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RICHARD A EPSTEIN is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. Previously, he taught law at the University of Southern California from 1968 to 1972.

He has been a member of the American Academy of Arts and Sciences since 1985 and a Senior Fellow of the Center for Clinical Medical Ethics at the University of Chicago Medical School. He served as editor of the *Journal of Legal Studies* from 1981 to 1991, and since 1991 has been an editor of the *Journal of Law and Economics*.

His books include *Torts* (Aspen Law and Business, 1999), *Principles for a Free Society* (Perseus Books, 1998), *Mortal Peril: Our Inalienable Right to Health Care?* (Addison Wesley, 1997), *Simple Rules for a Complex World* (Harvard, 1995), *Bargaining with the State* (Princeton, 1993), *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard, 1992), *Cases and Materials on Torts* (Little, Brown, 5th ed, 1990), *Takings: Private Property and the Power of Eminent Domain* (Harvard, 1985), and *Modern Products Liability Law* (Greenwood Press, 1980).

Professor Epstein has written numerous articles on a wide range of legal and interdisciplinary subjects and taught courses in contracts, criminal law, health law and policy, legal history, property, real estate development and finance, jurisprudence and taxation, torts, and workers' compensation.

The Treaty of Waitangi: A Plain Meaning Interpretation

It was only with some trepidation that I accepted your invitation to speak about the Treaty of Waitangi and the rights of indigenous people, a most controversial subject in New Zealand. At one level, the debates here replicate those that are occurring elsewhere in the world. But at a second level, much depends on the distinctive history of the Treaty in New Zealand, which has no obvious parallels elsewhere. My ignorance of the particulars of that history and the detail of the Treaty of Waitangi is profound. I must from the outset disclaim familiarity with the relevant literature, the judicial decisions on the Treaty, or even current political developments on this issue.

Given all these disclaimers, what might an outsider bring to this topic? Perhaps I can contribute in two respects. First, I have devoted a good deal of effort to analysing the legal issues surrounding the acquisition and ownership of private property across cultures and over time. One recurrent theme in these studies is the system of rules that keeps land ownership coherent. This problem comes up not only with indigenous peoples, but also with land and property taken in war and other civil disturbances, such as those in Germany and Eastern Europe, where the movement for the restitution of property wrongfully taken is extremely powerful. The problem also arises in every ordinary legal system where the doctrines

of adverse possession ask how long the holder of land is subject to suit by other individuals who claim better title to that property.

The issue of indigenous property rights marks an important throwback to an earlier era. When we talk about property today, we all too often regard it as an elaborate system for the regulation of land use and other natural resources such as fish and game. But in the historical sources on property law – such as the Roman law – extensive portions of the legal doctrine address the stability of title when land is forcibly taken from one person and given to another, or transferred from one person to another in a defective transaction, that is, a transaction that did not observe all the formalities normally required to transfer an interest in land. The legal issue is whether the validity of that defective transaction may be salvaged, or whether it should be set aside because of the improper way in which it was undertaken. There is an advantage in analysing these issues from the distant perspective of classical and common law. It allows an appreciation of how people in the past have approached such questions in the absence of the international or ethnic tensions involved in the Treaty of Waitangi, in the Hawaiian context, or indeed in other indigenous rights settings throughout the world. An understanding of these issues may help us cope with the more explosive settings, and provide a rough guide on how to proceed.

My second reason for discussing the Treaty of Waitangi is that I have actually read the document from start to finish. I read it, moreover, without any knowledge of the meanings subsequently read into it by those who have struggled with its interpretation. My perspective is that of a lawyer approaching the Treaty without any preconceptions about New Zealand. I think that this fresh look could pay large dividends, because all too often the debates over gloss and commentary obscure the central meaning of the original document, short as it may be.

This insistence on reading the Treaty as a stand-alone instrument forced me to engage in some legal archaeology: to read between the lines in order to understand the difficulties that the parties were at that time trying to address. I also approach the Treaty as a frustrated draughtsman

after the fact. Given a treaty of this type, forged in particular circumstances, what can be said about its overall objectives and structure? Was the language chosen appropriate for the task at hand? These questions present the additional difficulty, inevitable in this area, of choosing the norms of interpretation applicable to this treaty when so much turns on their proper selection.

The Treaty of Waitangi is an 1840 document. To an outsider, its most conspicuous feature is that it is short. Its brevity brings to mind the US Constitution, which is also short yet subject to an enormous amount of interpretation. Many of the current controversies take place in an era where the prevailing views of the relationships between contract, property and tort law differ markedly from those in Victorian times. These different background understandings of the common law influence the choice of interpretive rules. The older Enlightenment ideal of interpretation, which involved comprehension of the language through the general frame of reference in which it was drafted, gives way to approaches involving structuralism, post-modernism and various contextual interpretations. It may not be possible to arrive at uniform readings of the text given these vast differences, but, notwithstanding all the inordinate sophistication that is brought to interpretation as an abstract matter, it never hurts to put the issue into a more defined context.

