IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2012-470-000461
[2013] NZHC 1349

UNDER	the Arbitration Act 1996
IN THE MATTER	of an Arbitration Award dated 23 March 2012
BETWEEN	RAPATA (ROBERT) LEEF & ORS Applicants
AND	COLIN BIDOIS & ORS Respondents

Hearing: 6–8, 22 May 2013

Appearances: S P Bryers for Applicants
M J Sharp and TRM Williams for Respondents

Judgment: 10 June 2013

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 10 June 2013 at 10am pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
Martelli McKegg, Auckland (for Applicants)
Holland Beckett, Tauranga (for Respondents)
S P Bryers, Auckland (for Applicants)

Table of Contents

Introduction ..... [1]

Background
The Treaty of Waitangi claims ..... [4]
The settlement process ..... [7]
The mana whenua dispute ..... [12]
Subsequent legal proceedings ..... [24]

The issues to be determined ..... [29]

What is the legal nature of the dispute resolution agreement?
Pirirakau's application to amend their notice of opposition ..... [30]
The dispute resolution agreement ..... [34]
Issues ..... [36]
The strike out judgment ..... [39]

Did Ngati Taka and Pirirakau agree to submit the mana whenua dispute to arbitration? .....
(i) Submissions ..... [46]
(ii) Discussion ..... [48]

A dispute in respect of a defined legal relationship ..... [54]
(i) Submissions ..... [57]
(ii) Discussion ..... [59]
Decision in respect of the dispute resolution agreement ..... [71]

Impartiality and independence ..... [75]
(i) Submissions ..... [76]
(ii) Discussion ..... [79]

Were there breaches of natural justice?

Ngati Taka's amendment application ..... [92]
(i) Submissions ..... [94]
(ii) Discussion ..... [98]
Production of documents ..... [104]
(i) Submissions ..... [105]
(ii) Discussion ..... [112]

Should the Court exercise its discretion to set the arbitration award aside? ..... [129]

Result ..... [130]

Introduction

[1] Mr Leef and the other applicants are representatives of the hapu of Ngati Taka. Mr Bidois and the other respondents are representatives of the hapu of Pirirakau. I will refer to the applicants and respondents as Ngati Taka and Pirirakau, respectively. Ngati Taka and Pirirakau are two of the eight hapu affiliated with the iwi Ngati Ranginui, which is domiciled in the Tauranga area.

[2] Ngati Taka and Pirirakau are in dispute as to which of them has mana whenua over an area of land between the Wairoa and Waipapa Rivers, west of Tauranga. The land comprises (in general terms) the Te Puna peninsula and inland from the Te Puna peninsula to the coastal side of the Kaimai Ranges ("the disputed land"). The particular significance of the issue of mana whenua, for the purposes of this judgment, lies in the allocation of the proceeds of settlement of a claim for redress under the Treaty of Waitangi Act 1975.

[3] The issues raised in this proceeding centre on a decision regarding the competing claims of Ngati Taka and Pirirakau to mana whenua over the disputed land.

Background

The Treaty of Waitangi claims

[4] The Treaty of Waitangi claim was in respect of land confiscated from Maori in the Tauranga area in 1864/1865, during the New Zealand Land Wars ("the confiscation"). Much of the land taken was land of Ngati Ranginui. A further source of grievance was the Crown's compulsory purchase of land between Te Puna and Katikati ("the Te Puna/Katikati purchases").

[5] Pirirakau filed a claim with the Waitangi Tribunal in 1991 (WAI 227). Ngati Taka filed a claim in 1998 (WAI 727). Other hapu and iwi also filed claims, and they were considered by the Waitangi Tribunal collectively, as the Tauranga Moana Raupatu Claim (WAI 215).

[6] The Waitangi Tribunal issued an Interim Report in September 2004, which upheld the claims that the confiscation and Te Puna/Katikati purchases were in breach of the Treaty of Waitangi in various respects. The Tribunal declined to address remedies specific to individual hapu.

The settlement process

[7] The hapu of Ngati Ranginui then began negotiations with the Crown. As it is Crown policy to negotiate only with large groups (rather than individual hapu or whanau) the hapu of Ngati Ranginui entered into a Deed of Mandate in August 2007 ("the deed of mandate"). Both Ngati Taka and Pirirakau are parties to the deed of mandate, which set out a process for negotiating settlement with the Crown.

[8] Pursuant to the deed of mandate, Ngati Ranginui established a representative mandated body, Te Roopu Whakamana o te Raupatu o Nga Hapu o te Iwi o Ngati Ranginui (commonly known as Te Roopu Whakamana). Both Ngati Taka and Pirirakau have representatives on Te Roopu Whakamana. Te Roopu Whakamana accepted Ngati Taka's WAI 727 claim as a hapu claim on behalf of Ngati Taka, despite Pirirakau's opposition (alleging that Ngati Taka were a sub-hapu of Pirirakau rather than a hapu in their own right).

[9] The negotiation process adopted by Ngati Ranginui was that although they were negotiating with the Crown as an iwi, settlement proceeds would ultimately be allocated to individual hapu on the basis of an agreed formula, based (in part) on how much land was lost by each hapu. I was advised at the hearing that the current draft allocation provides for each of the eight hapu of Ngati Ranginui to receive a basic package of cash and lands to the value of $2 million for general Treaty breaches. In addition, hapu are to receive additional resources (cash and lands) as compensation for lands lost as a result of the confiscation and compulsory purchase. In the case of the disputed land, as a result of the decision which is the focus of this proceeding, Pirirakau is to receive an additional package of cash and land to a total value in the order of $9.4 million.

[10] Applying the formula established by Te Roopu Whakamana is problematic where more than one hapu claims to have lost the same area of land. To deal with

such issues (described as "cross-claimed resources") the Ngati Ranginui hapu negotiated and signed a further agreement, the "Confirmed Mana Whenua Process o Hapu o Ngati Ranginui" ("the mana whenua process agreement"), which set out a three-stage process for the resolution of cross-claimed resources:

(a) Stage 1: each hapu was to identify the extent of their claimed mana whenua interests over cross-claimed resources. The mana whenua agreement provided that the test for mana whenua is the mana that hapu traditionally held and exercised over the land, determined according to tikanga, including the demonstration of ahi ka roa from 6 February 1840 up to 15 May 1865.

(b) Stage 2: hapu were to negotiate to reach consensus. This was called kanohi ki te kanohi negotiation, and hapu with competing claims were to embark on a process of face-to-face negotiations to reach agreement. The hapu could be assisted by mediators. The mana whenua process agreement recorded an expectation of korero rangatira, defined as an open, principled, trustworthy dialogue by rangatira with authority to commit their hapu.

(c) Stage 3: if no agreement were reached at stage 2, the dispute was to be resolved by mediation or by adjudication. The adjudication was to be by a panel of three members, appointed by the iwi, who were required to be fluent in te reo, knowledgeable on matters of tikanga (in particular, how mana whenua is held and exercised by hapu), independent of the dispute, and not members of the hapu involved in the dispute. The decision of the adjudication panel was to be final and binding.

[11] The iwi body that is to receive the settlement proceeds, and to prepare the "Final Allocation Agreement" is the Post Settlement Governance Entity for Nga Hapu o Ngati Ranginui ("the Iwi PSGE").

The mana whenua dispute

[12] Both Ngati Taka and Pirirakau claim mana whenua over the disputed land. The disputed land comprises:

(a) Part of the confiscated land (between the Wairoa and Te Puna Rivers);

(b) Land to the west of the Te Puna River, extending to the Aongatete River, (between Tauranga and Katikati), which is part of the Te Puna/Katikati purchase area; and

(c) Land described as the "Whakamarama" area, inland and south of the areas in (a) and (b).

I shall refer to the dispute between Ngati Taka and Pirirakau as "the mana whenua dispute".

[13] It appears not to be disputed that mana whenua over the disputed land was held and exercised by the rangatira Te Ua Maungapohatu. Ngati Taka claim that Maungapohatu was a descendant of Taka (a great-grandson of Ranginui), and that they are descendants of Maungapohatu. Pirirakau claim that Maungapohatu was known (and identified himself) as a Pirirakau rangatira. They claim that Maungapohatu held and exercised mana whenua as a Pirirakau rangatira, and that Ngati Taka are part of Pirirakau.

[14] Following the mana whenua process agreement, Ngati Taka and Pirirakau attempted to negotiate an agreement of the mana whenua dispute. The "lead negotiator" for Ngati Ranginui, Mr Willie Te Aho (a lawyer) instigated meetings between Ngati Taka and Pirirakau. However, no agreement was reached. In November 2010, Pirirakau's solicitors wrote to Te Roopu Whakamana, asking it to activate the adjudication process (Stage 3) of the mana whenua process agreement. In that letter, it was also recorded that Pirirakau did not accept that Ngati Taka was a recognised functioning hapu of Ngati Ranginui during the period from1840 to 1865.

