BEFORE THE WAITANGI TRIBUNAL

WAI 369

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF A claim by Horimatua Evans on behalf of himself and his *whanau*

SUBMISSIONS FOR CLAIMANTS

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1. INTRODUCTION

1.1 WAI 369 claim is a claim made by Horimatua (George) Evans on behalf of the Evans *whanau.* It is a contemporary claim, relating to events that took place in the mid-1980s.

1.2 Misfortune befell the Evans *whanau* after they leased a farm on Waiheke Island from the Board of Maori Affairs. The farming operation was marginal. From the start the Evans[1] days were numbered, for the land was under claim by the ancestral owners, Ngati Paoa. After only a few short years on the farm, the Waitangi Tribunal recommended that the land should be returned to Ngati Paoa. George Evans accepted this, and reached agreement with Ngati Paoa that the partnership would surrender the lease. By that point, his objective was to retire with dignity, but this was not to be. Negotiations with the Board of Maori Affairs to surrender the lease were unilaterally cut short by the Board and the *whanau* were instead unceremoniously ejected for breaches of the lease. They lost everything.

1.3 The reality is that the land should not have been offered for lease in the first place. At the very least, when the Crown determined that the land would be returned to Ngati Paoa, it should have reached a fair settlement with the Evans' *whanau* that would have enabled them to leave the farm without being unduly prejudiced. The Waitangi Tribunal recommended as such, but its recommendation was ignored by the Crown.

1.4 The consequences of the claim have been enormous for the Evans *whanau.* George Evans was bankrupted and the family lost everything. Mr Evans fought the Crown through the courts, and although the courts exhibited considerable sympathy for his plight, they held that there was no legal remedy available. As Justice Hardie Boys expressed it in the Court of Appeal:

> *"The appellants came to Court for redress for what they perceive to be a great injustice. The Court cannot help them, for no legal right has been infringed. But it is not too late for those who are not constrained in the same way, to do what they may think is morally right."*[1]

1.5 In concluding that no legal right had been infringed, the courts did not have regard to the principles of the Treaty of Waitangi, for the Treaty does not form part of the law of New Zealand. The Tribunal is not so constrained. It is the contention of the claimants that the Crown's actions have not just been morally wrong, but contrary to the principles of the Treaty of Waitangi.

1.6 This Tribunal claim is an important stepping-stone for George Evans and his *whanau* on what has been a long road in search of justice.

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1 ***George Matua Evans and others v Attorney-General,* Court of Appeal, CA 310/91,9 July 1992, page 1.**

2. THE CLAIMANTS - THE EVANS *WHANAU*

2.1 George Evans is a registered valuer and an experienced farmer. His experience includes over 30 years of farm supervision of the Mangatu and Pouakani Blocks and numerous other Maori land developments. He was the Chairman of the Maori Land Advisory Committee - Tairawhiti for 8 years, the Director of the Rural Bank for 7 years, and Director of the New Zealand Wool Board for 4 years.

2.2 George's immediate family comprised his now late wife Beverley and children Georgina, Anita, Brent and Richard. Those events have touched not only the lives of this immediate group, however. The wider *whanau* has also suffered - many of them are also here today. George's brother Albert and his son Tony, George's sister Mary Butterworth, and Samson Te Whata and his family all lived on the Waiheke farm and have first-hand knowledge of the troubles. Those who were not on the island have also been affected, including Beverley's late mother Jean Hancock, George's brothers LeRoy and Trevor and their families, George's second wife Jean and her family, and the *whanaus* Aunt Gertrude Evans.

3. BACKGROUND FACTS TO THE CLAIM

3.1 The facts surrounding this claim are complex. The early part of the saga is detailed in Chapters 6 and 7 of the Waitangi Tribunal's *Waiheke Island Report,* and the remaining facts are set out succinctly in the amended statement of claim. By way of an introduction to today's hearings, I wish to reiterate and expand on that factual framework.

3.2 The claim relates to the Department of Maori Affairs' administration of a block of farmland on Waiheke Island. The land originally belonged to Ngati Paoa, and was purchased by the Crown in the 1850s. The block was sold into private ownership, and remained that way until the 1960s, when the Crown reacquired it. The property was then gazetted as being subject to Part XXIV of the Maori Affairs Act 1953.

3.3 The Department of Maori Affairs administered the property for a total of 17 years. During this time the property proved difficult to farm, and sustained large losses. Despite the ongoing concerns of Department officers about the farm's commercial viability, the Department decided to cut its losses by offering the farm for sale or for Crown-renewable lease to Maori individuals, trusts and incorporations.

3.4 The Department's proposition was advertised in newspapers throughout New Zealand, inviting applications from "suitably qualified Maori farmers".

3.5 George and Beverley Evans and their sons Brent and Richard were the successful applicants, under the name the "Waiheke Station Evans

Partnership" (hereafter referred to as the Evans Partnership). The Department was motivated in its selection of the Partnership by George Evans' farming experience, his Ngati Paoa connections (George's great-great-grandmother Hariata Whakatangi was Ngati Paoa and had lived on Waiheke), and the capital that George and Beverley could bring to the venture - their entire life savings of around $325,000.

3.6 The *whanau* was to take possession of the farm in February 1984. Even before the Evans arrived, trouble was looming on the horizon however. The decision to lease the property was the subject of strong protests by Ngati Paoa and island residents. Ngati Paoa protested vigorously and a Waiheke Island action group petitioned Parliament in a bid to stop the property being leased, but George Evans and his family were assured by the Crown that the controversy was nothing more than a "storm in a teacup".