The principles of property law

How then should we think about the principles that might be conducive to the permanence and stability of property ownership? Typically in any domestic legal system, two principles are constantly at war with each other, and people are always attempting to reconcile them as best they can. One is the so-called principle of first possession – a principle that is strongly grounded both in Roman law and in common law and has had a powerful influence on the organisation of English property law. To most modern writers on property, the doctrine has a distinctly conservative cast. It is very prominent in the philosophy of John Locke, where, with modification, it is used as a key element in the defence of private property.

The starting point in Locke and in common law is a state of nature: in that state of the world, people own their own persons, but they do not own the full array of natural resources. How then do we match up specific resources with specific persons?

The general rule for an individual, and to some extent for a group, was that ownership of a property or resource went to the individual or group who possessed it first. Often it is claimed that such a rule of first possession is highly individualistic, and effectively ushers in *laissez-faire* capitalism by creating strong sets of individual rights that are then subject to voluntary exchange. Although there is some truth in this assertion, that criticism underestimates the subtlety of the common law rule. For individuals can band together by kinship arrangements or through contracts, and agree that if one of them acquires title, the right is shared by the larger kin group or organisation rather than vested in that person alone. It is thus quite possible to marry the rule of first possession – normally thought of as individualistic – to a regime with collective ownership of property. All legal systems have elaborate rules that regulate joint tenancies or tenancies in common and reject the proposition that any one co-owner is allowed to exclude another co-owner from the use or possession of the property.

However, any system of collective ownership gives rise to a second level of problems that confronts all societies, whether ancient or modern. Governance rules must be determined within any jointly held property. Who decides how the resources are to be used? What is a fair distribution of the ownership shares? And most importantly, who determines whether a property is to be alienated, either through a complete sale or through some limited partial transfer?

With these baselines, however, the rule of first possession serves one critical function: it generally gives clear guidance on how to organise the priority of title. It is first come, first served. Thus in any conflict between a first possessor and somebody who acquires the land later through force or machination, the law will regard prior in time as higher in right. A vast body of ancient and medieval law involves the implementation of

that principle. On the basis of that doctrine alone, there is a strong presumption of the validity of certain Maori claims: a Lockean and common law defence, as it were – an irony on which I shall not unduly dwell.

In looking at the sequence of events, the first possessors of the land were clearly Maori. The cultural rules of Maori and British may differ in many ways, yet on the point of title through first possession there is a strong similarity. But other important elements now enter the picture. One of the functions of the first possession rule is to identify a person (or group of persons) capable of effecting the alienation of a property through sale, lease, mortgage, gift and the like. First possession settles the root claim from which the pedigree or provenance of subsequent titles can be derived. With a work of art, provenance can be traced back to the original artist. Therefore with a valid chain of sale, even to people outside the original ownership group, the rule of first possession no longer becomes the weapon of those who want to recover land or resources from subsequent owners. Rather, the first possession rule becomes the instrument by which original owners and subsequent trading partners benefit from clearly established title to property. There is an elaborate body of rules dealing with 'privity' between original and subsequent owners. If there is a valid transaction between two parties, the rights of the new titleholder include those that were part of the title of all earlier parties in the chain of title. This orderly system of transmission allows us to keep a system of property rights in land – a permanent object – on an even keel for a long period of time, so long as (and it is a big condition) there is no taint of invalidity or uncertainty regarding either original possession or the subsequent dispositions.

But now imagine that a genuine dispute arises over who is the owner of land, or whether a particular sale or transfer is valid. In an ordinary civil law system, a second set of principles emerges in opposition to the first possession rule. It is equally powerful but cuts in the opposite direction, by introducing the rules of adverse possession and the associated rules governing the statute of limitations. These rules are concerned with

expediting the resolution of disputes over title between people who claim to be original possessors and those who have allegedly taken it from them.

We know that land is a permanent asset, and that there are large social costs if titles are left in flux or uncertainty. When title is uncertain, nobody knows whether they can construct improvements on a property, sell a property, borrow on the security of a property and so on. So the doctrine of adverse possession effectively creates a statute of limitations, where the objecting party must raise a claim within a certain period of time or forfeit it forever. This is not because we wish in any way to favour titles generally regarded as mendacious. Rather, the impulse is that the value of the underlying asset is dissipated by the confusion over the ownership claims if a title is constantly subject to relitigation by individuals whose claims can never be barred. The basic purpose of adverse possession is not to give preference to the wrongdoer over the innocent party, but to operate as a principle of finality, of *res judicata*, designed to bring to closure some of these disputes over ownership so that subsequent gainful dispositions of property can freely take place.

