IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 229/99

IN THE MATTER of the Judicature Amendment Act 1972

A N D
IN THE MATTER of decisions made by the Ministers of Conservation and of Lands respectively to vest Mt Hikurangi in Te Runanga o Ngati Porou - Sections 436 and 437 of the Maori Affairs Act 1953

BETWEEN **DR HUGH BARR** of Wellington, Business Consultant and **PUBLIC ACCESS NEW ZEALAND INCORPORATED** a charitable trust incorporated under the Charitable Trusts Act 1957
Plaintiffs

A N D **THE MINISTER OF CONSERVATION**, Minister of the Crown
First Defendant

A N D **THE MINISTER OF LANDS**, Minister of the Crown
Second Defendant

A N D **TE RUNANGA o NGATI POROU** a body corporate constituted by the Te Runanga o Ngati Porou Act 1987
Third Defendant

A N D **THE MAORI LAND COURT** established by and under the Te Ture Whenua Maori Act 1993
Fourth Defendant

FOURTH AMENDED STATEMENT OF CLAIM
APPLICATION FOR REVIEW
DATED: 5th November 1999

Presented for filing by: Gaskin Avison
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The Plaintiffs by their solicitors say:

Parties

1. The Plaintiffs are both very concerned with the protection of the conservation estate lands held by the first defendant under the Conservation Act 1987 and the retention of its natural scenic, recreational and ecological values and, consistent therewith, access as of right and without charge by members of the public to such lands.

2. Full details of the Plaintiffs and their interests and concerns in this matter are set out in paragraphs 1 to 15 of the affidavit of Bruce James Mason of Omakau, Central Otago, New Zealand, Researcher, dated 9 September 1999 which is filed herewith. That affidavit refers to a lengthy list of exhibits which the Plaintiffs believe are relevant to the issues in the case.

3. The first defendant is responsible for the administration of the conservation estate lands held by the Crown under the Conservation Act 1987.

4. The second defendant is responsible for the administration of other lands owned by the Crown, and, specifically in this case, was responsible at all material times for the administration of the land described in paragraph 10 hereof and referred to as Pakihiroa Station.

5. The third defendant is a body corporate constituted by the Te Runanga o Ngati Porou Act 1987 No. 182 as a Maori Trust Board within the meaning and for the purposes of the Maori Trust Board Act 1955.

6. The fourth defendant is a special Court established by and under the Te Ture Whenua Maori Act 1993. It is the successor of the like special Court previously established by and under the Maori Affairs Act 1953.

The Land:

7. The case concerns two parcels of land which were purportedly vested in the third defendant (TRONP) by the fourth defendant pursuant to provisions of the Maori Affairs Act 1953. Together such parcels contain or include the land form known as Mt Hikurangi, on the east coast of the North Island of New Zealand.

8. The first such parcel of land (hereinafter referred to as "the conservation park land"), as described in the application by the first defendant to the Maori Land Court, consisted of 3,780 hectares more or less being part Papatipu o te Ngaere Block Part Arawhawhati Block, Sections 1 and 2 Block IV, Hikurangi Survey District, Section 1 Block VIII Hikurangi Survey District, Section 3, Block 1, Mata Survey District, Section 3 Block V, Mata Survey District as shown on Scheme plan GS 801. The said Scheme Plan, which is not adequate for deposit at the Land Transfer Office so as to enable the issue of a separate Certificate of Title, was prepared for the first defendant so as to enable an application for vesting under the Maori Affairs Act 1953 to be made.

9. The conservation park land (at least until its purported vesting in the third defendant) was, at all times material to the decisions in issue hereunder, held by the first defendant for the Crown and administered by the Department of Conservation pursuant to section 61(2) of the Conservation Act 1987 from the commencement of that Act. It had previously been held by the Minister of Forests for the Crown and administered by the Ministry of Forests as part of the Raukumara Forest Park.

10. The second such parcel (herein referred to as "Pakihiroa Station", by which name it is commonly known) is the land consisting of 3145.225 hectares comprised in Certificates of Title Volume 190 Folio 184, Volume 109 Folio 185, Volume 1D Folio 1463, Volume 2C Folio 743, Volume 2C Folio 736, and Volume 2B Folio 739 (Gisborne Registry). An estate in fee simple in that land was registered in the names of Colin Sydney Wallis Williams and others as registered proprietors for many years until a transfer to Her Majesty the Queen was registered on 18 June 1987 and then a vesting order vesting the land in Te Runanga o Ngati Porou was registered on 6 June 1991.

The Basic Documents

A. Deed of 3 November 1990

11. On 3 November 1990 a deed was entered into between the third defendant (subsequently called "the Ngati Porou") and Her Majesty the Queen acting by and through the Minister of Conservation (subsequently called "the deed returning Mt Hikurangi").

12. The deed returning Mt Hikurangi provided that "the Minister shall revest pursuant to section 436 of the Maori Affairs Act 1953 the land which is shown bounded by a broken line on the plan annexed hereto as Annex 1" subject to conditions which followed. The land concerned was the conservation park land.