3.7 Nothing could have been further from the truth. Ngati Paoa lodged a claim with the Waitangi Tribunal, alleging that the Department of Maori Affairs should not have leased the property to the Evans Partnership, but should instead have returned it to the *iwi.*

3.8 Meanwhile, farming on Waiheke turned out to be an extremely difficult enterprise, for a variety of reasons. Certainly the political turmoil and the poor physical condition of the farm did not help the Evans' plight. The *whanau* puts its every resource into developing the farm, to no avail. The Partnership's debts began to mount up, and by April 1986 the Department of Maori Affairs' records showed that the rates, mortgage and rent payments for the property were in arrears.

3.9 In June 1987 the Waitangi Tribunal published its *Waiheke Island Report.* The Tribunal recommended that the Crown establish a Ng§ti Paoa Trust on the available Waiheke Island land. In relation to the Part XXIV development scheme leased to the Evans Partnership, it recommended that *"a compromise agreement between [George Evans] and Ngati Paoa would help to resolve a whanau situation and bring them together as whanau."*

3.10 The Tribunal concluded: *"if all else were equal the scheme should now pass to Ngati Paoa".* However, the Tribunal recognised that the Evans Partnership had acquired its leasehold rights for value and in good faith, and stated that

> ***"the Evans family is an innocent party in this affair. We do not recommend any disposition of the Waiheke Station so as to prejudice the Partnership's position. It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party, while creating another for another***[n2]

[2] **Report *of the Waitangi Tribunal on the Waiheke Island Claim* (1987), page 47.**

3.11 The Tribunal recommended that the Crown negotiate with the Board, the Evans *whanau* and Ngati Paoa regarding the release of the property to a Ngati Paoa Trust.

3.12 George Evans had met with Ngati Paoa representatives several times between 1985 and 1987. Even before the Tribunal recommendations were published the parties had agreed that the Evans Partnership would relinquish the lease, the property would vest in Ngati Paoa, and the Crown through the Board of Maori Affairs would negotiate the terms of compensation payable to the Evans *whanau.*

3.13 George Evans then entered into negotiations with the Board of Maori Affairs. In July 1987 he met with a subcommittee of the Board in Kawhia. He offered to surrender the lease to the Crown and to hand over the livestock and plant, in return for the satisfaction of his farming liabilities and the restoration of his initial deposit for the lease of $325,000.

3.14 Sir Graham Latimer moved a resolution on behalf of the subcommittee to the effect that George Evans should be allowed to surrender the lease with his dignity intact and with his deposit of $325,000. Sir Graham later gave evidence before the High Court that the $325,000 was intended to be a net amount. George Evans thought that it was all over.

3.15 However, it was not to be as straightforward as ail that. When the full Board considered the matter in August 1987 it resolved to accept the surrender of the lease in return for repayment of the $325,000 deposit, but, critically, it refused to cover any of the debts. That meant that the Evans Partnership would still have been insolvent, which was not an acceptable outcome.

3.16 Negotiations between the parties continued until 14 October 1987. Then without warning, the Board unilaterally withdrew the offer on the table and resolved instead to re-enter the lease on the basis that the Evans Partnership had failed to remedy various defaults. The alleged defaults included non-payment of rent, insurance premiums and rates, and a failure to control noxious weeds.

3.17 On 16 November 1987, again without warning, the Department re-entered the property. George Evans and his family walked away with nothing. George and his daughter Anita were bankrupted.

3.18 Since that time George Evans has continued to seek redress, exhausting almost all the avenues open to him.

4. THE TRIBUNAL'S JURISDICTION TO CONSIDER THIS CASE

4.1 It is anticipated that the Crown may seek to argue that Treaty rights have not been infringed in this case because the transaction between the Department of Maori Affairs and the Evans Partnership was a purely

commercial

5. THE CROWN'S BREACHES OF THE PRINCIPLES OF THE TREATY

5.1 I turn now to consider the principles of the Treaty that the claimants consider the Crown has breached.

5.2 The Treaty is described as a partnership between Crown and Maori. Although that partnership is often thought of as being between the Crown and Maori people generally, in the recent Te *Whanau o Waipareira Report* the Waitangi Tribunal eschewed the narrow contractual sense in which the Crown has interpreted the notion of partnership. The Tribunal concluded that

> *"the concept of partnership applies to all Maori, and is primarily for the purpose of describing the way in which Maori and the Crown should relate to each other.* [n9]

5.3 The Treaty partners should act reasonably and in the utmost good faith towards each other:

> *"the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairty, reasonably and honourably towards the other.*[n10]

5.4 The sorry saga of the Evans Partnership's time on Waiheke Island demonstrates precious little good faith on the part of the Crown. The Crown breached its Treaty obligations to act in good faith, fairly, reasonably and honourably towards the Evans Partnership. It also breached its obligations actively to protect the interests of the Evans Partnership. It is well established that the Crown must take positive steps to protect Maori interests.

5.5 There are two broad heads to the claim:

(a) First, that the Evans Partnership should never have been settled on the Waiheke block in the first place.

(i) In failing to properly inquire into the Ngati Paoa claim to the block, the Crown let down not only Ngati Paoa but also the Evans *whanau.* The Crown should have realised from the outset that the land should be returned to Ngati Paoa, rather than leasing it and then reacquiring it in order to return it to Ngati Paoa.

(ii) The other aspect is that the land was at best a marginal farming proposition and the Crown knew it. That was in fact why the Crown was seeking to dispose of the land, in order to cut its losses. It cannot be consistent with the objectives of the Maori development scheme to set farmers up to fail.