[15] The reply from Te Roopu Whakamana was to the effect that:

(a) Ngati Taka had been recognised both in the Ngati Ranginui Deed of Mandate and the Ngati Ranginui Terms of Negotiation, and recognition of hapu was not addressed in the mana whenua process;

(b) It was premature to activate the adjudication process, as it was not yet "locked down legally". It was expected that the mana whenua process would start on 1 July 2012, when it was expected that the settlement legislation would be enacted, and funds would be available for the adjudication from the compensation received from the Crown; and

(c) However, if Ngati Taka and Pirirakau agreed to initiate a process for the determination of their dispute, and to be bound by the process, Te Roopu Whakamana could assist in implementing it.

[16] Ngati Taka and Pirirakau agreed to deal with the mana whenua dispute by entering into an agreement for a "Mana Whenua Arbitration Process". It emerged at the hearing in this Court that there is dispute as to the legal nature of this agreement, and the process set out in the agreement, and that is one of the issues to be determined. I shall therefore refer to this document neutrally as "the dispute resolution agreement", except when quoting from documents. The dispute resolution agreement was drafted by Mr Colin Bidois and after comments from Mr Rapata Leef, the final version was signed by Mr Leef on behalf of Ngati Taka, and Mr Bidois on behalf of Pirirakau. Both signed as "negotiator" for their respective hapu.

[17] Mr Leef and Mr Bidois also agreed that all evidence and submissions would be presented in writing, and copies would be provided to the other side.

[18] I shall refer to the terms of the dispute resolution agreement later in this judgment. It is relevant to note at this stage that it provided that each of Ngati Taka and Pirirakau could nominate one person (named as "arbitrators") to the two-person panel to consider and rule on the matter in dispute. Ngati Taka nominated Mr Kuku Wawatai, then head of Maori Studies at the Bay of Plenty Polytechnic. Pirirakau

nominated Mr Heta (Ken) Hingston, a retired Maori Land Court Judge. I shall refer to them collectively as "the resolution panel", and to the hearing before them as "the dispute resolution hearing".

[19] Late in November 2011, Mr Bidois advised Mr Leef that Mr Hingston's wife was of Pirirakau. On 23 January 2012, at the beginning of the dispute resolution hearing, Mr Hingston repeated this advice. At the same time Mr Hingston said that Mr Rawiri Kuka (one of the presenters on behalf of Pirirakau) was "a cousin". It was accepted that this was a reference to Mr Kuka being a cousin of Mr Hingston's wife.

[20] In his evidence in this Court Mr Hingston said that he did not seek the agreement of the parties to continuing, but simply "let them know, if they objected I was going home". Mr Leef, who was leading Ngati Taka's team at the hearing, did not object. Mr Hingston remained, and the hearing proceeded. On the second day of the hearing, (at the beginning of his presentation on behalf of Ngati Taka), Mr Leef said that he hoped Mr Hingston would be "unbiased".

[21] The resolution panel heard submissions and received evidence from Ngati Taka and Pirirakau over two days, on 23 and 24 January 2012. The evidence for both Ngati Taka and Pirirakau was referred to as "presentations", and those giving it were referred to as "presenters". The resolution panel adopted what Mr Hingston described as an inquisitorial approach. Presenters were not sworn in, they did not give evidence in any formal way, and they were not cross-examined. Each party presented documents by simply placing the documents on the table, and they gave their presentations and submissions orally. The documents (in the main, reports and other documents previously provided to the Waitangi Tribunal) were sometimes referred to during the hearing, but they were not read out. Particular parts of the documents on which parties relied were not highlighted. No additional time was made available for the non-producing party to read the reports that were presented, and no opportunity was given for the parties to respond to documents.

[22] The dispute resolution hearing was recorded and a transcript of the hearing was available at the hearing in this Court ("the Transcript"). Further, minutes of the

hearing were kept by Ms Lisa Gardiner, then a Project Manager employed by Te Roopu Whakamana ("the Minutes"). A copy of the Minutes was available at the hearing in this Court.

[23] The resolution panel released their decision on 23 March 2012 (the "dispute decision"). Their decision was that Ngati Taka were an integral part of Pirirakau. They concluded that:

> In the relevant period the "mana whenua" in respect of the lands mentioned was held by Pirirakau but the descendants of Maungapohatu who claim to be Ngati Taka are in our view an integral part of Pirirakau and are thus entitled to be involved as Pirirakau not as a separate entity.

Subsequent legal proceedings

[24] On 22 June 2012, Ngati Taka filed an application for an order that the "arbitration award" be set aside. The grounds of the application may be summarised as follows:

(a) the "arbitration agreement" was invalid because it did not comply with the mana whenua process agreement;

(b) the "arbitrators" exceeded their jurisdiction by finding that the hapu of Ngati Taka was an integral part of the hapu of Pirirakau;

(c) the composition of the "arbitration panel" was defective, because it did not comply with the mana whenua process agreement, and also because one or both of the "arbitrators" had affiliations with Pirirakau through marriage,[1] and were not, therefore, truly independent;

(d) the "arbitration award" is in conflict with the public policy of New Zealand because the "arbitrators" reached their decision by perverse and unreasonable reasoning; and

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[1] It was alleged that a conflict arose from the fact that Mr Hingston's wife was of Pirirakau, and that one of the persons who presented evidence for Pirirakau, Mr Rawiri Kuka, was the cousin of Mr Hington's wife. Ngati Taka also alleged, in its application to set aside the arbitration award, that Mr Kuka had a conflict as a result of his former wife's affiliation to Pirirakau, but that allegation was subsequently withdrawn: see n 5, below.

(e) the "arbitration award" is further in conflict with the public policy of New Zealand because there were breaches of natural justice; in particular Ngati Taka were not given proper opportunity to object to the "arbitrators" continuing to act, the "arbitrators" received evidence and submissions from non-mandated witnesses for Pirirakau in breach of the "arbitration agreement", and the "arbitrators" sought and received further information relating to the issues in dispute and did not give Ngati Taka the opportunity to comment on or make submissions about that information before issuing their award.

I shall refer to Ngati Taka's application to set aside the "arbitration award" as "Ngati Taka's substantive application".

[25] Pirirakau applied to strike out Ngati Taka's substantive application. That application was heard by Associate Judge Bell, and he gave an oral judgment on 11 October 2012 ("the strike out judgment").[2] Associate Judge Bell struck out three of the grounds of Ngati Taka's substantive application. He held that the "arbitration agreement" was an effective submission to arbitration, so the provisions of the Arbitration Act 1996 ("the Act") applied.[3] On this basis, he held that:

(a) the "arbitration agreement" could not be said to be invalid for failure to comply with the mana whenua process agreement;

(b) the "arbitrators" did not exceed their jurisdiction by finding that Ngati Taka was an integral part of Pirirakau; and

(c) the "arbitration award" could not be said to be contrary to public policy because of perverse and unreasonable reasoning.

[26] However, his Honour refused to strike out Ngati Taka's substantive application on the grounds of breach of natural justice by reason of:

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2 *Leef v Bidois* [2012] NZHC 2631.
3 At [24] and [44].

(a) alleged conflict of interest; and

(b) the alleged receipt and consideration of further information, without giving Ngati Taka the opportunity to make submissions in respect of that information.

[27] After the strike out judgment was delivered, Ngati Taka applied to amend the substantive application to reflect the outcome of the strike out judgment. Shortly before the hearing in this Court, Ngati Taka filed an application for leave to further amend the substantive application, to include that information was provided by Pirirakau to the arbitrators "during and/or after" the dispute resolution hearing, to which Ngati Taka was not given the opportunity to respond, and that Ngati Taka was not provided with copies of the information. I shall refer to this application as "Ngati Taka's amendment application". Pirirakau opposed the amendment application on the grounds that the allegation that information was provided to the arbitrators during the hearing (to which Ngati Taka could not respond) was a new ground. Ngati Taka's amendment application, and their substantive application, were directed to be heard together.[4]

[28] During the course of the hearing in this Court, an issue arose as to whether the dispute resolution agreement was in fact an arbitration agreement (and thus subject to the provisions of the Act). Pirirakau then sought to amend their opposition to Ngati Taka's application to set aside the dispute decision, to add as a ground that that the "arbitration agreement" was in fact an agreement to submit the mana whenua dispute to expert determination. I shall refer to this as "Pirirakau's application".

The issues to be determined

[29] At the conclusion of the hearing in this Court, counsel for the parties set out the issues to be determined in a Joint Memorandum of Issues, as follows:

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[4] *Leef v Bidois* HC Tauranga CIV 2012-470-461, Minute of Associate Judge Doogue, 11 February 2013.

Process

a) Was [the "arbitration"] an *arbitration* as opposed to an *expert determination*? This will in turn come down to the contractual intent of the parties (subject to [Pirirakau's] amendment to pleadings);

b) If the process is an expert determination do either of the Ngati Taka natural justice grounds for applying to set aside the arbitration arise as legal requirements within the process?