13. The deed provided for the Ngati Porou to "enter into a conservation covenant pursuant to section 77 of the Reserves Act 1977 with the Minister in respect of the land which is shown hatched in pink on Annex 1 (called "the covenant land") which land shall include the area with natural values in the northern sector of Hikurangi on Pakihiroa Station. Boundaries are approximate and will be subject to the preparation of a scheme plan of the covenant land. The conservation covenant "shall be in the

form attached as Annex 2 hereto and shall be a covenant given in perpetuity over the covenant land."

14. The deed returning Mt Hikurangi then said as condition (c) "The public shall have access to and freedom of movement in the covenant land apart from certain sacred places. The Ngati Porou and the Minister will identify which places constitute sacred places."

15. Condition (d) of the deed returning Mt Hikurangi then provided for a "registrable easement" through Pakihiroa Station "along the route shown on Annex 1 as a yellow line so that there is public access to the covenant land. The deed of easement will be in the general form attached hereto as Annex 3. It is recognised that the wording of Annex 3 will have to be modified if an easement can only be created under the Reserves Act 1977."

16. The deed returning Mt Hikurangi is included in full as one of the exhibits to the affidavit of Bruce James Mason filed herein. It was "contingent upon the Ngati Porou accepting title to Pakihiroa Station" (condition 1(k)).

B. Applications to Maori Land Court

17. On 21 December 1990 two applications to the Maori Land Court were signed respectively, namely:

(i) An application by the Minister of Lands for the vesting of Pakihiroa Station in Ngati Porou under section 437(4) of the Maori Affairs Act 1953.

(ii) An application by the Minister of Conservation for the vesting of the conservation park land in Ngati Porou under section 436 of the Maori Affairs Act 1953 and for an order that the block vest as Maori freehold.

C. Maori Land Court Hearings and Decisions

18. The applications just referred to were heard by Judge J L Rota of the Maori Land Court at Uepohatu Marae, Ruatoria, on 18 January 1991, of which there is a minute, containing the record of the proceedings and the Judge's proposed orders, in the list of exhibits. The matter was then the subject of an application seeking a rehearing, after which Judge Rota issued a decision at Gisborne on 27 March 1991, a copy of which is included in the list of exhibits. In that decision the Judge made orders that:

(a) Pakihiroa Station should vest in the Ngati Porou "as trustee to hold and administer for the common use and benefit of the Ngati Porou people subject to the following conditions:

(1) That Te Runanga o Ngati Porou enter into a conservation covenant pursuant to section 77 of the Reserves Act 1977 with the Minister of Conservation, registrable in the Land Transfer Office, in respect of that portion of the land hatched in yellow on the plan filed and attached to the application of the Minister of Conservation, Application No. 91232.

(2) That legal public access shall be provided by way of registrable easement between Te Runanga o Ngati Porou as Grantor and the Director General of Department of Conservation as Grantee, along the route hatched in green and shown on the plan attached to the application of the Minister of Conservation, Application No. 91232.

(3) That the sum of $300,000 be paid by Te Runanga o Ngati Porou to the Iwi Transition Agency as consideration for the vesting of the land the subject of this application within 2 months from the making of this order."

(b) Following which order the Judge said "The order in No.1 having been made and upon that order the land stated therein being then general land owned by Maoris, order Section 433(A)/53 that the status of the land described in order 1 immediately above be changed to Maori freehold land."

(c) Vesting the conservation park land "Order section 436/1953 and Section 267(3) & (3A)/53 by Section 27(2)/53" in the Ngati Porou "as trustee to hold and administer for the use and benefit of the Ngati Porou people on the following conditions:

(1) Compliance by the parties with the terms of settlement in respect of the abovementioned block entered into by the Crown and Te Runanga o Ngati Porou by deed dated 3 November 1990."

(d) "Pursuant to section 436(5)/1953 the status of the land described in order No. 3 above" (i.e. relating to the conservation park land) "is deemed to become Maori freehold land, but order Section 433A/53 formally changing the status of that land to Maori freehold land."

Sealed Orders and the Land Titles

19. Orders relating to the sitting of the Maori Land Court on 18 January 1991, which are contained within the list of exhibits, were sealed in an unconditional form as follows:

(a) Vesting Pakihiroa Station in the Ngati Porou "as trustees upon trust to hold and administer for the common use and benefit of the Ngati Porou people".

(b) Determining that Pakihiroa Station was "Maori freehold lands within the meaning of the Maori Affairs Act 1953."

(c) Vesting the conservation park land in the Ngati Porou "as trustees upon trust to hold and administer for the common use and benefit of the Ngati Porou people".

(d) Determining that the conservation park land was "Maori freehold lands within the meaning of the Maori Affairs Act 1953".