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9 *Te Whanau o Waipareira Report,* page 29.

10 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, page 304, in which the Court of Appeal outlined the "collective tenor" of the judgments in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

(b) Second, the Crown's actions in re-entering on the lease were in breach of the Tribunal's recommendation that a negotiated solution should be sought, and in breach of the "agreement in principle" reached at Kawhia that George Evans should be allowed to leave with his dignity intact. The Crown's legalistic approach may have saved it a considerable sum of money, but it is at odds with its duty to act reasonably and in good faith and to try and achieve a fair solution that did not prejudice the Evans Partnership. As the Tribunal said in relation to the Evans family's position, *"it is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party, while creating another for another" .*[n11] The Crown's actions are particularly galling when set against the backdrop of Government policies in respect of Maori development schemes. Not only was it virtually unheard of to take any action in respect of breaches of leases, but the Government wrote off large sums of Part XXIV debt.

6. THE CLAIM IN RESPECT OF WRONGFUL SETTLEMENT

6.1 The first aspect of the claim is the Crown's actions in settling the Evans *whanau* on the Waiheke block.

Ngati Paoa

6.2 The Tribunal has already found the Crown's actions relating to the lease of the block to the Evans Partnership wanting.

6.3 Ngati Paoa filed a claim in the Tribunal complaining that the Board of Maori Affairs had disposed of the farm to the Evans Partnership when it ought to have passed the land to Ngati Paoa. The Tribunal concluded that:

> *"the Crown acted contrary to the principles of the Treaty in enabling the disposal of the Waiheke Scheme through the Board without providing for an inquiry into the Ngati Paoa position, and the prospect of furnishing relief. Having made that inquiry ourselves we are of opinion that if all else were equal the scheme should now pass to Ngati Paoa in a way that assures a viable endowment for the Ngati Paoa people.*[n12]

6.4 This breach of the Crown had flow-on effects for the Evans *whanau* as well as Ngati Paoa. Given the Tribunal's conclusion, it follows that if a proper inquiry had taken place, Ngati Paoa would have gained possession of the land at the outset and the Evans Partnership would not have been offered the Waiheke scheme in the first place. The Evans *whanau* would not have been placed in what proved to be an impossible situation, and they would not have suffered the losses that have caused them so much grief.

6.5 The Crown's failure to make due inquiry into Ngati Paoa's position was compounded by the fact that it misinformed George Evans as to the Ngati

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[1] ***Waiheke Island Report,*** **page 47.**
[2] ***Waiheke Island Report,*** **page 47.**

Paoa claim and in particular the prospects that his tenure on the land would be disrupted by the Ngati Paoa claim.

6.6 While George Evans was aware of Ngati Paoa's connection with Waiheke Island through his great-great grandmother, and he was soon made aware of the protests by Ngati Paoa, he was assured by the Board of Maori Affairs that the controversy would amount to nothing (H6rimatua Evans evidence, paragraph 34; appendices 13 and 14). In particular, he was assured that there would be no prospect of Parliament taking steps to upset the settlement proposal. Based on these assurances and the lack of success of Treaty claimants at that time, it was reasonable for Mr Evans to conclude that the Crown was most unlikely to take any action to restore the land to Ngati Paoa.

6.7 What might have the position been if the Crown had felt unable to give Mr Evans those assurances, or if it had couched those assurances in more equivocal terms? It would surely have given the Evanses cause for doubt as to whether a long-term lease was a viable proposition given the uncertainty of the political situation.

6.8 As it turned out, the Board's assurances quickly proved to be ill founded. It appears that the Board knew more than it let on. What George Evans did not know was that the Crown had already considered returning the land to its ancestral owners. It is clear that the Board of Maori Affairs was well aware of Ngati Paoa's claim to the block before it offered the lease to the Evans Partnership. During the 1985 hearings the Tribunal learned that the District Officer of the Board had recommended in 1982 that the Board investigate returning the land to Ngati Paoa.[13] This recommendation was rejected by Head Office of the Department, apparently due to the Crown's unwillingness to effectively gift the property to Ngati Paoa.[14] The Board also reviewed whether the Tainui Maori Trust Board might be able to hold the land on Ngati Paoa's behalf, but concluded that the Trust Board could not afford to do so unless the property was substantially gifted.[15] In either case, Parliamentary approval would be required. The Board agreed with Head Office's recommendation that the scheme ought to be wound up and sold.

6.9 It is not clear from the documentary evidence the extent to which the Crown foresaw that the Ngati Paoa claim would eventually have to be dealt with. Certainly the social climate of the time - one of defiant protests and land marches - makes it difficult to believe that the Crown was unaware of the force behind the pleas to settle Ngati Paoa on the land. While the Waitangi Tribunal did not have jurisdiction in 1984 to inquire into historical claims, the issue of retrospective scope for the Tribunal's investigations, and a Treaty settlement process, must have been on the political agenda even then, given

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13 ***Waiheke Island Report,*** **page 24.**
14 ***Waiheke Island Report,*** **page 25.**
15 ***Waiheke Island Report,*** **page 25.**

that the jurisdiction was changed in 1985. In any event Ngati Paoa's claim was made in 1984 before the jurisdiction changed, and was based on the Board's decision to lease the land to the Evans Partnership.

6.10 A telling point is that in late 1984, less than a year after the Evans had settled the farm, the Board had come to the realisation that it had to remove the Evans *whanau* (Georgina Zervudachi's evidence, paragraph 18). If the Board had inquired into Ngati Paoa's claim more carefully, it may well have reached that conclusion sooner.