There is, however, an additional complication, because every system of adverse possession is subject to major exceptions. If the innocent party was incapable of bringing suit when the wrongful dispossession took place, the operation of the statute of limitations would be suspended, or as lawyers say more technically, 'tolled'. The most common cases of inability to sue are those of incapacity, such as when a person is an infant or insane. It is an open question how generous this exception for disabilities should be, and whether we should place one disability on the top of another – infancy on top of insanity, as it were, so that no closure can be had over disputes on title.

So, that is the basic legal framework, and there is no conclusive resolution between the priority of first possession, which creates valid title, and the real and pragmatic concerns of the statute of limitations, which will sometimes extinguish valid titles in order to ensure the system's stability and integrity into the future. It is this framework I apply in examining the Treaty of Waitangi and the claims arising under it.

The context of the Treaty of Waitangi

On turning to the Treaty, it is evident that even its most stylised facts help explain key provisions and the pattern of negotiations that led to its ratification. Several features of the Treaty are immediately apparent to an outsider, and they all suggest difficulty ahead.

First, it is important to note that any successful treaty negotiation will ideally be entered into before the contested transactions between the parties take place. This clearly staged progression gives us the benefit of an *ex ante* perspective, free of existing disputes. Matters are necessarily simplified, which increases the prospect of a principled form of resolution of outstanding issues in ways that will not embarrass either side.

However, history is often unkind to human endeavours, and individual parties tend to enter into discrete transactions without understanding how, if at all, they might fit into some overarching plan. Only when we are halfway down the road do we recognise that we are headed for trouble, and then we try to adopt measures to correct the situation without undoing all that has gone before. The Treaty of Waitangi certainly has that element about it. It contains explicit references to the fact that prior to the Treaty a large number of British subjects had settled in New Zealand and purchased lands from Maori tribes. Standing alone, these transactions were ordinary contracts of sale. Taken in context, they represented a transfer of political power to the new occupants of the land. One of the aims of Queen Victoria and her agents was to stabilise the titles of these new purchasers (and the people who purchased or inherited from them). This programme presupposed some confidence that the transactions already entered into were valid and worthy of respect. But did the people who sold the property have title, or were the sales void because the purported sellers were not the true owners? Without a well-articulated system of land ownership and solid knowledge of how tribal claims were organised, that would be a difficult question to answer. Yet the Treaty attempts to ratify these transactions, without any apparent awareness of the lurking complexities that could lead them to be modified, or even set aside. Moreover, the Treaty contains no systematic treatment of the

statute of limitations issues so critical to the operation of any well-organised domestic legal system. To an 1840s lawyer, these visible issues should have attracted much attention, given their immense importance to the future stability of the system.

The second distinctive feature of the Treaty is that it was not only designed to stabilise the relationships of British settlers who had already made purchases of land from Maori; it also contemplated further immigration to New Zealand and the acquisition of property by new settlers. The Treaty seems to assume some form of open immigration – a sign, if not of trouble, of at least further complexity. How many people would be coming? What types of transactions would they enter into? With whom would they be dealing? And so on.

It would be quite wrong of course to assume that the Treaty was only about securing the rights of past and future British settlers. That would not be the nature of a treaty, but an imposition of a rule by one culture on another. One of the striking things about the Treaty of Waitangi, particularly in the context of its times, is that it really does look like a treaty between equal and independent sovereigns. It bears no resemblance to the policies associated with the conquest and domination of indigenous tribes by many Western nations around that time.

In the settlement of the American West (in contrast with earlier American policy), it was not trade or treaty that dominated relationships. By the 1840s, it was confrontation, capture and conquest – not a comfortable way of securing titles worthy of respect in the next generation. So an important element of the Treaty of Waitangi is its attempt to supply a *quid pro quo*, which is crucial to a genuine treaty. And indeed the Treaty language offers a clear and powerful affirmation of Maori title. Another striking feature of the Treaty, which I suspect is a matter of design rather than accident, is the remarkable restraint shown by the British government in deciding the actual state of the title over individual pieces of land. The Treaty appears to contemplate a variety of title holdings in different parcels of land, and effectively says: 'You decide

how this title will be held. When that is sorted out, it will establish a mechanism that will allow for future trade'.

How might future trade take place? Here we come to a provision in the second article that would seem, through the eyes of a draughtsman in 1840, to create real potential trouble. The article says in somewhat convoluted language that there is a right of pre-emption vested in the Crown. To the extent that Maori landowners wish to sell at an agreed price, the Crown can appoint the person or persons entitled to buy land from the Maori population.

Several things are going on here, all of which are very important. First, there is an implicit acceptance that to the extent that individual Maori titles exist, tribal claims cannot block individual sales. The provision effectively says that there is some land owned by tribes, some by families and some by individuals. The right of sale granted by the Crown under the pre-emption rules is given to the proprietors of the land in question, which could be any of the above. This is a controversial and important feature, because it tends to treat property as a commodity rather than a source of territorial and hence political right. This statement means that if you have a community that is ethnically homogeneous, and somebody inside that community sells land to somebody else inside, then the trade preserves the degree of ethnic homogeneity and does not alter the balance of political power within the territory. To the extent, however, that individuals inside that community sell land to outsiders, who now come in and participate in forms of local government, private land sales alter the distribution of political power and with time change the structure of the local constitution.