20. The order (a) above referred to in respect of Pakihiroa Station was registered against the titles to the land concerned on 6 June 1991 and order (b) above referred to was registered against such titles on 7 December 1995. No reference appears on the titles to the land to the reservation of any marginal strip along the bank of the Tapuaeroa River in terms of section 24 of the Conservation Act 1987.

21. On the titles to Pakihiroa Station there now also appears a memorial relating to the registration on 5 August 1997 of a Transfer No 216747.1 "granting a forestry right under the Forestry Rights Registration Act 1983 in favour of Ngati Porou Whanui Forests Limited at Ruatoria (limited duration)".

Application for Correction of Orders

22. By an undated memorandum (referred to by Judge Rota as having been faxed to him on 21 May 1991) Tom Woods, signing himself as Counsel for the Crown, sought an amendment to the order of 18 January 1991 relating to vesting of the conservation park land "pursuant to Section 60 of the Maori Affairs Act 1953 in order to give true effect to the Courts decision as recorded in the minute (30 Ruatoria M.B. 313-323) of 17 March 1991". The intention was to have included in an amended order the condition set out in paragraph 18(c) above. The Judge issued "Directions" (also undated) in which he said he was "not prepared to amend the orders as requested by Mr Woods without further reasons". Copies of both such documents are contained in the exhibits.

23. On 29 August 1999 a "Variation of Deed" was signed between the Ngati Porou and "Her Majesty the Queen by and through the Minister of Conservation". This deed substantially amended the deed returning Mt Hikurangi and, amongst other things, substituted a new form of conservation covenant and of easement for the corresponding documents annexed to the original deed. A copy of this document is included in the exhibits.

Departmental Reports

24. The following reports from the Director General to the Department of Conservation to his Minister (as well as other documents included in the exhibits) seem to be of particular relevance viz:

(i) Report of 5 July 1990.

(ii) Report of 16 July 1990.

(iii) Report of 24 October 1990.

(iv) Report of 20 December 1990 with an accompanying press release for approval.

The Sequence of Events

25. The conservation park land was acquired from Maori by Deeds (Auckland 1191, 1249 and 1250) pursuant to section 34 Immigration and Public Works Act 1870. The land was then declared to be "waste lands of the Crown" (under section 17 Waste Lands Administration Act 1876 and section 28 Land Act 1877 amendment Act 1879). See Gazette notices 1881 pps 170-174, referring to 'Motu' on page 173, and 1881 pps 1108-1110, referring to 'Tauwhareparae on page 1110.

26. All but 63 hectares of the 7400 hectares (including the conservation park land), involved in the abovementioned acquisitions by the Crown, were declared State Forest in 1900 and the balance was so declared in 1976. In 1979 the area was declared to be a State forest park. It was known as Raukumara Forest Park.

27. Although, in the Departmental reports referred to in paragraph 24, references are made to a belief by Ngati Porou that the Mountain was sold by persons unauthorised to do so, the reports make it clear that the validity of this belief had not been investigated. Judge Rota in his decision of 27 March 1991, described the land as "land sold by original Maori owners to the Crown and not lost by the operation of any Act by compulsion". In a letter by the Minister of Justice of 29 October 1991, he said "to my knowledge no prima facie evidence has been suggested that the Crown failed to carry out its duty in protecting Maori rights to land they wish to retain".

28. It has been conceded by the first defendant also that no issue or claim in relation to the Treaty of Waitangi was involved.

29. In 1985 the Hon. Koro Wetere was both Minister of Maori Affairs and Minister of Forests. Mr Tamati Reedy a senior and respected member of Te Runanga o Ngati Porou, was Secretary of Maori Affairs.

30. Mr Reedy heard from Mr Colin Williams, one of the owners of Pakihiroa Station that it was up for sale. He advised his Minister, the Hon. Koro Wetere, who immediately expressed the view that if Ngati Porou could not purchase it then the Crown must intervene, as he did not wish to see the title continuing in private ownership.

31. By about mid 1985 or earlier the Hon. Koro Wetere, in conjunction with members of the Ngati Porou hapu, had formed a clear intention to:

(1) Form a Ngati Porou Trust Board.

(2) Acquire Pakihiroa Station through the Board of Maori Affairs and transfer it to that Trust Board in due course; and

(3) To complete the re-transfer of Mt Hikurangi to the Ngati Porou by withdrawing from the Raukumara Forest Park and vesting in the Trust Board that part of Mt Hikurangi which lay within that Park.

32. This intention was carried out by –

(1) The passing on 1 December 1987 of the Te Runanga o Ngati Porou Act 1987 constituting Te Runanga o Ngati Porou as a body corporate that was a Maori Trust Board within the meaning and for the purposes of the Maori Trust Board Act 1955. Under section 3(2) of that Act the beneficiaries of the body corporate were "descendants of the hapu of Ngati Porou from Potikitua to Te Toka a Taiua".

(2) Acquiring Pakihiroa Station for $1,300,000 in or about July 1987 through the Board of Maori Affairs. It was later administered by the Iwi Transition Agency until, after negotiations with the Ngati Porou, it was sold to them for $300,000, and vested in the third defendant as previously set out.