An uneconomic proposition

6.11 The other unsettling aspect of the Board's decision to lease the block was that it knew from the outset that the farm was marginal.[16] Being on an island increased costs, and the land was prone to drought in summer. By the time the property was offered to the Evans Partnership in 1983, the Department had farmed the block for some 17 years. The venture had turned a profit in only 4 of those years, and the Department's development debt had steadily grown until it had reached a peak of around $670,000.[17] It had become economically unsustainable for the Board to continue farming the land. Its objective in disposing of the scheme was to recover the debt.

6.12 A major factor for the Board in selecting George and his *whanau* was the
capital they could bring to the venture - a deposit of $325,000, around half the amount owed by the scheme to the Department.

6.13 In its *Waiheke Island Report* the Tribunal was careful not to criticise the Board's decision to lease the property. The Tribunal held that it was *"reasonable that when the scheme was not paying as it should, and the Maori development account was being taxed as a result, that the Board moved to dispose of it* ,[18] and that *"the Board had a duty to protect the Maori Development fund".* [19] That is a reasonable conclusion from a public policy point of view.

6.14 However, the Tribunal also assumed (presumably without being in possession of all the facts) that the land was "reasonably developed",[20] an assumption with which the Evans *whanau* begs to differ. George Evans will give evidence of the problems with which they were beset from the moment they set foot on the land, many due to previous bad management. For instance, the Board had stocked the land beyond its carrying capacity; there were significant ongoing losses of stock due to facial eczema and the harsh

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18 See for instance, *Waiheke Island Report,* page 22 *"the misgivings of the Board that development of the area was marginal was soon translated into fact;* Horimatua Evans evidence, appendix 5, which is the minutes of the committee interviewing the applicants. Various comments are made which reveal that it was recognised that substantial capital was required in order to make a go of it, that the economics would be tight, and that there was a possibility of failure. v

Waiheke Island Report, page 23.

18 *Waiheke Island Report,* page 32.

19 *Waiheke Island Report,* page 33.

20 *Waiheke Island Report,* page 23.

conditions; the Board had sold the farm's heifers prior to the Evanses taking posession; gorse was a significant problem that had not been adequately tackled; the Board had removed the water troughs and replacement was required; it was necessary to reticulate the water as the only springs were within the bush reserves; and fencing of reserves was left to the Evanses (George Evans evidence, paragraphs 49-56). Right from the outset, the Evans *whanau* was up against it.

6.15 It is true that some of the Evans Partnership's economic troubles may be attributed to a general downturn in farming. Farming is cyclical in nature, and what was needed was a sufficient capital base to weather the storms. However, the Department had required George and Beverley Evans to place all their assets into the deposit - a letter from the Department on 20 September 1983 (appendix 6 to George's evidence) states:

> *"All your family's assets will be required to be turned into cash and put towards this settlement proposition."*

As it turned out, requiring all their assets to be put into the scheme denied the Evans *whanau* a financial base from which to manage the substantial mortgage given to the Board.

6.16 A contributing factor to the financial difficulties, to which I shall return, is that the Ngati Paoa claim prejudiced the Evanses' ability to secure credit and prolonged the search for a solution once it became clear that it was no longer viable to continue farming.

6.17 It is submitted that the Crown was acting contrary to the objectives of the Maori land development scheme in placing Maori farmers on land that it knew was unlikely to be viable as an economic farming unit.

7. THE CLAIM IN RESPECT OF WRONGFUL RE-ENTRY

7.1 The Board re-entered on the lease in November 1987. This act constituted a breach of the principles of the Treaty. Again, there are several aspects to this broad cause of action.

Failure to comply with Tribunal recommendations in the *Waiheke Island Report*

7.2 The Crown, through the actions of the officers of the Department of Maori Affairs, ultimately did not comply with the recommendations of the Tribunal in its *Waiheke Island Report.*

7.3 It is worth setting out in full the Tribunal's findings and recommendations regarding the Evans Partnership:

"We are of the opinion that if all else were equal the scheme should now pass to Ngati Paoa in a way that assures a viable endowment for the Ngati Paoa people.

All else is not equal however. The Evans partnership acquired its leasehold and freeholding rights for value and in good faith. The Evans family is an innocent party in this affair. We do not recommend any disposition of the Waiheke Station so as to prejudice the partnership's position. It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another. [n21]

"...We recommend that the Crown negotiate with the Board, Mr Evans and the Ngati Paoa Development Trust (Inc), through a negotiator appointed by it, with a view to releasing the Waiheke Station to a Ngati Paoa tribal trust and establishing a viable operation on it, or failing agreement, that the Crown seeks for Ngati Paoa some other endowment that involves a land base within its ancestral territory. [n22]

7.4 The Crown fulfilled its Treaty obligations to Ngati Paoa by handing them the Waiheke block in 1989[23]. However, it did not pursue negotiations with the Evans Partnership in good faith, despite the fact that the Evans *whanau* was prepared to hand the lease over to Ngati Paoa. George Evans had even reached an agreement with the *iwi,* which was put in writing and filed with the Tribunal before its report was even published.[24]

7.5 The Board ultimately chose to enforce its strict legal rights rather than attempt to find an equitable, mutually acceptable compromise. This course of action would have saved the Board a significant amount of money, but it smacks of bad faith. The Evans *whanau* feel that they effectively subsidised the settlement with Ngati Paoa. It is submitted that a report prepared by the Board's acting secretary is instructive on this point. He wrote:

"The actions of the Board of Maori Affairs and departmental staff have been legally correct but in retrospect a different result would probably have emerged if discussions had taken place in the manner envisaged by the Tribunal. The Tribunal's approach that one injustice should not be solved by creating another would surely have improved the position of the Evan's".[25]

Agreement that George Evans should be allowed to leave with his dignity intact

7.6 In fact, the early discussions appeared promising. The Evans *whanau* believed that agreement on a way forward had been reached in principle at the Kawhia meeting, but the Board reneged on this understanding.