Conflict

c) Has the arbitrator, Judge Ken Hingston, discharged his responsibilities under clause 12(1) of the First Schedule of the Arbitration Act 1996 in disclosing to Ngati Taka *"any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence"*? In particular, has he:

    i) Disclosed that his wife had family connections with Pirirakau?

    ii) Disclosed that one of the Pirirakau submitters, Rawiri Kuka, was a cousin of his wife?[5]

d) If any such disclosures were made did the arbitrators then have an obligation to advise Ngati Taka of their right to object to Judge Hingston's appointment and if so were Ngati Taka advised of this right at the relevant time?

e) Can a party *waive* a right to an independent or impartial arbitrator (apparent or actual bias) under Article 4 [of the First Schedule of the Act]?

f) If so, is Ngati Taka deemed to *have waived* (under Article 4) their rights to object to an apparently biased arbitrator in Judge Hingston (as exist under Article 13)?

g) If there was any prima facie waiver by Ngati Taka of any objection to disclosure, was it a fully informed waiver, particularly in regard to whether they had knowledge at that time as to whether Rawiri Kuka would be making submissions?

h) If it is held that there was any failure by Judge Hingston to make disclosure, would this have provided Ngati Taka valid ground to object to the appointment of Judge Ken Hingston under Article 13 (First Schedule). Specifically, would the test for apparent bias as specified in the *Saxmere* case (particularly with Rawiri Kuka) have been satisfied.[6]

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5 During the hearing in this Court Ngati Taka withdrew its allegation of conflict of interest in respect of Mr Kuku Wawatai.

6 See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72. [2010] 1 NZLR 35 (SC).

i) Taking all such factors into account has [Ngati Taka] established that the composition of the arbitral panel was not in accordance with the First Schedule (Article 34(2)(iv))?

Documents

j) Were any documents provided by Pirirakau to the arbitrators after the hearing had finished and was Ngati Taka afforded the opportunity to respond to any such documents?

k) If so, has there been a breach of natural justice?

l) With any documents produced during the hearing, was Ngati Taka provided with sufficient notice and/or copies of the document so as to satisfy Articles 18 (equal treatment of parties) and 14(3) (communication of documents) of the First Schedule, generally of the requirements of natural justice (subject to leave being provided to amend pleadings). In this respect, specifically:

    i) Were the Ngati Taka representatives aware of the identity of the documents produced?

    ii) Were they aware of those parts of those documents that Pirirakau intended to rely on?

    iii) Did they have sufficient time to respond to the contents of the documents?

    iv) Did they *waive* any right of objection to the production of documents and in particular to any rights to have further time and opportunity to respond to the material in the documents?

m) Taking all such factors into account has [Ngati Taka] established that the arbitration process was in breach of the rules of natural justice and the public policy of New Zealand (Article 34(6)(b)(ii))?

Discretion

n) If the Court finds that there was a breach of process, either with regard to *conflict disclosure* or *production of documents*, then should the Court exercise a **discretion** to set aside the arbitral award?

o) In considering discretionary factors is the court restricted to those factors that arise as a consequence of the found breaches?

p) Are the following factors relevant?

    i) If Judge Hingston is found to have failed to make proper independence and impartiality disclosure is it likely that Ngati Taka would have objected to his appointment even if proper disclosure was made?

    ii) If it is found that documents were provided after the arbitral hearing or that Ngati Taka were not provided with a fair

opportunity to respond to any documents [produced] during the arbitral hearing, then would an opportunity to have made submissions to the arbitrators on these documents have made any difference to the outcome of the award?

iii) The Ngati Taka claims that Pirirakau representatives were not mandated and/or that the process was not in compliance with the *mana whenua process*.

iv) Whether it is in the public interest to provide a fair and equitable distribution of treaty settlement assets.

v) That the parties were not legally represented or advised during the process.

vi) The repercussions of having to run a fresh arbitration process including the time, expense involved and any potential disturbance to the Ngati Ranginui settlement process.

(emphasis as in original)

What is the legal nature of the dispute resolution agreement?

Pirirakau's application to amend their notice of opposition

[30] Prior to the hearing in this Court, both parties accepted that the dispute resolution agreement was indeed an agreement to arbitrate, to which the Act applied, and that the decision of Mr Hingston and Mr Wawatai was an "arbitration award" under the Act. Neither party expressed any doubt that they had entered into an agreement to submit the mana whenua dispute to "arbitration", and that Mr Hingston and Mr Wawatai had delivered an "arbitration award". Ngati Taka's proceeding was headed by a reference to the Act, and to an arbitration under the Act. This position was supported by the strike out judgment in which Associate Judge Bell held that the arbitration agreement was "an effective submission to arbitration".

[31] However, in the course of his evidence at the hearing, Mr Hingston stated that it was "debatable whether [the hearing before him and Mr Wawatai] was or wasn't an arbitration" and that he was "doubtful whether it was an arbitration as such". He went on to say that he was not familiar with the Act or its provisions, and did not address it at all before or at the hearing. He said that he and Mr Wawatai adopted "the procedure that has been common in Maori land matters"; that is, inquisitorial, not adversarial. He and Mr Wawatai did not discuss the matter with the

parties. Mr Hingston said this would have been irrelevant, given that neither side had legal representation. Mr Hingston later referred to the hearing as a hui.

[32] As a result of Mr Hingston's evidence I raised with counsel the issue of whether the "arbitration agreement" was in fact an arbitration agreement to which the Act applied. Having heard brief submissions from counsel the issue was left for further submission in counsel's closing submissions. Pirirakau then sought leave to amend their notice of opposition to Ngati Taka's substantive application to include as a ground that the "arbitration agreement" was in fact a submission of the mana whenua dispute to expert determination, and that the decision of Mr Hingston and Mr Wawatai was an expert determination rather than an "arbitration award".

[33] The legal nature of the dispute resolution agreement goes to the heart of the controversy between Ngati Taka and Pirirakau. I accept that Pirirakau's application was made in good faith and that it does not cause any specific prejudice to Ngati Taka. Neither party sought to lead new evidence on the issue. I am satisfied that Pirirakau's application should be allowed.[7]

The dispute resolution agreement

[34] The dispute resolution agreement is as follows:

> The Following is an Agreement Between Pirirakau Hapu and Ngati Taka
>
> In the matter of Mana whenua Status coinciding with:
>
> Lands waterways and resources from Wairoa river to the Aongatete river along the Aongatete river to the maunga Pukupenga to Te Mimiha Tuhanga onward to Waianuanu.
>
> Both Hapu have come to an agreement in using a Mana Whenua Arbitration Process which portrays which hapu and its rangatira had Mana Whenua status from 6th February 1840 to 15th May 1865.
>
> The following are the proposed terms on the selection and conduct of a Mana Whenua Arbitration Process.
>
> 1. Arbitrators: The litigators will agree on 2 arbitrators.
> 2. Roles and responsibilities of Arbitrators.
>   (a) To listen, to question, to enquire, to consult at their discretion.

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[7] See *Wright Stephenson & Co Limited v Copland* [1964] NZLR 673 (SC) and *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA).

(b) To make a decision that will be final and binding on both parties.
(c) To ensure the process is conducted in a Rangatira ki te Rangatira manner.

3. Engagement Process: To be determined by an agreement of the three parties ie Ngati Taka, Pirirakau Hapu and the Arbitrators.
4. Timeframe: Concluded by 30th November 2011.
5. Costs: To be shared by the two Hapu Ngati Taka and Pirirakau Hapu or as directed by the Arbitrators.
6. Venue: To be decided by agreement of all parties ie Ngati Taka, Pirirakau Hapu and the Arbitrators.
7. Litigation conduct: Mandated Te Roopu Whakamana representatives from each of the two respective hapu will speak for their hapu, ie there will be no professional legal representatives.
8. Apart from those giving evidence a total of five observers only from each of the 2 hapu are allowed to be present at the hearings.
9. Both parties agree that Lisa Gardiner Project Manager, Te Roopu Whakamana act as coordinator for these negotiations.

Signed by

Pirirakau Hapu Negotiator	Ngati Taka Negotiator
[Signed C Bidois] 19/08/11	[Signed R Leef] 21/8/2011

[35] The context in which the question whether Ngati Taka and Pirirakau agreed to submit the mana whena dispute to arbitration is to be considered is the difference between "arbitration" and "expert determination". As Fisher J said in *Methanex Motunui Ltd v Spellman*:[8]

> [46] By submitting their dispute to arbitration the parties have manifested a wish to have their dispute determined judicially, with the natural justice that that entails. They have an open choice in this regard. They can dispense with natural justice by referring their dispute to expert determination rather than arbitration ... Opting for arbitration rather than expert determination is synonymous with adopting natural justice safeguards. And natural justice safeguards would be hollow ones if unenforceable when needed. So finality of awards must always be balanced against the need to respect the parties' free and deliberate choice of a process that would entail enforceable procedural protection.
>
> ...
>
> [51] The inherent conflict in such an agreement must therefore be resolved by identifying the dominant contractual intention. In one case the conclusion might be that what the parties really wanted was expert determination, whatever the language used. In another the conclusion might be that they wanted arbitration, with its attendant natural justice protections. Such conflicts can only be solved by interpreting the particular arbitration agreement in the particular case. However in cases where the parties have

[8] *Methanex Motunui Ltd v Sepllman* [2004] 1 NZLR 95 (HC) ("*Methanex (HC)*") at [46] and [51].