One of the most constant realities of all property transactions, not only in New Zealand but also in places like the Middle East, is that an assignment of land is not simply a private transaction that determines who owns a particular resource. It is also a political transaction that determines who are the constituents of an altered polity. If incumbent proprietors can alienate their land to new arrivals, as the Treaty of Waitangi seems to

permit, it follows that ethnic homogeneity arguments are of no paramount virtue, because individual actions can undermine the geographical integrity of a particular community. This determined indifference to the political side of land transactions, of course, is the standard Western response in many situations. The outcomes are very complicated in the United States, in the Middle East, and in Albania, and it is no surprise to find that they are complicated in New Zealand as well.

An even larger question concerns why we should vest the pre-emptive right in the Crown if we are creating a right to sale – why should the Crown have the exclusive right to make or sanction purchases from the Maori? This feature exists also in the eastern United States, which in 1790 established something called the Non-Intercourse Treaty. This treaty provided that anybody wanting to deal in Indian lands had to go through a central authority. Private sales by ordinary Indians to ordinary white settlers were not allowed: everything had to be handled or authorised by the government.

As usual, there are two explanations for the adoption of this rule. One story is the benevolent one, which stresses the potential for advantage-taking, undue influence, corruption, and incompetence in private transactions. One group is regarded as sophisticated in commercial transactions, while the other is not. The pre-emptive right can thus be seen as protecting Maori against opportunistic British individuals. There is another view, however, which I suspect is more accurate and relevant. It characterises the pre-emptive right as a classic means of creating a monopoly trading situation for the advantage of some groups or individuals. Sorting out which motive was dominant, and when, is a job that can tax the ablest historians.

Having so far analysed the Treaty of Waitangi as a lawyer, I suggest the interesting questions for an historian are: Who received the right to buy land? What sort of influences were at work? What did the buyers do with the land they acquired? Could someone purchase land as a sole buyer at a song, resell it, and pocket the profits for use in some type of collateral enterprise? Establishing such rights of purchase typically creates a built-in

source of uncertainty that will mushroom in future years. People will always want to make private sales. If they enter into the transactions without the approval of the state, will the sales be regarded as void *ab initio*? That is one possibility. But if they are void *ab initio*, will they be the source of adverse possession claims, which will ripen into full title with the passage of years? That was the typical pattern in private law systems, but it might not necessarily apply to treaties. The one thing that is clear is that any approach adopted was bound to lead to litigation.

Private rights and sovereignty

Let me now explore what I regard as the other major tension in the Treaty, which is the relationship between private rights and sovereignty. One of the private rights aspects of the Treaty is that it gave the Maori tribes undisturbed possession of their lands, forests and other natural resources. This provision was a clear endorsement of the traditional system of tribal rights, but how does it stand up in subsequent times? Claims for undisturbed possession face an ambiguity in every modern society over the meaning of the word 'undisturbed'. One possibility is that undisturbed possession carries the notion of quiet title, in that the state cannot force the owner off the land on the grounds that it has something better to do with it. It leaves open the question of whether any of this land would be subject to the possibility of condemnation, because typically grants of undisturbed title are always subject to the implied right of the state to take the land, so long as it pays just amounts of compensation. After all, why should someone who receives title from the state be immune from condemnation when individuals who acquire title by first possession are subject to it?

In a treaty context, however, it is unclear whether this right of eminent domain applies. If it does, it is still unclear how it should be exercised, for what purpose the land can be taken, how the level of compensation should be determined and so forth. It is also unclear whether undisturbed possession allows general forms of state regulation to apply to lands held by Maori. Undisturbed possession may mean a Maori owner cannot be

thrown off the land. But Maori owners may not be immune from the various regulations that are also imposed upon land owned by the settlers. For instance, will land that Maori possess be subject to various safety restrictions relating to the types of buildings allowed on it? Will it be subject to height restrictions or to zoning laws under which land use can be restricted for agricultural and other uses, and so forth? If you have fishing rights with undisturbed possession, can Maori tribes be subject to general catch limits applied to everybody else?

These questions are enormously difficult. Even back in 1840 they were of more than theoretical concern, but the problem has become more insistent in recent years as the scope of government regulatory activity over private property has widened. In ways that no one quite understood at the time, matters were set on a course in which the very strong claim of individual title in a Lockean world would collide with the movement towards greater state control over private property. The word 'undisturbed' is just not strong enough to mediate all of those disputes in a way that will guarantee or even approach a consensus.