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22 *Waiheke Island Report,* page 47.
23 *Waiheke Island Report,* page 47, and repeated as Recommendation 1 at page 48.
24 See article in the *Sunday Star,* 12 March 1989, annexed to George Evans's evidence as appendix 82.
25 Memorandum of Counsel for Ngati Paoa of 23 February 1987 (appendix 17 to George Evans's evidence).
Report of 9 June 1989, quoted in Court of Appeal decision, page 12 (appendix 66).

7.7 The Kawhia meeting was convened on 8 July 1987, shortly after the Tribunal's report was published. George and the members of a sub committee of the Board discussed the terms of a hand-over of the farm.

7.8 The discussions are recorded in minutes, attached to George's evidence as appendix 47 (although they may not be a full record, they do not seem to record what was said in Maori). A subcommittee of the Board (comprising Richard Fox, Robert Mahuta and Sir Graham Latimer) and Department of Maori Affairs staff were present. As summarised in the Court of Appeal's decision:

> *"A feature of the minutes ... is the contrast between the rather judgmental and legalistic approach of most of the Departmental officers ... and the sympathetic and constructive attitude of the three Maori members. The former saw the problem as one of Mr Evans' own making, caused by bad management and unwise management decisions. The concern of the latter was with the morality of the matter, having regard to the property's "history of failure" to quote one of them, and to the Ngati Paoa claim, which was known when the lease was originally offered and which hampered if not precluded any sale of the lessees' interest other than to the Board. Their view prevailed and a resolution by way of recommendation to the Board was passed.* [n26]

7.9 The Department officials were reminding the Subcommittee even at that stage that the matter could be brought to an end by re-entering on the lease, but the M3ori Board members were clearly averse to this solution. Richard Fox referred to the *"amalgam of blame beginning with the Board of Maori Affairs off-loading the property",* and Sir Graham Latimer pointed out that the Department had settled the Evans Partnership *"knowing that the Waiheke property had a history of failure",*[27]

7.10 Sir Graham Latimer was one of the Board members, and he made the resolution in Maori. Translated literally into English, it was that George's deposit of $325,000 would be returned (Horimatua Evans evidence, paragraphs 76-78). No mention was made of the debts incurred by the *whanau* in developing and maintaining the farm. The High Court heard Sir Graham's evidence as to his understanding of the resolution. He said:

> *"What we meant was that Mr Evans' deposit in total should be returned to him, and the reason why we arrived at this in Maori was because there were two ways in Maoridom to address the situation. One is you can ostracise a person for not complying with Maori protocol. Or you can restore the dignity by offering back what he had contributed. In our eyes Mr Evans had not contravened Maori protocol but he should be allowed to walk away with his dignity intact, that is the reason why we offered back his deposit.*[23]

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26 **Court of Appeal decision, page 6 (appendix 66).**

27 **Minutes of the Meeting of the Board of Maori Affairs Sub-Committee held at Kawhia Hotel on Wednesday, 8 July 1987 at 2.20 pm, page 4, appendix 47 to Horimatua Evans evidence.**

21 **Court of Appeal decision, page 7 (appendix 66).**

Asked specifically whether by the resolution meant that the Board would cover the debts relating to the farm, Sir Graham said:

> *"The $325,000 net was what the Maori calls Tono, it [was] offered to the farm through the Board. That is the extent of his dignity and that he should walk away with the full amount. That there should be no expenses taken out of this $325,000. n29*

7.11 Therefore, an agreement was reached in Kawhia, at least in principle, that the matter would be dealt with according to *tikanga,* and that the Evans *whanau* would leave with its dignity intact. George Evans's understanding of the resolution was that:

> *"It meant that we were to exit the block with dignity, we were to go away with the mana that we went there with, and the koha that we had put down be returned to us."*
>
> (Horimatua Evans evidence, paragraph 78).

7.12 Given the *mana* of the members of the subcommittee, it would not be unreasonable to assume that an agreement in principle had been reached, and that the Board would adopt the subcommittee's recommendation. However, the full Board resolved to return the deposit but not to cover the farming debts. Those debts exceeded the value of the deposit, so George would still have faced the indignity of being bankrupted. He rejected the offer, as it did not accord with the spirit of the Kawhia agreement.

Unilateral withdrawal from negotiations

7.13 Negotiations continued for several months after the Kawhia meeting, until, inexplicably, on 14 October 1987 the Crown withdrew the offer on the table.

7.14 The Board's decision to withdraw its offer was not in keeping with the spirit with which the negotiations should have been conducted, given the Tribunal's recommendation that the position of the Evans Partnership should not be prejudiced.

7.15 The Court of Appeal found that the Board was legally within its rights in withdrawing the offer, but noted that it *"may have been inappropriate for the Board to have acted so peremptorily upon receipt of the solicitors' letter of 1 October".*[30] The reason for the Court's conclusion was that

> *"the Board's response was not what would be expected where the parties were coming closer, and the basic principle, that the initial deposit would be refunded so that Mr Evans would withdraw with his dignity intact, was accepted."*[31]

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29 Court of Appeal decision, page 7 (appendix 66).
30 Court of Appeal decision, page 18 (appendix 66).
3 Court of Appeal decision, page 10 (appendix 66).

