

Foreshore and seabed litigation

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Damian Stone - Senior Solicitor

On 19 June 2003 the Court of Appeal released its decision on the jurisdiction of the Māori Land Court to investigate title to the foreshore and seabed of the Marlborough Sounds.¹ Since then, the judgment has held the media and political spotlight.

The Court of Appeal held that the Māori Land Court has jurisdiction to determine the status of the foreshore and seabed under the Te Ture Whenua Māori Act 1993 (the **Act**) and that its 1963 decision in *Ninety Mile Beach* can no longer be considered to be good law.²

The Court of Appeal sat as a bench of five to hear the appeal, and the decision is set out in four separate decisions: Elias CJ, Gault P, Keith and Anderson JJ and Tipping J.

What is the foreshore?

The foreshore is generally known as the area between the mean high and low water marks of the sea.

What is the seabed?

The seabed area is generally known as the area between the mean low water mark of the sea and the outer boundary of New Zealand's exclusive economic zone.

Māori Customary Land

The Act defines Māori customary land as land that is still held by Māori in accordance with tikanga Māori.

Judicial Background

(a) Māori Land Court

In 1997, eight iwi from the top of the South Island sought declarations from the Māori Land Court that the foreshore and seabed within the Marlborough Sounds is Māori customary land as defined in the Act.

Prior to the application being heard, the Crown and other parties tried to stop the application on the basis that the Māori Land Court does not have jurisdiction to consider whether parts of the foreshore and seabed are Māori customary land under the Act.

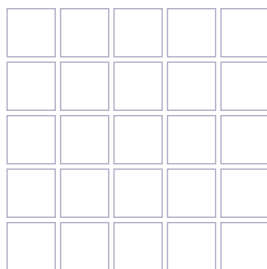
Judge Hingston ruled that the Māori Land Court does have jurisdiction to consider whether foreshore and seabed is Māori customary land, and that decision was appealed to the Māori Appellate Court by the Crown and certain other parties.

(b) Māori Appellate Court

Rather than consider the appeal, the Māori Appellate Court chose to state a case to the High Court on questions of law that are relevant to whether the Māori Land Court has jurisdiction to determine the status of the foreshore and seabed.

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Foreshore and seabed litigation

Essentially, those eight questions were aimed at determining, as a matter of law, and in the absence of any factual inquiry:

- whether the Māori Land Court had jurisdiction under the Act to determine the status of the foreshore or seabed; and
- whether New Zealand law recognises any Māori customary title to all or any part of the foreshore and seabed and, if so, has that title been expressly extinguished by statute.

(c) High Court

Justice Ellis found that the seabed was beneficially owned by the Crown at common law and was declared to be so by section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 and section 9A of the Foreshore and Seabed Endowment Revesting Act 1991. Accordingly, he held that the seabed could not be Māori customary land.

In respect of the foreshore, Justice Ellis applied the reasoning in *Ninety Mile Beach* and held that Māori customary property in the foreshore was extinguished once the adjoining land above high water mark had lost the status of Māori customary land.

The decision of Justice Ellis in the High Court was appealed to the Court of Appeal. The hearing of the appeal occurred in July 2002.

Essential findings of the Court of Appeal

The Court of Appeal's decision focuses primarily on three aspects of the case stated to the High Court:

- whether the Māori Land Court has jurisdiction to determine the status of the foreshore and seabed;
- whether that jurisdiction has been wholly removed by statute; and
- the effects of the decision in *Ninety Mile Beach*.

(a) Jurisdiction of the Māori Land Court

The Court of Appeal unanimously held that the Māori Land Court has jurisdiction to consider whether the foreshore and seabed are Māori customary land. In doing so, the Court of Appeal made a number of important findings, including:

- on the acquisition of sovereignty, the Crown acquired only a "radical" title (or imperium) to the foreshore and seabed and, in accordance with long established principles of common law, that title was subject to the pre-existing property rights of Māori;
- when the common law was introduced to New Zealand, it was adapted to reflect local custom, including property rights. This was made explicit in New Zealand by the English Laws Act 1858, which provided that English law was part of the law of New Zealand with effect from 1840 only "so far as applicable to the circumstances of New Zealand";

- any property interest of the Crown in land over which it acquired sovereignty depends on any pre-existing customary interest and the nature and content of such interest is a question of fact discoverable, if necessary, by evidence;
- the existence and content of customary property is determined as a matter of the custom and usage of the particular community and, in the case of status determinations under the Act, in accordance with tikanga Māori;
- from the Letters Patent of 1840, legislation in New Zealand has recognised prior existing property rights of Māori and that the Crown could not acquire both *imperium* and *dominium* (freehold) in respect of land without the prior consent of Māori; and
- interests in the soil below low water mark were, in any event, known under the laws of England and included interests that arose by custom and usage, and such interests were created by Crown grant in New Zealand.

(b) Statutory extinguishment of Māori customary title to the foreshore and seabed generally

The Court of Appeal also unanimously held that none of the general Acts referred to in the case to the High Court could be properly construed to have confiscatory effect and, therefore, extinguish Māori customary title to the foreshore and seabed.

(i) The Harbours Acts 1878 and 1950

The Court of Appeal held that the Harbours Acts were inadequate to effect an expropriation of Māori customary property.

Furthermore, the Court of Appeal questioned the reliance of the Court on the 1950 Act in *Ninety Mile Beach*, and considered that the decision was contrary to the common law and to successive statutory provisions recognising Māori customary property.