(3) The deed returning Mt Hikurangi of 3 November 1990, paving the way for the balance of the Mountain in the Raukumara Forest Park to be vested also in the Ngati Porou under section 436 of the Maori Affairs Act 1953, which then occurred as previously set out.

33. The Conservation Act 1987 brought the Raukumara Forest Park into the conservation estate for which the Minister of Conservation was responsible and,

from 30 July 1988, it was by section 61(2) "deemed to be a conservation park". That status was to continue until it was "declared to be held for conservation purposes under section 7(1) of this Act". Such a declaration was never made.

34. The Hon. Koro Wetere had, in December 1984, approved in principle the dedication of seven ecological areas. One of these was the Hikurangi Ecological Area of about 6500 hectares, which covered all the open tops of Mt Hikurangi within the forest park. It included the land that he was considering withdrawing from the forest park and he identified that, if that proposed withdrawal proceeded, consultations regarding this ecological proposal would be required.

35. The Departmental reports referred to in paragraph 24 identified that:

(1) Hikurangi was "of outstanding significance both from regional and national perspective, for its ecological, cultural and recreational values" – from the report of 5 July 1990, which then gave the reasons. The same report stated that the part Raukumara Forest Park proposed for transfer would be a major disposal of Conservation land which, the report then indicated, it would be necessary to advertise as a formal proposal and to allow eight weeks for submissions. The report continued: "As the land status is considerably above the stewardship category, it may also be necessary to pass special legislation".

(2) In the result, public consultation was deliberately avoided. The section 436 of the Maori Affairs Act 1953 vesting was seen, in the 16 July report, to enable by passing of "the normal steps for disposal". In the 24 October report the use of that procedure had firmed up – "there is now a degree of Crown commitment to the transaction which would make acceptance of public submissions inappropriate"

(3) Quite transparently, "the thrust from the Minister of Maori Affairs and the iwi that ownership of the Raukumara Forest Park section of Mt Hikurangi be transferred to Ngati Porou" (a quote from the first report) was a paramount consideration.

(4) The process was designed to enable the revesting of Mt Hikurangi in the Ngati Porou, by way of gift, to be a symbolic gesture for the end of 1990 – see report of 20 December and the accompanying press release.

36. It appears that the decision ("the first decision") to enter into the deed returning Mt Hikurangi of 3 November 1990 was made by the Minister of Conservation on 24 October 1990.

37. Pursuant to the deed returning Mt Hikurangi the Minister of Conservation made a decision ("the second decision"), on or about 20 December 1991, to confirm the decision of 24 October 1990 and to apply to the Maori Land Court under section 436.

38. Subsequently, the Maori Land Court issued the decisions represented by the sealed orders referred to in paragraph 19 hereof i.e.

(a) The decision referred to in 19(a) ("the third decision").

(b) The decision referred to in 19(b) ("the fourth decision").

(c) The decision referred to in 19(c) ("the fifth decision").

(d) The decision referred to in 19(d) ("the sixth decision").

39. After Judge Rota declined to act on the request from Tom Woods to amend the fifth decision (so as to make the order revest the conservation park land subject to the

condition that the terms of settlement in the deed returning Mt Hikurangi were carried out), and despite advice from the Crown Law Office that application should be made to the Court for recalling that order, the first defendant decided not to take any steps to have the terms of that order amended or the order recalled ("the seventh decision").

40. In a letter of 2 April 1991 to the Federated Mountain Clubs of New Zealand Inc. the first defendant confirmed that "Section 436 empowered me to apply to the Maori Land Court to vest the land in Ngati Porou, subject to conditions. A process of status change under the Conservation Act was not required". He confirmed "a level of commitment, dating back some years, to the return of that part of Mt Hikurangi which was previously State Forest".

41. The plaintiffs and others complained to successive Ministers of Conservation, from the time of the revesting of Mt Hikurangi by the Maori Land Court until now, about all aspects of the decisions which led to that revesting, and the lack of action by the Crown to rectify the situation.

42. Even during the hearings before Judge Rota, and subsequently, the Ngati Porou have objected to carrying out the terms of the deed returning Mt Hikurangi and have sought to renegotiate it. No conservation covenant or easement was signed by Ngati Porou as provided for in that deed.

43. The Ngati Porou have restricted access by means of the agreed walkway over Pakihiroa Station and/or claimed the right to do so and have claimed the right to charge for such access.

    (i) In relation to restriction of access the plaintiffs refer (without being exhaustive) to these matters:

. The Ngati Porou expressed concerns at the original Maori Land Court hearing of 18 January 1991 as to any encumbrances over Pakihiroa Station, the need for Ngati Porou control and reservations about anything in perpetuity.

. Ngati Porou thereafter refused or neglected to sign the access easement over Pakihiroa Station, as required by the deed returning Mt Hikurangi, which was treated by the first defendant as meaning that the public had no legal right of access (see letter of first defendant dated 28 October 1994 in the list of exhibits).