Re-entry without proper cause

7.16 The Department of Maori Affairs re-entered the lease on 16 November 1987. It is my submission that the Crown acted unreasonably in forcing re-entry, and that its motivation for re-entering extended beyond its desire to protect its financial position - the Tribunal had recommended by this stage that the land be returned to Ngati Paoa and the Crown required the land back. Although the Tribunal's decision did not come out until June 1987, the minutes of a Board meeting in April 1987 are telling. They record that the re-entry option was being discussed even back then, and the motivation for it:

> *"(Peter Little) said that the suggested action preserves the Crown's situation. By re-entering the lease, the Board preserves its interest in the entire Block."* (George Evans evidence, appendix 33)

7.17 The Crown re-entered pursuant to a Property Law Act section 118 notice served by the Department on 22 October 1987, which alleged numerous breaches of the lease.[32] This section 118 notice was the culmination of a campaign of frequent inspections that bordered on harassment. The Board was searching for a way out. A number of the allegations made in the 22 October notice were unfounded, and the requirement to remedy the other alleged breaches was totally unreasonable given the nature of the Waiheke operation.

7.18 The Department complained that a rent payment of $6,875.00 was overdue. This was incorrect, as Department had mistakenly appropriated an earlier overpayment of rent in that sum to the Evans partnership's mortgage account[33].

7.19 The error was not discovered until 1993, when the claimants applied for a re hearing of their court case. Justice Tompkins declined to order a rehearing, as in his opinion the Department could still legally re-enter on the basis of the other alleged breaches.[34]

7.20 His Honour did, however, speak of the Court of Appeal's reference to the possibility of *"those concerned doing what they may think is morally right".* Tompkins J stated:

> *"That indication is now reinforced by the events that have occurred. The department's error that has now been uncovered and the consequence that that error has had again points to the appropriateness of some course being adopted between the parties to alleviate the situation that has arisen. [35]*

His Honour continued:

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[32] Section 118 notice dated 22 October 1987, attached to the evidence of George Evans as appendix 58.

[33] The calculations of JG Russell of Commercial Management are attached to George Evans' evidence as appendix 59.

[34] *GM Evans Partnership v A-G,* an unreported judgment of Tompkins J, High Court, Auckland, 10 December 1993, (hereafter referred to as "bankruptcy judgment") page 5.

[35] Bankruptcy judgment, page 5.

> *"The error over the rent may well have prejudiced the plaintiffs in the respect to which I have already referred, namely that if the parties had recognised that there were no rental arrears at the time, the plaintiffs would almost certainly have applied for relief against forfeiture."*

7.21 The Department's error aside, the rent demand was unreasonable because rent was customarily paid after the summer sales of wool and weaner steers.[36] Indeed, on the date of re-entry there was already sufficient wool baled to cover the supposedly outstanding sum.

7.22 The second alleged breach was the non-payment of rates. George's evidence is that he was not paying rent to the Waiheke County Council as a form of protest.[37] Since 1985 the Council had refused to register a survey of the Crown reserves on the farm, which would have perfected the Evans' title and lessened both the rent and the rates payable by the *whanau.* The reason for this refusal was the uncertainty over the farm's future, due to Ngati Paoa's protests.[38]

7.23 The insurance premiums were also not up to date. The claimant asserts that the Department undertook to pay the premiums after the Bank refused to honour the partnership's cheques.[39]

7.24 A further breach alleged in the section 118 notice was the fact that George no longer lived on the property, as required by the lease. George had obtained employment in Mangakino to provide income for development of the farm. However, the Board and Department were well aware of this fact. The minutes of a meeting of the Board in early 1987 record:

> *Mr Dewes advised that the Board in settling Mr Evans had tacitly agreed to permit him to work away from the farm and that this should not therefore be a ground for breach of covenant*[40]

This advice was obviously forgotten by 22 October, when the section 118 notice was issued.

7.25 The Department made a number of further demands, which were due to be met by a date after re-entry eventually took place. In any event, these demands were completely unreasonable, especially given the well-documented economic troubles for farmers in 1987. Amongst other things, the *whanau* was required, within three months, to have applied over $180,000 worth of fertiliser, sown or oversown about 420 hectares of pasture, and eradicate 70 hectares of noxious weeds. Compliance with the

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35 Evidence of Horimatua Evans, paragraph 92.
37 Evidence of Horimatua Evans, paragraph 95.
38 Letter to George Evans from the Department of Lands and Survey dated 11 February 1987, attached to George's evidence as appendix 21.
39 Evidence of Horimatua Evans, paragraph 97.
40 Minutes of a meeting of the Board of Maori Affairs' Development Sub-Committee held on 10 March 1987, attached to the evidence of Horimatua Evans as appendix 32.

Department's demands, and with the terms of the lease in general, was physically and financially impossible. Re-entry was inevitable.

7.26 The Crown's actions should also be seen in light of its lenient attitude towards the lease breaches invariably found on other Maori land development schemes. Georgina Zervudachi, George Evans' daughter, is an expert on Maori leases. Her evidence is that

> *"the resumption of these types of leases was and is practically unknown. Lessees were almost invariably faced with difficult, if not impossible, farming and economic conditions, and it was standard practice for the Department to show tolerance regarding breaches of technical, and even more fundamental, covenants of leases.*[41]

In my submission, this inconsistent treatment constitutes a further breach of the Crown's duty to act with fairness and in good faith.