How does this relate to the sovereignty side of our story? The British consent to the Treaty is perfectly clear: we have Captain Hobson giving the relevant undertakings as a Crown agent. But the existence of multiple tribes makes consent much more complicated on the Maori side, and there are certain early warning signs. One does not know whether all tribes consented because there is nothing in the agreement on that point. I will assume for present purposes that a rule of practical construction would apply: if there is no manifest dissent from the Treaty, it is assumed all other tribes and their members have acceded to it even if they didn't sign it. I understand New Zealand historians agree that not all tribes were signatories.

The important question, however, concerns the meaning of sovereignty once power is ceded by Maori to the Crown. Here we can see the tension between the Treaty's property provisions and sovereignty provisions. The third article of the Treaty says that the Queen guarantees Maori all the rights and privileges of British subjects. This clause is a type

of non-discrimination provision; it does not specify any rights in and of itself. Rather, it protects Maori by ensuring that they will not be subject to any invidious laws that do not apply to non-Maori.

This clause offers Maori major protection. The practice is used all the time in the business sector where we routinely see non-discrimination clauses. It is used in the area of state regulation of monopoly, which often prohibits firms from engaging in discriminatory pricing. Clearly, this clause in the Treaty is of immense importance. My difficulty as a technical lawyer relates to the evident tension between the undisturbed possession guarantees and the non-discrimination provisions. Does undisturbed possession trump non-discrimination, so that general regulations that apply to non-Maori settlers cannot apply to Maori tribes because that would infringe their rights under Article 2? Or do we say that the Treaty was designed to create an ongoing system of governance, and once the issues of title to property and sovereignty are determined, the outstanding problems have been settled and henceforth all matters subject to ongoing political processes are not governed by the Treaty?

Errors and omissions

This brings me to my final point concerning some of the ambiguities in the Treaty's textual interpretation. As I read it, the Treaty shows the strong influence of the classical legal framework as applied to the creation and protection of private property interests. This is exemplified by the endorsement of first possession rules. To the extent that there is no statute of limitations, which in hindsight is a large omission, the classical framework is less in evidence. I also see the effort to regard the Treaty as a form of conveyance on the one hand, and, on the other, as a partial ratification and institutionalisation of a governance structure. On my reading, the Treaty was attempting to resolve the question of transition in a relatively short period of time, so that once it was in place New Zealand could have a structure of governance. All subsequent regulation of the rights of Maori and those of buyers and sellers of property would be determined by the standard political institutions that had been

established for the benefit of both communities. Nothing about the Treaty, apart from its guarantees of property, would in fact influence subsequent behaviour.

But it is clear that the Treaty is, in fact, subject to intense dispute. Instead of treating this transaction in the nature of a conveyance and an assumption of sovereignty, some authorities clearly regard the Treaty as a relational contract. That means the document itself counts only as Act One Scene One of a very complicated relationship, and that subsequent decisions with respect to Maori lands and sovereignty issues will typically need to be referred back to the Treaty rather than be mediated through the general legal and political systems of New Zealand. As an outsider, I cannot resolve the dilemma as to which interpretation is correct. But looking at the Treaty without detailed knowledge of its history, context, sociology and all else, I can see danger signs in it.

One danger sign is that the Treaty does not deal with the question of adverse possession and the statute of limitations, which must be the complementary tool to the first possession rules. Unless you address that question, the finality problem will not be solved. You run the risk of constantly promoting class and race warfare, or at least tension, which could be largely avoided with a strong principle of *res judicata*. The Treaty leaves us in a state of uncertainty.

Secondly, the Treaty was clearly wrong in its initial design when, in dealing with the power of sale, it created a state monopoly. One effect was to distort completely the market for the purchases and sales of land that took place, given the way it limited the options open to Maori sellers. It also created a breeding ground for invalid transactions when the monopoly constraints were not observed. The standard common law and Roman law rules would say that void titles become valid over time through uninterrupted possession. But again, in the absence of a strong statute of limitations, one does not know whether adverse possession will give rise over time to a title that is valid as against all comers.

The third big problem is that it is unclear how one reconciles the strong individualist notions of undisturbed possession that seem to be

guaranteed under the Treaty with the rule of non-discrimination in the enforcement of general forms of regulation. One option is to say that the grant of individual rights trumps the subsequent regulation. The other option says that it simply creates new private rights that are no better or worse than the undisturbed possession of subsequent purchasers, namely any New Zealander, who is thereby subject to the same rules.

There is much to be said for having a short treaty: the document is crisp, clear and comprehensible, and it has a certain political salience. But if its architects had added one or two more articles, they might have done better in steering a course through the political thickets that followed.

Questions

If you had been made aware of a view that Maori in 1840 interpreted Article 2 of the Treaty as reaffirming their own sovereignty, and that this somehow needed to be balanced with how the Crown viewed sovereignty, would that alter your interpretation of the Treaty given, for example, the international principle of contra preferentem. In other words, do you see any validity in Maori and academic contentions today that the Treaty guaranteed ongoing Maori sovereignty, and that our problem is how to give expression to that sovereignty or autonomy or self-determination in practical terms.