> deliberately used the expression "arbitration", I do not think that the Courts will lightly assume that all they really wanted was expert determination. ...
>
> (references omitted)

Issues

[36] "Arbitration agreement" is defined in s 2 of the Act:

> **Arbitration agreement** means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not

[37] In this case, for there to be an "arbitration agreement" under the Act there must be:

(a) a dispute between Ngati Taka and Pirirakau;

(b) an agreement between Ngati Taka and Pirirakau to submit the dispute to arbitration;

(c) the dispute must be in respect of a defined legal relationship.

[38] It clear that there is a dispute between Ngati Taka and Pirirakau as to which of them had mana whenua status over the disputed land. Two issues remain: whether the dispute is in respect of a defined legal relationship, and whether Ngati Taka and Pirirakau agreed to submit the dispute to arbitration.

The strike out judgment

[39] Before going on to consider the issues set out above, it is necessary to refer to the strike out judgment. This is because one of the issues considered by Associate Judge Bell was Pirirakau's submission that Ngati Taka's claim (in its substantive application) that the "arbitration award" should be set aside because "the arbitration was invalid because it did not comply with the provisions for adjudication in [the mana whenua process agreement]" should be struck out.

[40] Mr Bryers on behalf of Ngati Taka accepted that the strike out judgment was in respect of an interlocutory application, so was not a final judgment and,

accordingly, the doctrine of res judicata "probably has no application". However, to the extent that Associate Judge Bell struck out a particular ground of Ngati Taka's substantive application it was a "final determination" in respect of that ground. It is, therefore, necessary to consider whether res judicata applies.

[41] That question requires the identification of the particular issue determined by Associate Judge Bell. It is clear from the strike out judgment that his Honour was considering an argument that the dispute resolution agreement was invalid pursuant to art 34(2)(a)(i) of the First Schedule of the Act.[9] That provides:

> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) The party making the application furnishes proof that—
>
> (i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; ...

[42] His Honour rejected Ngati Taka's submission that the dispute resolution agreement was invalid because it did not follow the requirements for an adjudication under the mana whenua process agreement,[10] and struck out that ground of Ngati Taka's substantive application.[11] At the same time, his Honour recognised that non-compliance with the mana whenua process agreement could give rise to a separate argument as to whether the dispute decision was effective in terms of the mana whenua process agreement.[12]

[43] I note, first, that it is evident that Associate Judge Bell's consideration of the issue before him proceeded on the assumption that the hearing before Mr Hingston and Mr Wawatai was an "arbitration", that their decision was an "arbitration award", and that the Act, therefore, applied. There is no indication that either side submitted that the process was not an arbitration, that the decision was not an arbitration award, and that the Act had no application. Secondly, it is also evident that his Honour did

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9 Strike out judgment, above n 2, at [41].

10 At [45]. In particular, Ngati Taka submitted that the panel deciding the matter was required, under the mana whenua process agreement, to comprise three adjudicators, and they were to be chosen by Te Roopu Whakamana, not the parties.

11 At [48] and [103].

12 At [46].

not strike out all consideration of the effect of the failure to comply with the mana whenua process agreement.

[44] Accordingly, I conclude that I am not precluded by the doctrine of res judicata from considering whether the arbitration agreement was in fact an arbitration agreement to which the Act applied.

Did Ngati Taka and Pirirakau agree to submit the mana whenua dispute to arbitration?

[45] This issue focuses on the parties' intentions.

(i) Submissions

[46] Mr Sharp submitted on behalf of Pirirakau that, notwithstanding the use of words such as "arbitration process" and "arbitrators" in the dispute resolution agreement, Ngati Taka and Pirirakau had agreed to have the mana whenua dispute determined by expert determination, not arbitration. In support of that submission, he submitted:

(a) The agreement had been negotiated by Mr Bidois and Mr Leef, neither of whom had any legal training, and without legal advice.

(b) The process was intended to be a substitute for the procedure under the mana whenua process agreement.

(c) Having been told that (if it were available) the procedure under the mana whenua process agreement would be costly and time consuming, Mr Bidois and Mr Leef had sought to agree a process that would avoid formality and expense.

(d) The use of "arbitration process" and "arbitrators" was for want of a better English term to use.

(e) Clauses 2 (as to the "arbitrators' roles and responsibilities") and 7 (as to exclusion of professional legal representatives) of the "arbitration

agreement" can be interpreted as allowing the resolution panel to determine their own procedure within a Maori context, and a wish for a non-legalistic process.

(f) The very nature of the dispute, as to mana whenua, would favour the process being one involving Maori values rather than western-type Court procedures.

(g) The fact that the chosen resolution panel were experts in tikanga Maori with no previous experience in arbitrations indicates that a formal arbitration process was not intended.

[47] Mr Bryers submitted for Ngati Taka that the dispute resolution agreement is properly interpreted as an arbitration agreement. In particular, he submitted that:

(a) The agreement refers (twice) to the process as being a "mana whenua arbitration process", and to Mr Hingston and Mr Wawatai as "arbitrators", whereas there is no reference to "expert determination", or to "experts".

(b) The nature of the dispute does not require determination by "experts". The main task of the decision-makers was to listen to, and evaluate, evidence and submissions.

(c) The matrix of facts does not support a contention that Ngati Taka and Pirirakau intended to refer the dispute to "independent experts" rather than "arbitrators"; there is no evidence of any discussion on the point, or that Ngati Taka and Pirirakau intended to avoid adopting the standards of procedural fairness attendant on an arbitration.

(d) The fact that one of the parties engaged a retired Judge as one of the resolution panel indicates an intention to have matters determined in a judicial way.

(e) The way in which the hearing was conducted is consistent with it being intended that standards of procedural fairness were to be followed. Mr Bryers referred, by way of example, to Mr Hingston's disclosure of his wife's affiliation to Pirirakau, and the parties' agreement (prior to the hearing) to provide copies of evidence and submissions to each other.

(ii) Discussion

[48] I remind myself of Fisher J's observation in *Methanex (HC)* that "in cases where the parties have deliberately used the expression "arbitration" I do not think that the Courts will lightly assume that all they really wanted was expert determination".[13]

[49] Further assistance in interpreting the dispute resolution agreement is given in the judgment of Harrison J in *Forestry Corporation of New Zealand Ltd (In Rec'p) v Attorney-General*.[14] The principles set out by his Honour may be summarised as follows:

(a) An "arbitration agreement" does not need to be in a prescribed form. It requires only the indicia of consensus, as for any other simple contract, and a genuine meeting of minds agreeing to arbitrate.

(b) Like arbitration, expert determination provides for the final resolution of disputes by a private tribunal making a binding decision. With the increasingly informal nature of arbitration, and the use of experts in arbitration, the distinction between the two is increasingly blurred.

(c) The express words used may give a strong indication of the parties' intentions.

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13 *Methanex (HC)*, above n 8, at [51].

14 *Forestry Corporation of New Zealand Ltd (In Rec'p) v Attorney-General* [2003] 3 NZLR 328 (HC) at [11].

(d) To be valid and enforceable the terms of an arbitration must be clear and certain. In particular, there must be a clear reference to arbitration and the procedure envisaged must be consistent with arbitration.

(e) A purposive approach, where the circumstances surrounding the making of the agreement are considered, is only required where the words of the agreement are unclear or ambiguous.

[50] In the face of the wording of the arbitration agreement, and in the absence of any evidence of contemporaneous discussion or correspondence indicating that they wanted to submit their dispute to expert determination, it is difficult to find support for concluding that Ngati Taka and Pirirakau intended to submit the mana whenua dispute to expert determination rather than arbitration.

[51] There was no evidence before me that determination of issues in a "Maori context" required a process that was inconsistent with arbitration and consistent with an expert determination. Nor was there any evidence that Mr Bidois and Mr Leef considered any other description of the process they were entering into, but chose "arbitration process" and "arbitrators" for want of a better English term. Further, there was no evidence that "the very nature of the dispute" favoured the determination process being one "involving Maori values rather than western-type Court procedures".

[52] Matters such as entering into the "arbitration agreement" as a substitute for an adjudication under the mana whenua process agreement, the wish to avoid the formality and cost of an adjudication, the roles and responsibilities of the "arbitrators", and the exclusion of legal representatives do not point any more to expert determination than they do to arbitration. They may equally be applicable to an arbitration. Nor does the nature of the dispute, or the fact that Mr Hingston and Mr Wawatai were chosen for their expertise in tikanga Maori point more to an expert determination rather than arbitration. Persons with expertise in the field in which the dispute has arisen are often chosen as arbitrators. Further, the choice of Mr Hingston indicates a wish to draw on his particular judicial expertise.

[53] I conclude that, in line with their identification of the process as an arbitration, Ngati Taka and Pirirakau intended to submit their dispute to arbitration, not expert determination. The more difficult issue is whether the third requirement of an arbitration was satisfied: that is, whether the dispute between Ngati Taka and Pirirakau was "in respect of a defined legal relationship".