. Ngati Porou continued in its discussions with the first defendant to assert the "right to close the walkway for various purposes" (see memo of an officer of the first defendant of 21 June 1995).

. The Ngati Porou maintained publicly that the access track "runs through private land and permission must be obtained prior to your tramp etc" (see undated notice by Ngati Porou amongst the list of exhibits) and that "Access over Pakihiroa is a priviledge and not a right" and "Anyone going over Pakihiroa Station without permission is liable to prosecution" (see notice by Api Mahuika for Ngati Porou dated 15 February 1996 in the list of exhibits).

. Members of the Gisborne Canoe and Tramping Club were told and believed that access over Pakihiroa Station would be denied them (evidence to be filed) and hence did not attempt access.

. Ngati Porou have now asserted wide rights to restrict access over Pakihiroa Station and the former conservation park land in the said deed of variation of 29 August 1999 (as examples see annex 1 clauses 5.2 to 5.6 and sections 3 and 4 of annex 2), which they have

persuaded the first defendant to agree to, and which, if exercised, will substantially control rights of public access (if any) in relation to Mt Hikurangi.

(ii) In relation to claiming the right to charge for access, the Chairman of Ngati Porou, the said Mr Api Mahuika was reported in the Gisborne Herald of 31 August 1994 as saying "We can now control who goes on and off Mt Hikurangi". The newspaper item continued: "From now on there will be a $5.00 charge to go up the mountain with half price for schools and community groups." The item continues with the reasons for such charge being stated.

44. The plaintiffs gave notice to the first defendant on 10 August 1999, by letter from their solicitors, that the decisions of the first defendant were regarded as illegal. They sought a meeting and a written undertaking that:

"(i) No orders in terms of the Maori Land Court decision will be further acted upon in any way or registered.

(ii) No Crown commitment will be made to vary in favour of Ngati Porou, any of the conditions set out in the Deed of 03 November 1990."

45. A meeting between the Director General and other Departmental officials with the plaintiffs and legal representatives was held on 23 August 1999. At that meeting a briefing paper with several attachments was handed to the Director General setting out the main elements of the plaintiffs' case and its concerns. It reiterated that it was "urgent that the Crown ensures that nothing is done to further prejudice the position" and sought that the Crown should acknowledge that the transactions were illegal and take steps to have the Court orders rescinded.

46. The order vesting the conservation park land in Ngati Porou may be registered at the Land Transfer Office as soon as the survey of the land and the easement and conservation covenant area is completed. No undertakings not to alter the position or to register documents have been given by the first defendant, except upon an interim basis until the hearing and determination of these proceedings. The first defendant has advised that it believes it has acted legally. It has advised the estimated times required to complete surveys, by which it would seem that registration of the vesting order and other documents may technically be able to be effected by mid to late November this year.

47. Despite the Plaintiffs' requests not to prejudice the position, the first defendant decided, on or before 29 August 1999, to sign a deed with the Ngati Porou on that date which varied the deed returning Mt Hikurangi of 03 November 1990. It substantially weakened the position of the Minister; for example, it substituted new forms of conservation covenant and walkway easement that allowed Ngati Porou to limit access over Pakihiroa Station and on the Mountain ("the eighth decision"). Details (without being exhaustive) of the way in which the conservation covenant and walkway easement under the variation of deed dated 29 August 1999 of the deed of 29 August 1990 had, by comparison, weakened the position that the first defendant had secured from the third defendant under or by the corresponding documents under the said 1990 deed are:

(i) The new provisions enabling restriction of access by the public outlined in paragraph 43(i) hereof and also the new provision affecting the public rights of access in section 10 of annex 1 and section 8 of annex 2 of the 1999 deed.

(ii) The right conferred upon the third defendant to have both the conservation covenant and the walkway easement reviewed pursuant to clause 8 of the 1999 variation, compared with the rights conferred in perpetuity by the corresponding documents under the 1990 deed.

(iii) The extended and new rights conferred upon the third defendant by the 1999 deed of variation to terminate the conservation covenant (see sections 12 and 13) compared to the corresponding 1990 document.

(iv) The provisions of paragraph 5.1 of the deed of variation and sections 2, 3 and 4 (read collectively) of Annex 1 thereto (the conservation covenant) compared to the provisions of paragraph 1(e) of the 1990 deed and of recital E and clauses 2 and 3 of Annex 2 thereto (the 1990 proposed conservation covenant).