That is a hard question. The version of the Treaty I used came from the *New Zealand Official 1990 Yearbook*. It gives the Maori version on one side. It does not give the English retranslation that the people putting forward that view would rely on. I read the original English version, where the ambiguity is just not there. So now the question concerns how we read the Maori version. I cannot answer that question. Even with the errors of translation, it would be striking that there could be such a radical divergence on such a central point. The whole *quid pro quo* in the Treaty was the guarantee of property in exchange for sovereignty and protection. If your interpretation is, in fact, the correct one, I find it hard to see how the Treaty makes internal sense or why anyone would sign it. Suppose you believe the Treaty affirms Maori sovereignty. You then have some real problems to confront. You cannot explain the provisions about sale. You must explain how Maori can have total control, and yet at the same time land can clearly be alienated to certain individuals who purchase it from them. That seems to me to be an implicit contradiction.

Putting that aside as a textual ambiguity which presents some difficulty, let us move on to the next issue. If an interpretation of the Maori version asserts sovereignty with respect to certain properties, we should be able to identify the territory over which the sovereignty applies. Here again, there is an ambiguity. Maori sovereignty not only precludes Maori from suffering from, or being bound by, some of the onerous provisions of the British Crown; it also cuts them off from all the potential benefits of British citizenship, in relation to the very issues that concern them. When it comes down to modern times, if the claim is that there is effectively a separate sovereign nation, would any general welfare scheme exclude Maori on the grounds that they cannot tap the revenues of citizens of another sovereign state? So my question to an interlocutor putting forward the Maori sovereignty interpretation is this: Are you prepared to take the bitter with the sweet? Are you willing to say that if you can identify the territories over which you would claim sovereignty, you thereby cut yourself off from all redistribution, which is perfectly appropriate between citizens of a single nation but inappropriate between strangers?

I might add that every article in the Treaty will need to be changed if Maori sovereignty is to be regarded as a substantive portion of the Treaty. The provision in Article 3 making Maori equal subjects of the British becomes unintelligible. So does everything about the transfer of property. It may be textually correct that some read Maori sovereignty into the Maori version of the Treaty. But if so, it is probably no treaty at all, for the want of fundamental agreement. If the British read one meaning from a certain text and the Maori chiefs read a quite different meaning from their text, then in effect there was never an agreement. And if you have no agreement, then you may be in a fine mess, but Maori certainly cannot claim Treaty rights if there is no Treaty at all.

I was much taken by your legal archaeology. People like Hobson and the missionaries were not political sophisticates. I can't help feeling that the Treaty has all the hallmarks of eighteenth-century British constitutionalism influenced by

Lockean ideas. It makes more sense if you see tiro rangatiratanga as similar to a lordship, with its possession-of-land monopoly that was then exercised in English society. The missionaries had a vague notion that if Maori society had an aristocratic, property-based constitution, this would be a bridge to a British society which was also property-based and aristocratic. But after 1840 Wakefield brought out the most advanced and radical set of British colonists. They had no time for the British constitution and Lockean ideas. They wanted instead to impose Chartist ideas, and tensions with the ideas inherent in the Treaty subsequently developed. Do you have any reflections on this interpretation?

About the subsequent wave of migration, I know nothing. But I believe that my interpretation remains fairly good legal archaeology. To me this was indeed a strong Lockean document, which is the more congenial because Lockean did not think that title started with the Crown and worked its way down to the people through feudal conveyances. People like Hobson and the missionaries may not have been sophisticated, but at least they were reasonably familiar with current political ideas. If other people came along later who did not care about those traditions, this does not affect the interpretation of a document they did not write.

How difficult or complicated is it to be a Lockean? It may be very difficult to explain all the elegant justifications and subtleties of a Lockean constitution. I have spent the better part of a lifetime preaching its virtues to many unresponsive audiences, and I know how long it takes to get the full conceptual framework across, and how long it takes to defend. But if you believe the Lockean, the implementation is somewhat less complicated. What the British side could identify in 1840 were various elements of the framework: private property, neutral sovereignty and equal subjects. This was not a trivial set of achievements. Compared with events elsewhere, I would regard the Treaty of Waitangi, even if construed in a way that Maori today would find utterly unacceptable, as a triumph for its time. It may be true that Maori saw it as giving sovereignty to Maori. But internally it reads as a consistent Lockean document, so that if you pull out one strand, the whole Treaty will start to unravel.

I would be quite happy to read an alternative translation and tell you what I think about it, again as a schoolhouse lawyer. I come from a very old interpretative tradition. I have an ill-concealed impatience with the modern fad by which some elaborate hermeneutic device always makes the worse seem the better cause. When a structuralist starts to talk, I get a migraine. You know the old joke: the government makes you an offer you cannot refuse, and the structuralist makes you an offer you cannot understand. It is almost shameful for me to describe my naive linguistic philosophy to a sophisticated academic audience. As against the current interpretivist rages, I remain unapologetically a plain meaning man.