A dispute in respect of a defined legal relationship

[54] In *Methanex (HC)* Fisher J held that "a defined legal relationship" has a "particularly broad meaning".[15] It is "neither confined to relationships recorded in documents nor to formal relationships such as contracts, trusts, or partnerships agreements."[16] However, he went on to say:[17]

> There must be some limitation imposed by the term "defined legal relationship" if complete redundancy is to be avoided. As a bare minimum, the expression would seem to indicate that the dispute must be of a legal nature as distinct from a merely religious, cultural, academic, or social one." That would be consistent with the enforceability provisions of art 35(1) of the First Schedule...I take it from art 35(1) that for two individuals to have a "defined legal relationship" for present purposes there must be a relationship which gives rise to the possibility that one is entitled to some form of legal remedy against the other.

[55] In its judgment on appeal, the Court of Appeal agreed with Fisher J's reasoning and conclusion on this point.[18]

[56] The central issue in determining whether Ngati Taka and Pirirakau in fact entered into an arbitration agreement is whether the mana whenua dispute is a "dispute in respect of a defined legal relationship". In the strike out judgment, Associate Judge Bell did not consider whether the mana whenua dispute was a dispute in respect of a defined legal relationship. That is understandable, as the hearing before him proceeded on the basis that Ngati Taka and Pirirakau had entered into an arbitration agreement to which the Act applied. However, the issue having been raised as a result of Mr Hingston's evidence, it must now be dealt with.

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15 *Methanex (HC)*, above n 8, at [83].
16 At [84].
17 At [85].
18 *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA) ("*Methanex (CA*")) at [60]-[62]

(i) Submissions

[57] Mr Bryers submitted that the defined legal relationship was to be found in Ngati Taka and Pirirakau being common parties to the mana whenua process agreement. He submitted that that relationship was sufficient to bring the dispute resolution agreement within the definition of "arbitration agreement" in the Act.

[58] Mr Sharp accepted that a "legal relationship" could be found between Ngati Taka and Pirirakau, as both were parties to the deed of mandate and the mana whenua process agreement. However, he maintained his submission that the process agreed by them was an expert determination, not an arbitration.

(ii) Discussion

[59] With respect, neither counsel addressed the whole of this element of the definition of an arbitration agreement. It is not sufficient to find a "legal relationship" between the parties; they must have agreed to submit to arbitration "all or certain disputes which have arisen ... between them in respect of a defined legal residential".[19] As Fisher J said in *Methanex (HC)*, "The dispute must be of a legal nature as distinct from a merely religious, cultural, academic, or social one", and "there must be a relationship which gives rise to the possibility that one is entitled to some form of legal remedy against the other."[20] Thus, in this case, it is necessary to determine whether the mana whenua dispute is a dispute in respect of a defined legal relationship, which gives rise to some form of legal remedy.

[60] Ngati Taka and Pirirakau entered into the dispute resolution agreement in order to resolve their dispute as to which of them had mana whenua over the disputed land between 1840 and 1865. In and of itself, resolution of that dispute does not give rise to a possibility of one of them obtaining a legal remedy against the other. It does not, on its face, determine the allocation of proceeds of the Treaty of Waitangi settlement; allocation is determined according to the Deed of Mandate and the mana whenua process agreement. It is only if the dispute resolution agreement is the equivalent of, or complies with the mana whenua process agreement that the

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19 Arbitration Act 1996, s 2(1), definition of "arbitration agreement".

20 *Methanex (HC)*, above n 8, at [85].

resolution panel's decision could affect the allocation of the settlement proceeds. Accordingly, it is necessary to examine the mana whenua process agreement insofar as it deals with the resolution of cross-claimed resources, then to consider whether the dispute resolution agreement can be regarded as equivalent to or complying with it.

[61] The principles of the "mana whenua process" are set out at cl 2.2–2.5 of the mana whenua process agreement. As relevant, they state:

> **2 Principles of Process**
>
> 2.1 The Cross Claimed Resources ... will be allocated to Hapu on the basis of mana whenua, and the agreements reached between Hapu in a kanohi ki te kanohi process or otherwise determined by this Mana Whenua Process.
>
> 2.2 The mandated Hapu representatives of [Te Roopu Whakamana] are committed to the Hapu deciding upon the allocation of Cross Claimed Resources for themselves, on their own terms, answerable to one another.
>
> 2.3 The Hapu acknowledge their commitment to a Mana Whenua process that:
>
> 2.3.1 enhances and promotes the mana and integrity of all Hapu; and
>
> 2.3.2 is open and transparent; and
>
> 2.3.3 promotes the whanaungatanga, manaakitanga and kotahitanga amongst the Hapu.
>
> ...

[62] I have referred, at [10], above, to the three stage process for resolving cross-claimed resources. Ngati Taka and Pirirakau did not succeed in resolving the mana whenua dispute at stages 1 or 2. Stage 3 of the process is outlined at clause 6 of the mana whenua process agreement. As relevant it provides:

> **Stage 3 – Finalising Allocation Agreement ...**
>
> ...
>
> 6.3 The Hapu interested in the Disputed Resources will decide whether to refer the dispute to:
>
> 6.3.1 Mediation, to endeavour to reach agreement; or

6.3.2 Adjudication, in order to determine the dispute (whether or not mediation has been attempted first).

...

6.10 If a dispute over Disputed Resources is referred to Adjudication, the Board of the Iwi PSGE will appoint an adjudication panel that comprises at least 3 members to decide the dispute. The Board will have complete discretion to decide who the members of the panel should be, subject to the following requirements:

6.10.1 The panel members must be fluent in Te Reo Maori, and be knowledgeable on matters of tikanga, including in particular how mana whenua is held and exercised by Hapu;

6.10.2 Panel members must be independent of the dispute, and not be members of any of the Hapu involved in the dispute.

6.11 The Adjudication Panel may seek legal advice on process, or legal or other expert advice on any other matter.

6.12 The Adjudication Panel will hear the claims of the Hapu interested in the Disputed Land.

6.13 The Adjudication Panel will have complete discretion to determine the process and timetable for the hearing, subject to the following requirements:

6.13.1 The Hapu will provide an agreed joint statement to the Adjudication Panel outlining the nature of the dispute.

6.13.2 Each Hapu will have the opportunity to provide a written submission to the Adjudication Panel stating their mana whenua interests in the disputed lands and their position concerning the dispute;

6.13.3 The Hapu involved will file written evidence;

6.13.4 Each Hapu claimant is entitled to a right of reply;

6.13.5 There is a right to question witnesses;

6.13.6 Parties are not entitled to legal representation before the Adjudication Panel unless all parties agree.

6.14 The Adjudication Panel will reach a decision on allocation of the Disputed Lands ... in accordance with the mana whenua test set out at clause 4.2. The Adjudication Panel shall have the power to:

6.14.1 Allocate the disputed resources to one Hapu; or

6.14.2 Allocate the disputed resources to more than one Hapu in joint or multiple ownership as tenants in common in resource, either divided in equal shares or proportionally according to the respective interests of the Hapu;

6.14.3 Allocate the disputed resources to one Hapu, but acknowledge the relationship of the other Hapu with the land in a specified manner;

6.14.4 Implement any other solutions proposed by one or more of the parties, subject to any modifications determined by the Panel.

6.15 A decision with reasons will be given. The decision of the Adjudication Panel will be final and binding on all parties.

[63] It was common ground that the dispute resolution agreement is not in accordance with the adjudication procedure set out as Stage 3 in the mana whenua process agreement. The dispute resolution agreement provided for a resolution panel of two, appointed not by an independent party (Te Roopu Whakamana) but by the parties themselves; it did not require the resolution panel to be independent and not be members of either Ngati Taka or Pirirakau; it did not specify the parties' right to question witnesses and to have a right of reply; it did not set out the resolution panel's powers in relation to their decision.

[64] In my view, the only way in which Ngati Taka and Pirirakau could be said to have submitted "a dispute in respect of a defined legal relationship" to arbitration is if the resolution panel's decision as to mana whenua status affects the allocation of the proceeds of the Treaty of Waitangi settlement. If it does, then there will be an entitlement to a legal remedy. If it does not, then there is no entitlement to a legal remedy. The panel's decision will be as to a historical, cultural dispute, but that would not make it an arbitration award.

[65] On the face of the dispute resolution agreement, the resolution panel's decision cannot affect the allocation of settlement proceeds. The panel was to decide which hapu and its rangatira had mana whenua status from 1840 to 1865. By contrast, the adjudication panel in the adjudication procedure under Stage 3 of the mana whenua process agreement was required to allocate the disputed resources. Thus the decision resulting from the dispute resolution agreement is not the same decision as that resulting from an adjudication: the dispute resolution agreement did not provide for allocation.

[66] This points to the different legal effect of the dispute resolution agreement. While both Ngati Taka and Pirirakau understood it to be equivalent to an adjudication under the mana whenua process agreement (albeit less costly and time consuming) it was not equivalent, either in substance or effect. All the resolution panel could do under the dispute resolution agreement was determine mana whenua status. They could not make any allocation decision. Their decision could not give rise to the possibility of a legal remedy.