Grounds for Relief

The First Decision:
Based on an Irrelevant and/or Improper Consideration

48. In making the first decision the first defendant was required to make it in terms of the criteria in and considerations arising from the Conservation Act 1987 relating to the piece of land which was held as conservation park but, in fact, the decision was based on or materially influenced by an irrelevant or improper consideration, viz the perceived commitment by the Crown to give Mt Hikurangi back to the Ngati Porou in pursuance of an earlier intention expressed by the Hon. Koro Wetere, when he was Minister of Maori Affairs and of Forests. The relevant provisions of the Conservation Act 1987 to which the first defendant should have had regard include:

(i) Firstly, section 61(2), which identified that the part of Mt Hikurangi that the first defendant decided should be revested in Ngati Porou (that which had formerly been part of Raukumara Forest Park), was "deemed to be a conservation park", and hence subject to section 19 of the Act, whereby it was to "so be managed –

(a) that its natural and historic resources are protected; and

(b) subject to paragraph (a) of this subsection, to facilitate public recreation and enjoyment."

(ii) Secondly, in the light of the considerations arising from subparagraph (i) above, the first defendant should have considered the functions of the Department of Conservation (which the first defendant controlled by virtue of section 5 of the Act), as those functions are set out in section 6 of the Act, and particularly 6(a), (b) and (c), and the meanings given by the Act to "conservation", "conservation area", "historic resource", "natural resources" and "protection".

(iii) Thirdly, the first defendant should have taken account of section 16 of the Act, restricting the disposal of conservation areas, and also sections 18, 26, 49 and 50 of the Act, specifying how the status of land held for a conservation park might be altered and how it might thereafter be disposed of, subject in each case to compliance with the procedures required by sections 49 and 50. Collectively, the provisions just mentioned either actually prevented the first defendant from deciding to dispose of the land in the manner he proposed to, as the plaintiffs in fact argue, or at the least were very strong reasons for not disposing of the conservation park land by a procedure which was chosen to expressly exclude any input from the public or even the relevant Conservation Board and the New Zealand Conservation Authority.

(iv) Fourthly, if the first defendant did actually consider the matters raised by the provisions of the Conservation Act 1987 previously referred to and, arising from that, there was any question or issue properly to be addressed relating to the status and/or ownership of the conservation park land (neither of which the plaintiffs say was actually the case) then, and only then, the provisions of section 4 of the Act conceming the interpretation and administration of the Act

may have required consideration. Whatever relevant effect (if any) the principles of the Treaty of Waitangi may have had in these circumstances, and the plaintiffs contend that there was none, it certainly did not require or include a gift of Mt Hikurangi to the third defendant. There was no legal or Treaty of Waitangi claim that the third defendant had to the mountain.

49. The first decision was thereby flawed.

The First and Second Decisions:

Illegal Use of Section 436 of the Maori Affairs Act 1953

50. The first decision, insofar as it contemplated in the deed returning Mt Hikurangi that application would be made by the Maori Land Court under section 436 of the Maori Land Act 1953 to vest the conservation park land in the Ngati Porou, and the second decision confirming that such an application to the Court should be made, were both illegal, for all or each of the following reasons:

(1) Given:

(a) the criteria in and considerations arising from the Conservation Act 1987 in respect of the conservation park land,

(b) the values and characteristics of that land (which were mentioned in the Departmental reports to the first defendant) and

(c) the deliberate failure to consult with or obtain input from the public and the New Zealand Conservation Authority on relevant conservation issues or considerations;

no reasonable Minister of the Crown could reasonably have made the decision that the first defendant was required to make, viz that the land was "no longer required for the public work or other public purpose for which …

it is held". To apply under section 436 of the Maori Affairs Act 1953 the Minister was obliged to make such a decision and such a decision was irrational. It is here assumed that the first defendant implicitly made such a decision, but if he did not, then the decision to make an application under section 436 was illegal upon the basis that a fundamental legal requirement for such an application was not met.

(2) Section 436 aforesaid could not be used, because it was a requirement for the use of such section that the land was "acquired by the Crown … for the purposes of a public work or other public purpose", and it was not so acquired. No evidence in support of the proposal was adduced to the Court on this point, nor was it discussed in the Departmental reports. The manner of acquisition and history of the land has been previously set out, and it does not disclose that it was acquired by the Crown for the purposes of a public work or other public purpose, rather the reverse is the case.

(3) Section 436 aforesaid could not be used because its purpose is to enable the restoration to those previous owners who were affected (or their successors) of the right to obtain their land again on fair terms. It applies only to land that has been acquired compulsorily, or at least with a measure of executive power, to achieve an identified public work or purpose, and not to land that was acquired, albeit by the Government, in a willing buyer/willing seller situation. In this respect, section 436 is akin to section 40 of the Public Works Act 1981. The section was not intended or designed for use as a vehicle by means of which the Government might make a gift to Maori of conservation land, and thereby circumvent the processes for disposal of conservation land specified by the Conservation Act 1987.

(4) Section 436 aforesaid could not be used in this case because, at the time of its purported use, it had impliedly been repealed by section 16(1) of the Conservation Act 1987.