7.27 The other aspect of Government policy that warrants scrutiny is the widespread debt write-offs that took place as development blocks were released from Part XXIV. In the period from 1985 to 1991, over $30 million was written off by the Government.[42]

Lack of financial assistance and failure to pay proper compensation

7.28 There are many instances in which the Crown's failure to intervene in a timely fashion and provide the assistance it had promised, or which it was obliged to provide, prejudiced the position of the Partnership.

7.29 The farm could have been more manageable if the ongoing assistance promised by the Board had materialised. Funding was promised in the offer letter (appendix 3 to George Evans' brief) for the purchase of replacement stock ($15,000) and materials for fencing and water reticulation ($9,000), but was never provided. The Department had sold these items immediately before the *whanau* entered the property in 1984. It had undertaken to provide finance to replace these - the Department's lease offer to the Partnership clearly sets this out[43] - but this was never forthcoming.[44] The Evans Partnership had to borrow from other finance companies; the Board never met those debts.

7.30 It is important to appreciate that the Crown's failure to resolve the Ngati Paoa claim had a significant impact on the viability of the farming operation. The Waiheke County Council refused to approve the survey of the land, apparently due to its support of Ngati Paoa, which meant that title couldn't be issued. The lack of title and the Tribunal claim made the bank extremely

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41 Evidence of Georgina Marie Iritana Zervudachi, paragraph 35.

42 Letter from Hon Doug Kidd, Minister in Charge of the Iwi Transition Agency, to Ian Peters MP dated 28 November 1991, attached to the evidence of Horimatua Evans as appendix 56.

43 Letter from the Department of Maori Affairs to George Evans dated 20 September 1983, paragraph 6 (appendix 6).

44 Evidence of Horimatua Evans, paragraphs 50 and 53.

nervous, and it withdrew its credit facility (Horimatua Evans evidence, paragraphs 58-60). To make matters worse, the Partnership's ability to find a solution to its debt problems was limited due to the Board's unwillingness to allow the Partnership to sell its interest in the lease.

7.31 This was evidenced at a debt-restructuring meeting held in April 1987. Present were the Evans partnership's main creditors, including the Department of Maori Affairs, and members of the *whanau.* The Department convened the meeting in accordance with the Government's rural assistance measures, whereby the Government would facilitate solutions to farmers' financial woes. The Government's policy was to write down the debts owed it by a farmer, if the other creditors could resolve to do the same. The purpose of the meeting was, in the words of its Chairman: *"to give assistance if it was possible, to the fanner so that he could continue to farm".*[45]

7.32 The creditors at the meeting passed a resolution declaring that:

> *The meeting of creditors whilst recognising the particular conditions and constraints pertaining in the lease, and that it would be difficult to obtain the maximum price for the property, recommend that the Evans Partnership be given the opportunity to establish a full market value in an unfetted (sic) manner, preferably by public auction and that this be accomplished within two months.*[46]

It meant that the *whanau* would be able to sell its interest in order to meet its debts and walk away.

7.33 However, the Crown did not facilitate a solution to the Evans Partnership's financial problems. Contrary to Government policy, the Board of Maori Affairs rejected the resolution, which would have greatly eased the burden on the *whanau.* It seems the Board resolved to maintain its control over the property, while it waited for the Tribunal's recommendations on whether the land should be returned to Ngati Paoa (the report finally came out in June 1987).

7.34 The rejection of this solution meant that the situation continued to drag on unresolved for the remainder of 1987, while the Partnership's debts mounted. Given the Department's objective of retaining Crown ownership over the land, and the prejudice occasioned to the Partnership by its refusal to allow the Partnership to dispose of its interest, it would have been reasonable for the Department to provide some financial relief in terms of the Partnership's mortgage. This was not forthcoming, despite the fact that Government policy allowed substantial debt write-offs during this period.

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45 **Minutes of the debt-restructuring meeting held on 2 April 1987, attached to the evidence of Georgina Marie Iritana Zervudachi as appendix "A".**

48 **Minutes of the debt-restructuring meeting (appendix A).**

7.35 Furthermore, since re-entry the Crown has failed to compensate the Evans *whanau.* The debt to the Department was eventually forgiven, but by that time it was clear that George would become bankrupt anyway.

7.36 Given George Evans' financial situation after the farm was taken from him, any reduction at that stage to the Department's mortgage would have been nominal only - George's bankruptcy was inevitable. Nevertheless, it is my submission that the debt's balance remained at an incorrect level, as the Department failed to take into account certain relevant considerations - listing these errors serves emphasise the injustice of the lack of compensation for the Crown's actions.

7.37 Firstly, the stock valuation conducted on re-entry was woeful. In the estimation of the claimant, himself a professional valuer, the stock was undervalued by up to $120,000[47].

7.38 Moreover, no consideration was made for the value of the improvements to the farm made by the Evans Partnership at its own cost. The *whanau* had made significant improvements to, amongst other things, the farmhouse and the shearers' quarters[48].

7.39 Finally, no account was taken of the reduction in market value of the property as a result of Ngati Paoa's Tribunal claim. A report provided by the Valuation Department in 1989[49] concluded that the value of the Evans partnership's leasehold interest in the farm had dropped by around $171,000 - this was not reflected in the debt figures held by the Department, however.

Failure to remedy Treaty breaches

7.40 George's hopes have been raised time and time again as his case has been heard or considered by the Cabinet, various Ministers of Maori Affairs, the Prime Minister, the Ombudsman, and numerous Members of Parliament.