[67] The effect is that an adjudication pursuant to Stage 3 of the mana whenua process agreement has not been completed. Thus, while the dispute resolution agreement provided for the resolution of a historical, cultural, dispute, it did not provide for the arbitration of a dispute in respect of a defined legal relationship, and it could not, therefore, be an arbitration agreement under the Act.

[68] I have considered whether it could be argued that having obtained from the resolution panel a final and binding decision as to mana whenua over the disputed land, the parties could then call on the Iwi PSGE to allocate settlement proceeds in accordance with that decision, thus avoiding the mana whenua process agreement adjudication and, in effect, transforming the dispute resolution agreement into an arbitration agreement as defined in the Act. I note that neither party made such an argument. Both considered they were undertaking their own "adjudication".

[69] However, I have concluded that even if this had been argued, the argument could not have succeeded. First, the mana whenua process agreement makes it clear, at 2.1, that mana whenua in respect of cross-claimed resources is to be determined by "agreements reached between Hapu in a kanohi ki te kanohi process or otherwise determined by this Mana Whenua process". The dispute resolution process undertaken by Ngati Taka and Pirirakau is not provided for in the mana whenua process agreement.

[70] Secondly, the mana whenua process agreement was signed by representatives of the eight Hapu of Ngati Ranginui. Even if Ngati Taka and Pirirakau reached a decision that their own mana whenua dispute was to be determined by the dispute resolution process they agreed to, they could not unilaterally vary the mana whenua

process agreement to do so. The fact that Te Roopu Whakamana appears to have given its blessing to the procedure adopted by Ngati Taka and Pirirakau is not relevant. Te Roopu Whakamana is not a party to the mana whenua process agreement, and cannot vary it.

Decision in respect of the dispute resolution agreement

[71] Accordingly, I conclude that:

(a) Ngati Taka and Pirirakau intended to submit the mana whenua dispute to arbitration.

(b) The dispute resolution agreement was not an arbitration agreement as defined in the Act, because it was not a submission to arbitration of a dispute in respect of a defined legal relationship.

(c) The dispute resolution agreement was not an agreement to submit the mana whenua dispute to expert determination.

(d) The decision of Mr Hingston and Mr Wawatai is not an "adjudication" for the purposes of Stage 3 of the mana whenua agreement, and does not determine the allocation of the Treaty of Waitangi settlement proceeds.

[72] The effect of my decision is that the competing claims by Ngati Taka and Pirirakau to have held and exercised mana whenua over the disputed land have not been determined. If agreement cannot be reached by negotiation or mediation, they will have to follow the adjudication procedure under the mana whenua process agreement. This is most regrettable, because it will add to the time and expense involved in resolving the dispute. Unfortunately, while both parties sought to avoid the formality and cost of an adjudication, they have not managed to do so.

[73] My decision is sufficient to dispose of Ngati Taka's application: the "arbitration award" must be set aside, because there was no "arbitration" as defined in the Act. However, in case I am wrong in that decision, I go on to consider, briefly,

Ngati Taka's arguments as to impartiality and independence, and breaches of natural justice.

[74] The following discussion proceeds on the assumption that my finding that the dispute resolution agreement was not an arbitration under the Act is found to be wrong. For the purposes of the discussion, therefore, I am assuming that Ngati Taka and Pirirakau intended to, and did, submit a dispute in respect of a defined legal relationship to arbitration. I will, therefore, refer to Mr Hingston and Mr Wawatai as "the arbitrators", and to the hearing before them as "the arbitration hearing".

Impartiality and independence

[75] As noted above at [19], Mr Hingston disclosed his wife's connection to Pirirakau before and at the start of the arbitration hearing. Mr Hingston also said, at the start of the hearing, that Mr Kuka (one of Pirirakau's presenters) was his wife's cousin. Ngati Taka did not expressly object to Mr Hingston continuing to act as arbitrator.

(i) Submissions

[76] Mr Bryers submitted that this relationship created a clear case of apparent bias; that is, "a fair minded lay observer might reasonably apprehended that [Mr Hingston] might not bring an impartial mind to the resolution of the question [he] is required to decide".[21] Mr Bryers submitted that Ngati Taka's right to impartial arbitrators was inalienable; that is, it could not be waived. He accepted that Mr Hingston had disclosed his wife's connection, but submitted that he did not disclose that his wife was a cousin of Mr Kuka. He submitted that at the time Mr Hingston referred to Mr Kuka as "cousin", there was no mention of the fact that he was to be a presenter.

[77] Mr Bryers submitted that the real issue is whether Ngati Taka could waive the right to object to Mr Hingston continuing to act as arbitrator and, if so, whether they did so, or could be deemed to have waived the right to object.

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[21] See *Saxmere Co Ltd v Wool Board Disestablishment Co Limited*, above n 6, at [3], per Blanchard J.

[78] Mr Sharp submitted that Mr Hingston made full disclosure of his wife's connection to Pirirakau, and that it was at least implicit in Mr Hingston's reference to Mr Kuka that Mr Kuka would be a presenter. He submitted that Mr Kuka's position was made clear very shortly after Mr Hingston referred to him, when he was identified at the start of Pirirakau's presentation as being one of their presenters. Mr Sharp also submitted that Ngati Taka's right to object had been made clear, and that not having objected, Ngati Taka had waived, or could be deemed to have waived, any right to object to Mr Hingston continuing to act as arbitrator.

(ii) Discussion

[79] The First Schedule of the Act sets out provisions as to impartiality, challenging arbitrators, and waiver of rights. Article 12 provides that a prospective arbitrator "shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence", and that an arbitrator may be challenged if circumstances exist that "give rise to justifiable doubts as to that arbitrator's impartiality or independence". Article 13 sets out a procedure for challenging an arbitrator, which applies if the parties do not agree on such a procedure. Article 4 provides that if a party knows that any provision of the Schedule, from which the parties may derogate, has not been complied with, yet proceeds with the arbitration without stating an objection without undue delay, then that party is deemed to have waived the right to object.

[80] Counsel were unable to refer me to any authority where the facts were comparable to the present case. In *Grey District Council v Banks*, Panckhurst J noted a submission that, despite the "deemed waiver" provisions of art 4, there might be incidents of the arbitral process (such as the requirement of impartiality and independence) which were so fundamental in nature that they could not be waived. However, his Honour considered that not to be an issue before him.[22] On appeal, the Court of Appeal also left open the question whether an award could be set aside, despite failure to object, for breach of a mandatory requirement.[23]

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22 *Grey District Council v Banks* [2003] NZAR 487 (HC) at [55].

23 *Banks v Grey District Council* [2004] 2 NZLR 19 (CA) at [11]–[12].

[81] Counsel also referred to the decision of Ellen France J in *Duncan & Davies Nurseries New Plymouth Ltd v Honnor Block Ltd*, in which her Honour considered an application to set aside the appointment of an arbitrator, on the grounds of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence.[24] Her Honour declined the application, on the basis that the applicant had plainly been aware of the "circumstances" at the time the arbitrator was appointed. The circumstance of that case were somewhat unusual in that the appointed arbitrator had previously been appointed to mediate the dispute between the parties, and the settlement agreement entered into after the mediation included a clause to the effect that if there were any dispute as to the terms of, or implementation of the settlement agreement, the parties would appoint the mediator to determine the dispute.

[82] Some support for Mr Bryers' submission that the right to object to an arbitrator on the grounds of lack of impartiality and independence cannot be deemed to be waived may perhaps be gained from the judgments in *Methanex*. In the High Court, Fisher J held that parties to an arbitration could not contract out of the right to seek judicial review on the grounds of breach of natural justice.[25] The Court of Appeal upheld that conclusion.[26]

[83] I would accept as correct the view expressed by DAR Williams QC and A Kawharu in their text *Williams & Kawharu on Arbitration*, that the right to an impartial and independent arbitrator is inherent in art 12, which is in mandatory terms, and that the waiver provision in art 4 applies only to requirements "from which the parties may derogate"; that is, non-mandatory provisions.[27] Thus, Ngati Taka may challenge the arbitration award on the grounds of Mr Hingston's apparent lack of impartiality and independence, notwithstanding that no challenge was made at the time of the arbitration. I would also accept, as Williams and Kawharu go on to

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[24] *Duncan & Davies Nurseries New Plymouth Ltd v Honnor Block Limited* HC Auckland CIV-2005-404-2513, 14 June 2005.

[25] *Methanex (HC)*, above n 8, at [127]–[132].

[26] *Methanex (CA)*, above n 18, at [92]–[117].