(5) Section 436 aforesaid could not be used in this case to vest in Te Runanga o Ngati Porou the conservation park land as Maori freehold land because, as a trust board under the Maori Trust Board Act 1955, it was not empowered to receive and hold the land upon that basis. By this statement the plaintiffs mean that the third defendant can only hold land as a Maori Trust Board under the Maori Trusts Board Act 1955 (see section 3 of Te Runanga o Ngati Porou Act 1987) and section 35 of the Maori Trust Boards Act 1955 provides that: "No beneficiary shall acquire or be deemed ever to have acquired any interest, whether vested or contingent, or legal or equitable in the assets of the Board of which he is a beneficiary."

Yet section 436(5) prescribes: "Any land vested in the Maori pursuant to this section shall thereupon be deemed to become Maori freehold land, unless the Court otherwise expressly orders", and the applications made to the Maori Land Court pursuant to section 436 expressly sought orders that the land should become Maori freehold land and orders were made by the Court accordingly. The essential or defining feature of Maori freehold land, at the time when the applications and orders were made, was that it was "land other than general land which, or any undivided share in which, is owned by a Maori for a beneficial estate in fee simple, whether legal or equitable", (Maori Affairs Act 1953, section 2(1) definition). The third defendant could not hold land upon the basis that it was Maori freehold land.

51. That accordingly the first and second decisions were flawed and/or illegal.

Third, Fourth, Fifth and Sixth Decisions:

Illegal or Ultra Vires

52. The third, fourth, fifth and sixth decisions referred to in paragraph 35, representing the decisions of the Maori Land Court to vest land in the third defendant, were illegal or ultra vires in that:

(a) They were not made in accordance with either the applications that were made to the Court, or in accordance with the terms of its final decision of 27 March 1991. Such sealed orders could not be issued in the form that they were. Specifically, the application by the Minister of Lands referred to in paragraph 17(i) hereof sought "that the vesting order be made subject to following conditions:

1. That Te Runanga o Ngati Porou enter into a conservation covenant pursuant to section 77 of the Reserves Act 1977 with the Minister of Conservation in respect of that portion of the land hatched in yellow on the plan attached hereto marked "B".

2. That legal public access shall be provided along the route shown on the plan attached hereto in green;"

and the application by the Minister of Conservation referred to in paragraph 17(ii) sought the vesting of the land referred to therein in the Ngati Porou be "upon the following terms and conditions namely:

(a) That the order be made subject to compliance with the terms of settlement in respect of the block entered into by the Crown and Te Runanga o Ngati Porou by deed dated 03 November 1990.

(b) That the block vest as Maori freehold."

The Applicants for such orders never waived before the Court the requests that the orders should be made subject to the conditions set out as 1 and 2 above and (a) and (b) above, respectively, and, ultimately, orders were recorded in the decision of the Court as set out in paragraph 18 hereof. Yet the sealed orders referred to in paragraphs 19 and 38 hereof were made and issued by the Court without reference to any such conditions, although such conditions, which were conditions precedent, had not in fact been met or fulfilled.

(b) Such orders also had the effect of vesting land in the third defendant which, as Maori freehold land, it was not empowered (as a trust board under the Maori Trust Board Act 1955) to receive and hold upon the basis which was set out in those orders.

(c) Such orders represented a disposition of land by the Crown within the meaning of section 24 of the Conservation Act 1997 which required that a marginal strip of land extending along and abutting the landward margin of the bed of the Tapuaeroa River should have been reserved from the disposition pursuant to Part IVA of that Act along the true right bank of such river. Such marginal strip was not reserved in or by such orders and the orders were registered against the titles to Pakihiroa Station without any reference to the reservation of such a marginal strip being entered on those titles.

53. The third, fourth, fifth and sixth decisions were flawed and/or illegal.

Seventh Decision:

Irrational Decision

54. The seventh decision, namely to take no action to have the sealed Court orders recalled or rescinded and/or amended was one that no Minister of the Crown,

properly considering the public interest and being responsible for the administration of the Conservation Act 1987, could reasonably have arrived at. It was irrational to allow a situation to continue whereby a very large and valuable part of the conservation estate, held as a conservation park, had been given away, with no assurance that the advantages which the Ngati Porou were contracted to provide in return would be obtained.

55. The seventh decision was flawed.

Eighth Decision:

Irrational Decision

56. The eighth decision, namely to sign the deed of variation dated 29 August 1999, which substantially weakened such benefits to the Crown and the public of New Zealand as the deed returning Mt Hikurangi of 03 November 1990 had secured, was one that no Minister of the Crown, properly considering the public interest and being responsible for the administration of the Conservation Act 1987, could reasonably have arrived at. Given that the terms of this variation would then reflect all that the Crown had managed to achieve in exchange for the gift to the Ngati Porou of the large and valuable area of conservation park, and also that it meant the Crown was relinquishing wider rights or benefits to the Crown, which the Ngati Porou had contracted to provide, the eighth decision was irrational. Specifically, the plaintiffs refer again to the manner in which the conservation covenant and walkway easement that were to be given under the deed returning Mt Hikurangi (1990) as compared to the corresponding documents substituted by the variation of that deed (1999) respectively, had been weakened, as set out in paragraph 47 hereof. The plaintiffs point out, however, that such weakening was not limited to matters of access to Mt Hikurangi alone. It also related to matters such as:

. The acknowledgement in the 1999 deed conservation covenant Annex 1 (see recitals generally, but particularly A, E and F) that the Ngati Porou already

were the legal beneficial owner by virtue of vesting under section 436 of the Maori Affairs Act 1953, without reference to any conditions to which such vesting was subject or any suggestion of partnership, and provisions which followed such as paragraphs 1.3 and 2.1. This is quite new compared to the 1990 deed and places Ngati Porou in a much stronger and more dominant position compared to the position outlined in recitals A, B and E(iii) of the conservation covenant in Annex 2 of the 1990 deed.