(ii) Territorial Seas Acts

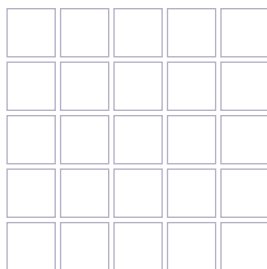
The Court of Appeal considered that neither the Territorial Sea and Fishing Zone Act 1965 nor the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 expropriated Māori property.

The Court of Appeal held that the language used in those Acts related to deeming the “radical” title in the Crown and preserving existing Māori customary property interests, whereas to extinguish Māori customary title would require a clear indication of this intention.

(iii) Foreshore and Seabed Endowment Revesting Act 1991

The Court of Appeal held that section 9A of this Act applies only to lands which are property of the Crown.

The Court considered that section 9A restates the restriction on disposing of foreshore and seabed lands which are property of the Crown, takes into account the major realignment of governmental responsibilities in relation to the coastline



Foreshore and seabed litigation

and forms part of a package of statutes including the Conservation Act 1987 and the Resource Management Act 1991.

The Court noted that both of those Acts contain acknowledgements of the Treaty of Waitangi and, in that context, it would be inconceivable that section 9A was intended to effect an expropriation of Māori customary land.

(iv) Resource Management Act 1991

Submissions were made also that the ownership of property in the foreshore and seabed is inconsistent with the controls of the coastal marine area under the Resource Management Act.

The Court, however, noted that the management of the coastal marine area under the Resource Management Act may substantially restrict activities able to be undertaken by those with interests in Māori customary property. However, the Court considered that as the case for all owners of foreshore and seabed lands and indeed for all owners of land above high water mark.

The Court concluded that the statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The Resource Management Act, in itself, does not effect an extinguishment of such property.

(c) Ninety Mile Beach

The Court of Appeal is of the view that the decision in *Ninety Mile Beach* is based on the premise that the English common law of tenure displaced customary property in land upon the assumption of sovereignty.

Consistent with the Court's earlier findings, the Court of Appeal held that this could not be correct. The Court of Appeal considered that the reasoning in *Ninety Mile Beach* was based upon the discredited authority of *Wi Parata v Bishop of Wellington*.³

The Court of Appeal determined that whether there are properties in coastal land is a matter for the Māori Land Court to investigate in the first instance as a question of tikanga on a case-by-case basis.

Keith and Anderson JJ held that one of the reasons for the finding in *Ninety Mile Beach*, that section 150 of the Harbours Act 1950 restricted the jurisdiction of the Māori Land Court, could not be justified because:

- (i) that Act did not contemplate the confiscation of existing titles, including customary property; and
- (ii) customary property rights are not to be extinguished by a side wind, and the Harbours Act 1950 was a general statute concerned with harbours.

Keith and Anderson JJ also held that section 12 of the Crown Grants Act 1866 was misconstrued by the Court in *Ninety Mile Beach*, and is merely a conveyancing presumption that does not, in itself, extinguish customary title.

Conclusion

The Court of Appeal therefore answered the first question in the case stated in the affirmative, holding that the Māori Land Court has jurisdiction to determine the status of the foreshore and seabed.

The Court declined to answer the remaining questions in the case stated on the basis that the answers to those questions depend on the facts of the particular case.

What do the findings mean?

The Court of Appeal was at pains to ensure that its findings should not be exaggerated.

The Court highlighted that the question that it answered was a legal one, and that Māori customary title to the foreshore and seabed would still need to be established before the Māori Land Court. The Court of Appeal indicated that may not be an easy task.

In addition, because the decision has only been released recently, it is not yet known whether the Court of Appeal's decision will be appealed. If it is, this may impact on the ability to request that the Māori Land Court exercise its jurisdiction to determine the status of the foreshore and seabed in any parts of New Zealand.

Furthermore, a number of comments have been made in the media to the effect that the Crown should pass legislation overriding the Court's decision.

However, if the decision is not appealed, is upheld on appeal, or is not legislated against, Māori will be able to make application to the Māori Land Court for investigation into whether any areas of the foreshore and seabed can be determined as Māori customary land under the Act.

The Court of Appeal does make some comment on the nature of Māori customary land that can be recognised under the Act, although makes no firm findings on that issue.

Whether foreshore and seabed is Māori customary land will be a factual question, to be determined and discoverable by evidence.

Therefore, any groups wishing to request that the Māori Land Court investigate title to the foreshore and seabed should be aware of the type of evidential requirements that may be needed to establish title. Groups contemplating making an application to the Māori Land Court for such an investigation may wish to seek advice on the nature of the evidence required to support such a claim.

Footnotes

¹ *Ngati Apa and others v Attorney-General and others* (Unreported, 19 June 2003, Court of Appeal, Wellington, CA173/01). This decision was the result of an application by eight iwi from the top of the South Island to the Māori Land Court to investigate title to the foreshore and seabed of the Marlborough Sounds.

² *In Re Ninety Mile Beach* [1963] NZLR 461 (CA)

³ (1877) 3 NZ JUR (NS) SC 72

For further information, please contact your usual Bell Gully adviser or:

WELLINGTON

Damian Stone – damian.stone@bellgully.com 64 4 915 6823

Auckland

Royal & SunAlliance Centre, 48 Shortland Street
PO Box 4199, Auckland, New Zealand, DX CP20509, www.bellgully.com
Telephone 64 9 916 8800, Facsimile 64 9 916 8801

Wellington

HP Tower, 171 Featherston Street
PO Box 1291, Wellington, New Zealand, DX SX11164, www.bellgully.com
Telephone 64 4 473 7777, Facsimile 64 4 473 3845