Suppose there were transactions that were invalid, along with adverse possession and a statute of limitations. Would not most people think there was a problem if you couldn't compensate somebody whose great-grandfather had been robbed of his land?

If you take the theory seriously, two things are happening simultaneously. You typically have land that comes by way of descent. You are also saying that you have a right of action to recover land that was invalidly alienated, and that also goes by way of descent. Now two unsettling problems arise. One is the fragmentation of land amongst multiple owners. There is a tendency to keep land in parcels of useable size and to give other individuals so-called charges against the land – money claims paid out of it – so that the land is kept intact. If this right of action is passed down, it raises the problem of infinite fragmentation. So that is an issue, but in theory if you could trace back the right of action, whoever would have been on the land has the claim.

The other difficulty is a practical one. With land we have occupation. But with this particular right of action, we have a collection of heirs. So we must construct a claimant on the right of action side, and we do not have to construct a defendant on the land side. That is one reason why

these statutes of limitation were created. We know that the links to succession are secure, but the links of succession are not secure for the cause of action that goes to persons no longer in possession.

Matters are not made easier when a legal regime of prescriptive rights has to deal with two discordant cases. The first was that of a stranger coming in and taking land from an owner by brute force. The other was when somebody came in and took land under a deed of sale that was later determined to be invalid for some reason; formalities were lacking, or the seller lacked the capacity to alienate. The principle of adverse possession applies to both cases. In fact it was thought to be more morally imperative in the second case – this at least had the patina of individual consent, which would be valid, say, for the pre-emption clause. The principle of common law marriage is a good example of just how powerful the logic of adverse possession can be. If two people get together, have an invalid marriage ceremony, live together as husband and wife and then have a child, we do not want to call that child a bastard – certainly not in 1840. So we make the marriage for prescription in long use, and in that way legitimacy is restored.

We need to build some principle like that into our understanding of the Treaty. The great question of interpretation is: do we read the Treaty as saying that the adverse possession and statute of limitations rules are incorporated as part of the general incidents of sovereignty, or do we say that they are not there since they are not stated? That is the hundred billion dollar question. As a common law conveyancer, my own answer is clear: the general part of the law is always included unless it is explicitly excluded. There is no question that in a domestic context, you always adopt the closest analogy to a statute of limitation when one is not stated, because these issues are thought to be enormously problematic. So, that is my answer to the question. But obviously a Maori theoretician who disagrees with me on cession will disagree on the statute of limitation issue also.

Regarding the statute of limitations, if the claimants had attempted to exercise their claims over a long period of time but the court system or political system prevented that from happening, would the statute of limitations still apply?

This is where the tolling doctrines – those which suspend the operation of the statute of limitations – that I mentioned earlier come in, and that is why the issue is so hard. A statute of limitations is designed to force the resolution of a contract back to an earlier date where evidence is reliable and witnesses are available. With an infant, the statute of limitation is tolled to the majority. With somebody who is insane, it is tolled until guardians are appointed or sanity is restored. In designing the statute of limitations, there has always been a question, not only of the basic period in which competent people must sue, but also of the rules governing cases of disability. At least in the standard cases, my position would normally be to have two provisions in a statute of limitation: a basic period when there are no tolling periods; and a somewhat longer period after which tolling exceptions are no longer allowed. But this approach does not solve all problems. Suppose we have a statute of limitations of, say, 50 years that applies even when people file the first claims under the Treaty of Waitangi Act 1975. It is hard to decide what should be done. Nothing about the Treaty of Waitangi precludes some effort to resolve earlier land claims, even if they are no longer Treaty-based, and even if they are Treaty-barred. We may want some voluntary waiver of the statute of limitations in order to arrive at an acceptable solution. But that is a very different intellectual position from one that accepts a statute of limitations defence. If, in fact, a statute of limitations does not apply, the original claims confront all the problems that I discussed in answering an earlier question. But if meeting a claim effectively involves a voluntary *ex gratia* payment of some type, then, through the political process, one could limit the amount paid without regard to the total amount involved in a claim.

In terms of the standard mechanism in private law for handling stale claims, the Treaty case is not only very important, given its size and history, but is also extremely difficult to resolve. I have studiously avoided discussing the modern claims and their resolution, because I do not know

the right answers. But as an outsider with absolutely no axe to grind, I can explain to supporters of each version of the Treaty why the other side has a plausible case. The realisation that there is something to be said on both sides may help expedite the process of compromise and resolution. The longer these claims take to go through the Waitangi process, the more political discord they will generate. Their prompt resolution would benefit everybody through greater civil harmony. It is very difficult for people to work together when they are locked in litigation. In litigation, people will always look for a way to accuse the other side of bad faith. That will simply escalate the tension. So you should wish to temper everything down. Everybody will benefit if there is a quick resolution; nobody will win if it goes on too long.

Are you saying that the clause in the Treaty giving the Crown its pre-emptive right over the sale of Maori land was, in effect, a form of illicit taxation?