. The wider opportunity for the Ngati Porou to engage in commercial operations (see paragraph 1(e), and attached conservation covenant clauses 2, 3 and 10 of the 1990 deed, compared to paragraph 5.1, and attached conservation covenant clauses 2. 1 and section 4 of the 1999 deed).

. The way in which the hut originally constructed by the Gisborne Canoe and Tramping Club is dealt with (see paragraph 7.1 of the 1999 deed compared to clause 8 of the conservation covenant attached to the 1990 deed.)

57. Alternatively, the first defendant, who purported to act for and sign on behalf of Her Majesty the Queen in signing the said deed of variation dated 29 August 1999, had no power to do so, and the signing of such deed by the first defendant on behalf of the Crown was ultra vires or illegal. The first defendant was functus officio and there was no power conferred by the Conservation Act 1987 or otherwise by which the first defendant was so empowered to act. The first defendant was functus officio because:

(i) If the conservation park land has vested in the Ngati Porou, as the first defendant has claimed in the 1999 deed of variation, then the first defendant is not dealing with land that is subject to the Conservation Act 1987 but only with the terms of a deed of 03 November 1990, and documents to be completed pursuant thereto, none of which include a power or provision for variation of such documents by the parties. Nor is such a power to be

implied on the part of the Minister in the circumstances which exist here, where the purpose and effect of the Minister revisiting a completed arrangement (albeit not yet fully implemented by title registrations) was to substantially weaken the position of the Crown and the public as earlier set out; or

(ii) There being no express power for the first defendant to enter into the 1999 variation, either under the Conservation Act 1987 or the relevant documents, no power to do so could be implied unless and until the first defendant had properly endeavoured to enforce the terms and provisions of the 1990 deed and had found it was unable to do so, and thus was required to negotiate some amendment thereto.

58. The eighth decision was flawed and/or illegal.

Remedy

Wherefore the plaintiffs seek:

1. A declaration that each of the first to the eighth decisions referred to were illegal and invalid, but that the invalidity in relation to the decision referred to in paragraph 38(a) hereof (the third decision) may be treated as cured (by virtue of the registration of the sealed order against the relevant titles and the provisions of the Land Transfer Act 1952) if the first defendant (with the consent of the third defendant) takes the steps directed by the Court referred to in paragraph 3 below. (Note that the plaintiffs make no such concession in relation to any of the decisions apart from the third decision).

2. An order quashing or setting aside each of those eight decisions, but subject in relation to the third decision to the same qualification set out in paragraph 1 above.

3. An order directing the first defendant and the fourth defendant to reconsider and take all such steps as are necessary to correct the third decision by ensuring the sealed order, and its subsequent registration against the relevant titles, is subject to:

   (a) Compliance with Part IVA of the Conservation Act 1987 in relation to the requirement to reserve a marginal strip along the true right bank of the Tapuaeroa River, as referred to in paragraph 52(c) of the statement of claim; and

   (b) Registration against the titles to Pakihiroa Station of an easement providing a walkway across that land for the public in the form specified as annex 3 to the deed returning Mt Hikurangi.

4. A direction to the first defendant that it ought to reconsider all matters that arise from the invalidity, quashing or setting aside of such decisions and a direction or order in the nature of mandamus that the first defendant take such steps as are necessary including (but subject to the exception referred to above in relation to the third decision) the cancellation of the sealed orders of the Maori Land Court and any registration against the relevant titles of such orders, so as to enable the position of the Crown to be restored to that which had existed before the illegal and invalid decisions were taken.

5. Costs.

This Statement of Claim is filed by **BENEDICT JOHN JOSEPH SHEEHAN**, solicitor for the plaintiffs of the firm of Gaskin Avison. The address for service of the plaintiffs is at the offices of Gaskin Avison, Ground Floor, NZI House, Cnr Queens Drive and Waterloo Road, Lower Hutt. (Phone: 04 566-6777).

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Documents for service on the abovenamed plaintiffs may be left at that address for service or may be:

(a) Posted to the solicitor at PO Box 30-430, Lower Hutt; or

(b) Left for the solicitor at a Document Exchange for direction to DX TP 42002, Lower Hutt; or

(c) Transmitted to the solicitor by facsimile to (04) 569-3354.