[27] DAR Williams QC and A Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 5.8.6.

say, that the failure to raise a timely challenge is a relevant factor to be taken into account when assessing the genuineness and strength of the challenge to the award.[28]

[84] It is helpful now to refer to the Transcript of the arbitration hearing. As relevant to this issue it records, in the course of discussion of preliminary issues, the following exchanges:

> [Mr Hingston]: Right. Now we are on record, there's one thing I'd like to raise before we commence, and I imagine you're all aware of it, my wife is Pirirakau. Everybody's aware of that. Secondly, and of course my kids are too, eh. And secondly, if there is any objection to me participating because of that relationship, let's hear it now because we can't go ahead. I mentioned this to Rawiri.
>
> [Mr Leef]: No, I understood that you were Pirirakau, but someone also told me that ...
>
> [Mr Hingston]: Not me, my wife.
>
> [Mr Leef]: Your wife, someone also told me that somewhere along the lines, you fellas were obviously Ngati Taka; is that right?
>
> ...
>
> [Mr Hingston]: I'm not sure. Rawiri would have to answer that one because he's cousin.
>
> ...
>
> [Mr Hingston]: I'm not sure about that, not sure about that.
>
> [Unidentified male]: You're not sure about that. Oh well, we'll leave it in the banks.
>
> ...
>
> [Mr Hingston]: If there are no objections well, I'm quite happy to continue. If there are, we can't continue.
>
> [Mr Wawatai]: I'll ask the question then, is there any reason why Ken should not proceed as being an arbitrator? Is there any objections? If there's no objections then we will proceed. Does anyone have a view that it compromises? Counting down, four, three, two, one.
>
> [Mr Hingston]: Thank you, we'll get on with the job. ...

[85] Then, when Mr Tommy Wilson was introducing the presenters for Pirirakau, he referred to:

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[28] Ibid.

> Rawiri Kuka, the chairman of Pirirakau society who will talk about who Pirirakau are and the events that happened pre-Raupatu during the window of 1840 to 1865 and right through to contemporary times.

[86] Shortly thereafter, Mr Leef objected to Mr Kuka and two other named presenters on the grounds that they were not "mandated Te Roopu Whakamana representatives" for Pirirakau.[29] Mr Leef did not raise any issue as to Mr Hingston acting as arbitrator, based on Mr Kuka's relationship to Mr Hingston's wife.

[87] On the second day of the arbitration hearing, before Mr Leef began his presentation for Ngati Taka, he recorded two points. The first was that "at present" Ngati Taka had "given way to Pirirakau" to give their presentations in breach of the agreement, and "non-mandated representatives" had given evidence. The second point was recorded as:

> I want to put to Mr Hingston, that we want to ensure that everything is unbiased as we can. Knowing full well that you do have a connection to Pirirakau for your wife.

[88] There is an apparent conflict arising out of the fact that if the arbitrators were to decide in favour of Pirirakau, then members of Pirirakau, which included Mrs Hingston, would benefit. Conversely, if they decided in favour of Ngati Taka, members of Pirirakau would be disadvantaged. In this case the particular nature of the dispute and the contentions of Ngati Taka and Pirirakau (as set out at [12] and [13], above) also give rise to an apparent conflict where an arbitrator has some connection to one of the parties. I am satisfied that, objectively, there are grounds for concluding that a fair minded lay observer might reasonably apprehend that Mr Hingston might not have brought an impartial mind to the decision he was required to make. In terms of art 12, there are justifiable doubts as to his impartiality or independence.

[89] Further, and in my view more significantly, there is an apparent conflict in relation to Mr Kuka. I do not accept Mr Sharp's submission that Mr Kuka was not a key witness. He was one of five presenters for Pirirakau. Mr Wilson described his evidence as talking about "who Pirirakau are and the events that happened pre-Raupatu during the window of 1840 to 1865 and right through to contemporary

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[29] See cl 6 of the Dispute Resolution Agreement at [33], above.

times". His evidence is set out in some three pages of the Transcript and is in relation to Pirirakau's name and history, the tupuna Tutureinga, Maungapohatu, and Taka, and Pirirakau's current activities. He gave evidence on the substantive issue as to mana whenua over the disputed land. I accept Mr Bryers' submission that the arbitrators' decision was likely to involve accepting or rejecting Mr Kuka's evidence. Objectively, Mr Kuka's relationship to Mrs Hingston could affect that decision.

[90] Accordingly, I would conclude that notwithstanding the failure of Ngati Taka to object at the time, there are grounds to challenge the arbitrators' award on the grounds of an apparent lack of impartiality and independence.

[91] I would reject Mr Sharp's submission that Ngati Taka waived any right to object to Mr Hingston as arbitrator. I would accept Mr Bryers' submission that Mr Leef's statement at the beginning of the Ngati Taka presentation that Ngati Taka "wants to ensure that everything is unbiased" is clear, and is not an unqualified acceptance of Mr Hingston.

Were there breaches of natural justice?

Ngati Taka's amendment application

[92] It is necessary, first, to consider Ngati Taka's application to amend its substantive application. As filed, one of the grounds on which it applied for an order setting aside the "arbitration award" was that:

> ... after the hearing the arbitrators, without the knowledge of Ngati Taka, sought and obtained further information relating to the issues in dispute and, further, the arbitrators did not afford Ngati Taka with an opportunity to comment on, or to make submissions about, that information before publishing their award.

[93] Ngati Taka's amendment application sought leave to amend this ground by alleging that the information was provided by Pirirakau "during and/or after" the dispute resolution hearing, and that Ngati Taka were not provided with copies of the information.

(i) Submissions

[94] In support of the application, Mr Bryers submitted that the essence of this ground was that Ngati Taka was not given any opportunity to comment on or respond to documents produced in the arbitration. He submitted that the timing of when documents had been produced was immaterial; what was material was the failure to give Ngati Taka an opportunity to comment or respond.

[95] Mr Bryers further submitted that at the time the substantive application was filed, Ngati Taka had understood that documents had been provided after the hearing, and Ngati Taka had subsequently learned (from Pirirakau's opposition) that certain documents and reports had been provided during the hearing. Mr Bryers submitted that the amendment sought was not an attempt to put forward a new ground of the substantive application. Rather, it was a refinement of the original application, based on evidence adduced by Pirirakau, of which Ngati Taka was not previously aware.

[96] In opposing the amendment application, Mr Sharp submitted that the amendment sought is material, and new. He accepted that the "umbrella" of Ngati Taka's complaint is their contention that they did not have the opportunity to respond to reports and documents produced by Pirirakau. However, he submitted, there is a material difference between the initially pleaded factual context of documents produced *after* the dispute resolution hearing, and the amended factual context of documents produced *during and/or after* the hearing.

[97] Mr Sharp further submitted that the Transcript and Minutes of the arbitration hearing do not support Ngati Taka's contention that they did not know that reports and documents had been produced during the hearing until recently. He pointed to references in both records to the production of documents.

(ii) Discussion

[98] Article 34(3) of the First Schedule of the Act provides that an application to set aside an arbitral award may not be made after three months from the date on which the party making the application received the award.

[99] In its judgment in *Downer-Hill Joint Venture v Government of Fiji*, a full Court of the High Court held that if an amendment to an application to set aside an arbitral award constitutes a fresh cause of action, the amendment may not be made after three months.[30] As to what constitutes a fresh cause of action, the Court adopted the formulation put forward by counsel for the Government of Fiji:[31]

> The essence of the test is whether the alleged new cause of action/ground is merely a re-configuration of the existing factual and/or legal pleadings, or whether it introduces new factual and/or legal components to the case which were not in the existing pleading and which are sufficiently significant that the case which the applicant advances, and the case the respondent must answer, is a different one.

[100] The question whether an amendment is a "re-configuration", or constitutes a new ground, is one of degree. It requires an assessment for each individual case.

[101] I would accept Mr Bryers' submission that the fundamental point of this ground of Ngati Taka's substantive application is that documents were presented by Pirirakau to the arbitrators, to which Ngati Taka were not given any opportunity to respond. I would also accept his submission that it is by no means clear from the Transcript or the Minutes of the arbitration hearing what documents were presented, and when.

[102] I would accept that Ngati Taka's amendment application is a "re-configuration" of this ground of the substantive application. There is nothing essentially different in the ground itself, the difference is in the timing of production of documents. The amendment does not introduce new factual or legal components to the case which are sufficiently significant that the case advanced by Ngati Taka is materially different. I would therefore grant leave to Ngati Taka to file a second amended application to set aside the arbitration award.

[103] I add that both Pirirakau and Ngati Taka had the opportunity to, and did, adduce evidence at the hearing in his Court regarding information presented to the arbitrators, and to cross-examination each other's witnesses.

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30 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [40].
31 At [41].

Production of documents

[104] As noted earlier, the nub of Ngati Taka's complaint is that documents and reports were presented to the arbitrators by Pirirakau, but Ngati Taka were not given a proper opportunity to comment on or respond to them.

(i) Submissions

[105] Mr Bryers referred first to art 24(3) of the First Schedule, which provides that:

> Statements, documents, or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the party.

[106] Mr Bryers then referred to a comment made by Mr Hingston at the start of the arbitration hearing, that if presenters were going to "read out a book" it would be better to highlight it. He said "just bring our attention to the things you want to highlight". Mr Bryers submitted that this was not what occurred. Rather, documents were "handed up willy nilly", with no highlighting or direction to specific passages.

[107] Mr Bryers submitted that it is unclear from the Transcript and Minutes of the arbitration hearing what documents and reports were presented, and when, and that it is apparent that some documents were presented to the arbitrators in the course of Pirirakau's reply, after Ngati Taka had completed its presentation. Mr Bryers submitted that, whenever documents were presented, Ngati Taka was not given a proper opportunity to respond to them.