That is consistent with what I said. The question I wanted to ask myself was: what happened when the pre-emptive right was exercised? My guess is that the land was resold. Presumably those titles would be valid. With a monopsony or single buyer, there would presumably be a gap between the value of the land on the open market and the price paid by the Crown. If the Crown did make a profit, how was that profit used? At this point, my 1840s Lockean public choice instincts would suggest that, unless very powerful institutions were in place to deal with that rent, much of it would be dissipated through corrupt behaviour. I would have recommended against a pre-emption clause in the Treaty given that risk. What would have been preferable? Consider again that last clause, which talks about a single sovereign with the obligation of non-discrimination between individuals. To fund public works or improvements, the government should subject everybody, Maori and non-Maori alike, to a non-discriminatory property tax, assessed against their land in relation to the benefits received.

How would that be done? There was a long debate in the nineteenth century about the proper way to make special assessments. One option

is to collect all the money at the centre and then allocate it to fund public works according to centrally determined priorities. The alternative is to tax the local owners of land to pay for any particular project because you think most of the benefits are concentrated locally. My own view is that whenever there is some degree of suspicion or antagonism between ethnic groups, or danger of privileges for particular factions, we should favour the decentralised special assessment route rather than the centralised general revenue route. The reason is not that special assessments in the abstract are always more efficient – although some claim that is the case. Rather, it is that with a localised basis for revenue collection and for expenditure on public projects, we reduce the possibility of illicit wealth transfers across ethnic groups – something we wish to avoid. If I had been the designer of the Treaty, knowing what I now know, I would have given much more careful thought to the taxation structure in order to avoid that problem. Covert forms of financing can easily become corrupt, notwithstanding any good intentions on the part of the founders. The pre-emption clause has state monopoly written all over it, which always spells trouble. A good Lockean would try to minimise its impact. The two traditions – bottom-up in respect of ownership and top-down in respect of authority – came to a collision course at the end of the Treaty, and New Zealanders are paying the price today.

The Maori chiefs were light on Locke, but they were fairly high on the Bible. An eminent Maori scholar once gave what I think is the best interpretation of the Treaty from the point of view of the Maori chiefs. He said they viewed the Crown as the Roman Empire, and the tiro rangatiratanga guaranteed under Article 2 as the small kingdoms in the Middle East under Roman rule, such as the kingdom held by Herod. So they could identify quite easily with the Maori version of the Treaty: Article 1 was the Roman Empire; Article 2 was the chiefs as Herods; Article 3 was the actual rip-off. And the settlers shafted them later.

Obviously I have not spoken with the chiefs, but let me explain the difficulty with that interpretation. If this view is correct, we must be able

to identify territorial enclaves comparable to those governed by the Romans. I do not see any segmentation of territoriality. To make this model credible, the chiefs would have had to think like the Swiss: the Swiss do not allow foreign ownership. The Treaty clearly did allow foreign ownership. So again, under that interpretation it is not just a word that would have to be changed. The whole document would have to be turned upside down. If that is a correct interpretation, then there is in effect no agreement but a fundamental chasm on every key element required for consent. All the claims of security of title that the Treaty creates, even under my interpretation, go by the wayside and are left to general systems of regulation. I am willing to listen to a more sophisticated version but in the end it brings problems for Maori political aspirations. It is inconsistent with the basic structure of the Treaty because it utterly nullifies unified sovereignty, without specifying an alternative territorial or enclave sovereignty in Article 2 or Article 3. So I doubt the validity of that interpretation. As a lawyer with some experience in business deals, I do not think it sounds like a good business contract between thinking people.

Prior to the Treaty, sales of land were taking place between two sides with different legal cultures. How would you arbitrate disputes between them, and what in fact was the legal status of land in New Zealand at that time?

The answer is an amalgam, and an interesting one. If the case in question in 1840 concerns Maori land, we clearly use Maori law. There is no alternative. But the next question is whether Maori law had any rules on prescription and adverse possession. I will bet a large amount that it did, because it needed them. Maori fought amongst themselves and had family disputes. I would be extremely surprised if the relevant laws were radically different from those I have been talking about. I quite consciously spent as much time on the analogues and solutions to these problems in Roman law as on their counterparts in English law. I did that because they raise effectively the same substantive concerns, and yet there is

relatively little evidence of cross-fertilisation between the cultures. In other words, every legal system experiences the need for certainty of title on the one hand and a logical means of resolution of disputes on the other.

The really hard question concerns what to do with contracts of sale between someone in a Maori culture and someone in a non-Maori culture. The Roman solution invoked the so-called *jus gentium*. According to *jus gentium*, I do not impose my formalities upon you, and neither do you impose your formalities upon me. We look to pure consensus as the basis of obligation, so as to avoid any domination by one system over the other. In fact that combination of indigenous law and the *jus gentium* is much more stable across cultures than many of these cultural disputes would lead us to believe.