7.41 Despite this, the Evans *whanau* has never been compensated for its suffering.

8. PREJUDICE SUFFERED BY THE *WHANAU*

8.1 In short, the Waiheke saga brought the financial ruin of the *whanau.* The *whanau* was dispossessed of its property, the life savings of George and Beverley Evans were lost, and George and Anita Evans were bankrupted.

8.2 The suffering is not merely financial of course. I will leave it to the *whanau* members themselves to relate more fully the pain that they have suffered as a result of the Crown's actions.

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47 Evidence of Horimatua Evans, paragraph 109.

48 Evidence of Albert John Evans, paragraph 4.

49 Valuation report prepared by Valuation New Zealand, dated 7 August 1989, attached to the evidence of Graeme Thomas Foster as appendix "B".

9. SPECIFIC REMEDIES SOUGHT

9.1 The Evans *whanau* seeks a recommendation that the Crown compensate the claimant for the prejudice suffered as a result of the policies, practices, acts and omissions of the Department in both leasing the property to the Evans Partnership and forcing re-entry. The schedule to these submissions suggests an approach as to quantum.

9.2 Finally, the claimant seeks an acknowledgement by the Crown of the wrongs perpetrated on the Evans *whanau.*

10. THE EVIDENCE

10.1 You have been introduced to the claim, and now it is time for the witnesses to speak. First the claimant, Horimatua Evans, will tell his story. He has recounted it many times during his quest for justice, which has spanned the past 14 years. Today will be one of the first times that people have been prepared to listen.

10.2 Graeme Foster will speak about a Board of Maori Affairs meeting he attended in 1989. Mr Foster was a member of the Board at that time, and he will give evidence of a Board resolution to pay George out, which was overturned at a ministerial level.

10.3 George's daughter Georgina has come from France to recount her experience of the Waiheke farm. Georgina has published a Masters thesis on Maori leased land, so is able to give the Tribunal a broader perspective of the *whanau's* treatment.

10.4 Other members of the *whanau* will tell of their time on Waiheke. George's son Brent Evans managed the farm for some time, and will tell of the pressure of the Department's constant inspections. Albert Evans is George's brother, who accompanied George to the Kawhia meeting. Samson Te Whata also lived on Waiheke, and was managing the farm when the Department re-entered the lease.

Dated the 3rd day of October 2001

Karen Feint David Randal

SCHEDULE - Compensation for loss suffered by the Evans *whanau* as a result of the Crown's actions

The claimant invites the Tribunal to indicate a fair figure for compensation, if it sees fit to do so. There are several possible approaches to the question of quantifying the loss to the claimant.

A legal approach

In legal terms, the claimant's bankruptcy in 1994 has cleared the debts incurred during his time on Waiheke. Choses in action do not survive bankruptcy, and so any legal right to the financial contributions put into Waiheke by the claimant have been lost, as the Official Assignee did not pursue any claims on George Evans's behalf.

A moral approach

It is submitted that a better approach is to gauge the claimant's loss according to the position that the claimant would have been in if the Crown had not acted contrary to the principles of the Treaty. As the Court of Appeal put it, it is not too late for the Crown to do what is morally right.

One possible method is to look at the cost saved by the Crown in not buying back the claimant's interest. By way of analogy, I refer to the Crown's settlement of Alan Titford, a Northland farmer whose land was required for return to Maori, pursuant to the Tribunal's recommendations in the Te Roroa claim. Mr Titford's freehold interest in his farm was worth roughly the same as the Evans Partnership's in the Waiheke Station (about $1 million), and he too had substantial debts over his property. Mr Titford benefited from a compensation package worth $3.25 million.

Graeme Foster's evidence is instructive of the Board of Maori Affairs' approach in 1989, which subsequently came to nothing. The Board asked Mr Foster to prepare a rough valuation report to calculate loss, as if the land had been compulsorily acquired under the Public Works Act.[50]

The report at paragraph 2(i) sets out the value as:

Stock and plant as at 8 July 1987	*(unknown)*
Loss of land	*$427,000*
Loss of lease value due to Ngati Paoa claim	*$171,000*
Costs associated with the claim	*(unknown)*
Plus interest from 8 July 1987 to completion	*(unknown)*
Less the amount of the Evans Partnership's debt to the Department plus interest	*(unknown)*

[50] **The report is attached to the evidence of Graeme Thomas Foster as appendix "B".**

The amount of this debt was very large. The claimants assert that it was incorrectly calculated, however, for the reasons given at paragraphs 7.37 and 7.38 of the opening submissions. A complete write-off of the debt would result in a payment to the claimant of well over $600,000 plus interest. This figure does not take into account the emotional distress suffered by the *whanau.*

A simple and fair method

However, in my submission the simplest way to quantify loss is by restoring the claimant to the financial position he occupied before being settled. This is on the basis that the Evans Partnership should not have been settled there in the first place.

This approach would require the return of the deposit of $325,000.

Secondly, compensation should be paid to take into account the contributions made toward the property during the *whanau's* time on Waiheke. This is estimated at a sum of $140,000.

Interest should be paid on these two figures, so that the amount has the same value as it did when it was paid by the Evans Partnership.

Finally, it is my submission that the Crown should also make a payment to recognise and compensate the mental anguish suffered by the *whanau.* The claimant understandably declines to put a figure on this suffering - it would be improper for him to do so.

The claimant invites the Tribunal to indicate a fair global figure for compensation, if it sees fit to do so.

Thus the compensation claimed is:

Initial deposit	*$325,000*
Other contributions	*$140,000*
Plus interest at such a rate as the Tribunal sees fit	

Plus compensation for emotional suffering as the Tribunal sees fit