Conservation Act 1967 in ruling:-

4. That it was relevant for the Tribunal to take into account as a factor in favour of the granting of the application, that untreated effluent was being discharged by

the second respondents without the controls of a water right.

5. That there was evidence before the Tribunal on which it could be satisfied that the conditions imposed by the first respondent were sufficient to meet the tests prescribed under section 21(3A).

6. That it was a relevant consideration in the exercise of the Tribunal's functions that the appellant had adduced no evidence alleging detrimental affects to water quality or contradicting evidence given by witnesses for the first and second respondents."

and I further find that the Planning Tribunal did not correctly apply the policies of the Act in ruling:-

2. That the spiritual values and cultural relationship of Maori people to the waters of the region, including the waters of the Waikato River and its tributaries, are not proper matters to be considered on an application pursuant to section 21.

3. That only if the appellant had adduced evidence alleging detrimental affects to water quality arising from the proposed discharge would the Tribunal have been able to adjudicate upon detrimental effects.

3A That the concerns being pursued by the appellant were not legitimate ones, as the law stands.

So far as the Treaty of Waitangi is concerned it is not clear whether the Planning Tribunal availed itself of the provisions of the Treaty as an aid in the interpretation of section 24(4). In answer to question (1) I find:-

> "That the provisions of the Treaty of Waitangi do not for the purposes of an application pursuant to sections 21 and 24 provide the appellant with any recognisable legal right relevant to such an application. I further find that on a proper interpretation of section 24(4) Maori spiritual and cultural values cannot be excluded from consideration if the evidence establishes the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori. The weight to be given to any such evidence is a matter for the Tribunal.

The appeal is in part allowed. The questions of law are answered in terms of questions 1 to 6 above and the case is remitted to the Planning Tribunal for further consideration by way of rehearing on the basis stated in this judgment.

THE APPEAL AGAINST THE DECISION OF THE PLANNING TRIBUNAL TO AWARD COSTS

As previously mentioned, by a decision dated 6 August 1986 (Decision No C 46/86), the Planning Tribunal ordered the appellant to pay to the second respondents the sum of $420 for costs.

The error of law alleged in the notice of appeal is that the Planning Tribunal exercised its discretion to award costs upon principles which were wrong and which did not correctly apply the policies and objects of the Water Act in ruling:-

(1) That there was evidence before it on which, in rejection of a submission made by the appellant, it could conclude that the application for the water right had been properly made out at the hearing before the first respondent.

(2) That is was entitled to take into account that the appellant's case on appeal "did not add to that information (being the information necessary to enable the first respondent to make a proper decision under the Water Act), in any way."

(3) That "the concerns being pursued by the appellant were not legitimate ones, as the law stands."

(4) That the appellant's submission that the earlier decisions of the Tribunal, referred to at page 5 of the judgment, were not binding and, in any event, were wrongly decided, had already been ruled on by the Tribunal in its substantive decision.

(5) That it was appropriate for costs to be assessed on a solicitor and client basis by awarding the second respondents by way of costs the full amount of an account received by them from the solicitors who represented them at the hearing.

(6) That it was a relevant consideration that the appellant, or its officer Mrs Minhinnick, had been a party to the earlier decisions of the Tribunal which had ruled that her concerns were not capable of being taken into account under the Act.

(7) That it is a relevant consideration in determining whether an order for costs should be made that an unsuccessful appeal "involves principally a value judgment."

The question of law stated to require resolution is whether the above rulings (1) to (7) are correct principles, tests and considerations in the exercise of the Tribunal's discretion to award costs in the administration of the Act.

Counsel for the appellant supplied the Court with comprehensive submissions supported by authorities. Counsel for the second respondents made submissions in reply. While it is appreciated that the parties wish to receive the guidance of this Court on the issues put for resolution, I consider that it is premature to answer them because the result of the appeal on the substantive issue has the consequence that the order for costs cannot

stand. The whole matter of costs will have to be reviewed by the Planning Tribunal at the conclusion of the rehearing when it may well be that fresh issues in relation to costs may arise. It suffices, for the purpose of giving jurisdiction to the Planning Tribunal, to find that it's decision was erroneous in point of law in ruling that the concerns being pursued by the appellant were not legitimate ones. The case is remitted to the Planning TribunaL for further consideration by way of rehearing of the question of costs. The Court reserves its opinion on the remaining issues the resolution of which is stated to be sought by the appellant.

COSTS IN THIS COURT

All questions of costs in relation to this appeal are reserved. If the parties are unable to agree upon costs counsel may file memoranda and, in any event, each party has liberty to apply for a fixture for the hearing and determination of all such questions.

M.J. Chilwell J

29TH May 1987

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