ATTORNEY GENERAL V MAIR AND OTHERS

Court of Appeal of New Zealand (Chambers, O'Regan and Baragwanath JJ)
22 December 2009
[2009] NZCA 625

New Zealand – deed of settlement – Treaty of Waitangi – conflicting claims over land – whether the tribunal acted unlawfully in refusing to grant urgency to the claimants – *Treaty of Waitangi Act 1975* (NZ) s 6(6) – whether the High Court should have refused to grant relief

Facts:

A deed of settlement was entered into between Ngati Apa and the Crown, providing for final settlement of interest in land, as well as a historical account of the Crown interaction with Ngati Apa, including recognition of breaches of the *Treaty of Waitangi Act 1975* (NZ) and an apology by the Crown. On 12 July 2007, the Runanga, entitled to negotiate for Nga Wairiki, and the Crown signed a non-binding and without prejudice agreement, in principle, contained in a deed of settlement that was to be given effect by legislation. While the majority ratified the Ngati Apa settlement, there were competing claims over the land.

The respondents, claiming to represent the separate iwi of Nga Wairiki, sought an urgent hearing with the Waitangi Tribunal ('the Tribunal'), arguing that they would suffer significant, irreversible prejudice if the *Ngati Apa (North Island) Claims Settlement Bill 2009* (NZ) ('the settlement Bill') was enacted before their claims were heard. The Wai 655 claimants argued that their claim, relating to historical Treaty breaches affecting Nga Wairiki, would be extinguished if the terms of the deed of settlement are embodied in an Act of Parliament, while the Wai 1840 claimants argued they would be unable to pursue their claim in relation to resumption of the Lismore Hills Forest to the extent they wish. Both were refused an urgent hearing by the Tribunal.

The respondents appealed the decision to the High Court where it was found that the Tribunal had erred in law. The Attorney-General appealed against the High Court decision. The issues for the Court of Appeal of New Zealand to determine were: first, whether the Tribunal acted unlawfully in refusing to grant urgency to the two claims; and second, if it is found that the Tribunal acted unlawfully in refusing urgency, should the High Court have declined to grant relief to the appellants.

Held, allowing the appeal, per Chambers and O'Regan JJ:

1. In relation to the Wai 655 claim, it is unlikely that Judge Milroy of the Tribunal confined her consideration to financial detriment. Further, it is clear that she did take into account the extinguishment of Wai 655. It cannot be said that she failed to take into account relevant considerations or took into account irrelevant considerations. The Tribunal will only grant urgency in exceptional cases and only after satisfying itself that adequate grounds have been made out; therefore, Judge Milroy was entitled to conclude that the Wai 655 claim in the circumstances was not entitled to urgency. In addition, there were thousands who supported the deed that would be prejudiced in bringing their negotiations to settlement, if the claim were accorded urgency: [53]–[54], [56], [65].

2. The two claims are closely interlinked; therefore, the Wai 1840 claim is dismissed for the same reasons as stated above. There is no doubt that Judge Milroy took into account whether the Wai 1840 claimants would suffer significant and irreversible prejudice if urgency was not granted. The Judge weighed that consideration against the likely prejudice to the Ngati Apa of a delay in their settlement, and decided in favour of the latter: [71]—[74], [77].

3. Due to the above conclusion that the Tribunal did not act unlawfully in failing to grant urgency, there is no need to consider whether there ought to have been a decision to decline relief on the basis that, because the settlement Bill had since been introduced to the House of Representatives, s 6(6) of the *Treaty of Waitangi Act 1975* (NZ) precluded the Tribunal from considering the respondents' claims: [80].

Held, allowing the appeal, per Baragwanath J:

4. There is no error in law regarding the refusal of the urgency application. The Judge recognised that the refusal of urgency would result in the extinguishment of the elements of mana whenua and status as iwi advanced in the claim, and that the appellants claim to speak for the Nga Wairiki is excluded by the overwhelming mandate given to the Ngati Apa Runanga. This position is not affected by the application of the *Treaty of Waitangi Act 1975* (NZ) to the Tribunal: [84], [111]–[115]

5. The jurisdiction of the *Treaty of Waitangi Act 1975* (NZ) extends to the Judiciary and, therefore, there is no reason to exclude its application in relation to the Waitangi Tribunal. It is the very purpose of the *Treaty of Waitangi Act 1975* (NZ) to subject to the jurisdiction of the Tribunal all conduct of the Crown, both as Executive and as Legislature, even including Acts of Parliament, other than which falls within the language of the s 6(6) exception. Since Parliament has authorised the Tribunal to review statutes, it must a fortiori countenance review of all Legislative and Executive conduct short of the Bills referred to in s 6(6): [87], [158], [162]; *Daniels v Attorney-General* HC AK M 1615-SW99 3 April 2002, considered.

6. The Court may not seek to restrain the presentation of a Bill to Parliament. However, it can and will resist attempts to restrain access to judicial bodies to which there is a legal right of access. In this case the bodies are the Tribunal and the courts: [171].

7. Section 6(6) of the *Treaty of Waitangi Act 1975* (NZ) should not be read as inhibiting the Tribunal from pursuing its hearing for the following reasons. First, there is no clear language in terms of s 5 of the *Interpretation Act 1999* (NZ) that would be required to bring about such a result. Second, s 6(6) is to be read against later developments. Furthermore, it is inconceivable that the New Zealand Parliament could have intended to create legislation that would impede the settlement of Treaty claims: [175]; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, considered.