[108] Mr Bryers further submitted that it was apparent from the arbitration decision that on at least one issue, the arbitrators had reached their decision on documents produced to them where there had been no oral evidence or argument at the arbitration hearing. He submitted that the arbitrators should have advised the parties of their intention to rely on the documents and invited further submissions.

[109] Mr Sharp submitted, first, that it was necessary to consider the issue of whether Ngati Taka had a proper opportunity to respond to documents produced by

Pirirakau in the context of *this* arbitration, and to ask what would reasonably be expected from this arbitration, given that the arbitrators were left to set their own procedure.

[110] Mr Sharp further submitted that Pirirakau was not required to specify particular parts of the documents that were relied on, because the documents were presented as generally backing up what presenters said at the hearing. He submitted that there was a broad range of responses that Ngati Taka could have made when documents were produced, and it was open to them to do so. He submitted that Ngati Taka did not seek to reply to the documents because they did not support Ngati Taka's claim, and in fact supported Pirirakau's claim.

[111] Finally, Mr Sharp submitted that the context of this arbitration was important. He submitted that this case had its own approach to process, procedure, and tikanga Maori, and the arbitrators had the ability to control the procedure.

(ii) Discussion

[112] It is necessary to determine what documents were produced and when, whether Ngati Taka were provided with copies of those documents, and whether Ngati Taka was given the opportunity to respond to them.

[113] It appears from the Transcript and Minutes of the arbitration hearing that documents were presented on behalf of Pirirakau by Mr Bidois and by Mrs Jenny Rolleston. The arbitrators directed that documents were to be produced "to the table", that is, placed on the table where the arbitrators were sitting.[32] Unfortunately, neither the Transcript nor the Minutes is clear as to what documents and reports were produced, and when.

[114] Mrs Rolleston is recorded in the Transcript as saying, at the end of her presentation on the first day of the arbitration hearing:

> The finding of the Waitangi Tribunal was that Pirirakau's claim was found. The evidence is here in the volumes we have placed before you and I invite

[32] Mr Hingston's evidence was that the arbitrators and the presenters were all seated around a large table, with the arbitrators at one end, and the parties at the other.

> you to take the time to read these before making your decision. ... And these are the evidence, this was all the presentations that we did to the Tribunal. There's the Pirirakau Raupatu reports, and this is the report from the Waitangi Tribunal.

[115] The Minutes record that "The Pirirakau Raupatu Report and the Waitangi Tribunal Report were formally received by the table."

[116] Mr Bidois also gave his presentation on the first day of the arbitration hearing. The Transcript does not record him presenting any documents or reports during his presentation, but it appears from the Transcript that he may have referred to documents, although the particular documents are not identified. The Minutes do not record Mr Bidois producing any documents. In both his affidavit evidence and his oral evidence in this Court, Mr Bidois said that when he gave his presentation he "handed up" a report by Dr Katherine Ord-Nimmo called "A Matter of Bargain" (a report commissioned by the Waitangi Tribunal for the WAI 707 and WAI 727 claims, on behalf of Ngati Taka). He did not know why that was not recorded in either the Minutes or the Transcript. He added that while he was sure he had produced the documents, he could be corrected.

[117] On the second day of the arbitration hearing, after Ngati Taka had completed its presentation, the arbitrators invited Pirirakau to reply. In the course of his reply Mr Bidois is recorded, in both the Transcript and the Minutes, as producing a report "A Matter of Chance".[33] The Transcript records Mr Bidois as saying:

> There were Court hearings in relation to Taka's claim and there was a ... document made out; called "Matter of Chance", and that was produced by Katherine Ord-Nimmo in September of 1998. And she goes through the whole case, the whole case, and I give this as evidence, that's the report, that's her report.

[118] There is no reference, either in the Transcript or the Minutes, to the "Document Bank" to Dr Ord-Nimmo's report being produced to the arbitrators. Mr Bidois in his evidence in this Court said that he produced the "Document Bank" to the arbitrators on the second day.

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[33] This was accepted by the parties to be a reference to Dr Ord-Nimmo's report "A Matter of Bargain".

[119] It appears clear from the Transcript and Minutes that Mrs Rolleston produced the Pirirakau Raupatu report and its addendum, and the Waitangi Tribunal report, on the first day of the arbitration hearing. Regarding Dr Ord-Nimmo's report "A Matter of Bargain", it appears more likely than not that the report was produced on the second day of the hearing, in Mr Bidois's reply presentation. While there is no record of it occurring, it appears that the "Document Bank" may have been produced at the same time. There is some support for this in that the Transcript records a reference to a Minute of the Native Land Court, and that reference is to a document in the "Document Bank".

[120] In his evidence in this Court, Mr Leef said that Ngati Taka was not given copies of the Pirirakau Raupatu report, the addendum to that report, or the Waitangi Tribunal report at the arbitration hearing. He had his own copies of those documents, but he did not have them at the arbitration hearing. Mr Leef also said that Ngati Taka was not provided with copies of Dr Ord-Nimmo's report or the "Document Bank". Mr Bidois confirmed that Ngati Taka were not given copies of the documents produced to the arbitrators. He said that he saw no reason to provide Ngati Taka with copies of their own documents (that is, Dr Ord-Nimmo's report and the "Document Bank") and that Ngati Taka was familiar with the Pirirakau reports.

[121] Mr Bidois confirmed in his evidence in this Court that particular passages in the documents on which Pirirakau was going to rely were not identified when they were produced. He said that there "would only have been a couple of passages ... They both were quite voluminous and they would have relied on these in general". Mr Bidois said he thought it possible that passages Pirirakau were relying on would have been marked in the copies of documents given to the arbitrators.

[122] The evidence for Ngati Taka that Pirirakau provided evidence *after* the arbitration hearing was disputed by Ms Gardiner (who had control of the documents after the hearing) and by Mr Hingston. In my view, it is more likely than not that Ms Gardiner was asked to provide the documents to Mr Hingston after the hearing, when he needed them for the purpose of preparing the decision, and she did so.

[123] The real issue is what opportunity Ngati Taka had to respond to the documents produced by Pirirakau.

[124] Documents placed on the arbitrators' table remained there over the course of the hearing. Although Mr Hingston said in his evidence that documents placed on the table were available of anyone to go and look at them, there is no record, in either the Transcript or the Minutes, that that was made clear to the parties at the hearing. I would conclude that, on the evidence, no time was given to Ngati Taka to read the reports produced by Pirirakau, no specific passages were identified or highlighted as being those on which Pirirakau intended to rely, and no opportunity was offered by the arbitrators to Ngati Taka, to take time to look at the reports and decide whether they should be responded to.

[125] The question whether this is a breach of natural justice turns on whether the ability to read and submit on the reports is a requirement of natural justice, and, secondly, whether there was a breach of this requirement.

[126] I bear in mind that the requirements of natural justice vary with the power which is being exercised and the circumstances in which it is being exercised. As the Court of Appeal said in *Daganayasi v Minister of Immigration*, the requirements' "applicability and their extent depend either on what is to be inferred or presumed in interpreting the particular Act ... or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the purpose of the legislation."[34] One of the requirements of natural justice is that a party should have the opportunity to reply to negative evidence. As Cooke J said in *Daganyasi*, "The appellant should have a fair opportunity of correcting or contradicting any relevant statement prejudicial to his or her view".[35] In this case, I would find that Ngati Taka did not have the opportunity to reply to negative evidence, in particular, the documents presented in Pirirakau's reply.

[127] I return briefly to Mr Sharp's submission that the context of this arbitration was important, and that I should consider the parties' submissions in the light of Mr

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34 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141, per Cooke J.
35 *Daganayasi*, above n 34, at [143].

Hingston's evidence that the procedure adopted at the arbitration hearing was one that "has been common in Maori land matters", and look at the issues in the "Maori context".

[128] I would accept that context is important, but there was no evidence before me as to what difference (as to the application of the principles of natural justice) the "Maori context" might make. In particular, there was no evidence that the "Maori context" (either generally, or in respect of Ngati Taka and Pirirakau in particular) required a lesser standard of fairness and natural justice, and did not require each side of a dispute to have a proper opportunity to respond to what the other side was putting forward. Accordingly, there is no basis on which I could find that the normal standards of fairness and natural justice did not apply to this arbitration.

Should the Court exercise its discretion to set the arbitration award aside?

[129] In the light of my earlier decision that the dispute resolution hearing was not an arbitration, it is neither necessary nor appropriate for me to make a ruling on this point. However, I would observe that it appears that, as a result of the apparent lack of impartiality and breach of natural justice, Ngati Taka has (at least) an arguable case that (if there were an arbitration award) the arbitration award should be set aside.

Result

[130] In accordance with my decision outlined at [71]–[73] above, the "arbitration award" of Mr Hingston and Mr Wawatai, issued on 23 March 2012 is set aside.

[131] As to costs, I direct that if the parties are not able to reach agreement them memoranda are to be filed. In their memoranda, counsel should indicate whether a decision may be made on the papers, or if a further hearing is required.

Andrews J