IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2012-470-461
[2012] NZHC 2631

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an Arbitration Award dated 23 March 2012
BETWEEN	RAPATA (ROBERT) LEEF, STEPHANIE TERIA TAIAPA, NADINE HORINA PIRAKE, CAIN RAROA TAIAPA, DARREN WILLIAM LEEF, NEIL HIRAMA AND PANIA ANEISHA BROWN Applicants
AND	COLIN BIDOIS, JENNY ROLLESTON, TAARI NICHOLAS, PATRICK NICHOLAS, CHRIS (KIRITOHA) TANGITU, RAWIRI KUKA AND SHADRACH ROLLESTON Respondents

Hearing: 11 October 2012

Appearances: S P Bryers for Applicants
M J Sharp for Respondents

Judgment: 11 October 2012

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

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[1] This case is about an arbitration award. The unsuccessful party, representative of Ngāti Taka, say that the award should be set aside. The successful party, representatives of Pirirākau, have applied to strike out the setting aside application.

[2] The award was given on 23 March 2012. The arbitrators were Mr Kuku Wawatai and Mr Heta (Ken) Hingston, a retired Māori Land Court Judge. As explained, the parties to the arbitration were representatives of Ngāti Taka and representatives of Pirirākau, both hapū of Ngāti Ranginui iwi.

[3] In their award, the arbitrators said that the matter they had to determine was which of the hapū had mana whenua in respect of an area of land from 1840 to 1865. The area of land comprises in general terms the Te Puna peninsula and inland from the Te Puna peninsula going back as far as the coastal side of the Kaimai Ranges. That is the land I will refer to in this decision.

[4] The arbitrators held that between 1840 and 1865 the mana whenua for the land was held by Pirirākau but that descendants of Maungapōhatu, who claimed to be Ngāti Taka, were an integral part of Pirirākau and were thus entitled to be involved as Pirirākau but not as a separate entity. The significance of that decision relates to the distribution of the proceeds of a settlement under the Treaty of Waitangi Act 1975 of a claim brought by Tauranga Moana. The effect of this finding, if it is applied to the distribution of redress given by the Crown, will be that Pirirākau will receive significantly more by way of allocation of compensation, than Ngāti Taka will.

[5] The grievances against the Crown go back to the Tauranga campaign in the New Zealand Land Wars. That campaign is known most famously for the Battle of Gate Pā (Pukehinahina) in which Māori were successful, but as a result of that campaign taken against the iwi in the Tauranga area, Tauranga Moana, the Crown confiscated large areas of Māori land, including much of the land of Ngāti Ranginui. Another major source of grievance was the Crown's compulsory acquisition of land

between Te Puna and Katikati. Pirirākau and Ngāti Taka say that they had mana whenua over some of the land which was the subject of these grievances. That is that area comprising the Te Puna peninsula and areas inland in this case.

[6] Both Pirirākau and Ngāti Taka made claims in the Waitangi Tribunal. The Waitangi Tribunal dealt with all claims in respect of Tauranga Moana collectively. It held hearings regarding the confiscation of land. The claimants who were heard by the Waitangi Tribunal comprised not only hapū of Ngāti Ranginui but also other iwi. The Waitangi Tribunal gave a report in 2004. That report dealt not only with the confiscation but also with the compulsory acquisition of the Te Puna-Katikati blocks. The Waitangi Tribunal upheld the claims but did not make any recommendations for specific remedies, in particular for individual hapū. Instead, it made proposals for negotiating a resolution of the Tauranga claims.

[7] After the Tribunal's report, the eight hapū of Ngāti Ranginui began negotiations with the Crown. It is Crown policy to negotiate only with large groups rather than with individual hapū or whanau.

[8] In August 2007, the hapū of Ngāti Ranginui entered into a deed of mandate. Both Pirirākau and Ngāti Taka are parties to the deed. The deed established a representative mandated body called Te Roopu Whakamana o te Raupatu ō Ngā Hapū o Te Iwi ō Ngāti Ranginui, which is commonly known as Te Roopu Whakamana. There was also appointed an operational team, te kōmiti whakahaere. These bodies were to negotiate a settlement with the Crown on behalf of all the hapū of Ngāti Ranginui.

[9] While the deed allows Ngāti Ranginui collectively to negotiate redress with the Crown, it came to be appreciated that there could be competition within Ngāti Ranginui as to the allocation of redress received from the Crown. To deal with that, the hapū entered into a further agreement in April 2010, called the Confirmed Mana Whenua Process o Hapū ō Ngāti Ranginui. It contemplated that an iwi body would receive compensation from the Crown and that that would in turn be allocated amongst the various hapū. The iwi body that would receive the compensation is

referred to as the Post-Settlement Governance Entity for Ngā Hapū o Ngāti Ranginui or Iwi PSGE. The agreement contemplates that there may be "cross-claimed resources", that is, resources claimed by more than one hapū. The agreement provides that cross-claimed resources would be allocated to hapū on the basis of mana whenua. The agreement provides for a three-staged process for determining the allocation of cross-claimed resources. The process was not to start until there had been a settlement with the Crown. That settlement was to be the coming into force of legislation giving effect to the settlement negotiated with the Crown. The agreement anticipated that that settlement date would be at the end of August 2012, but I am told that legislation has not yet been introduced into Parliament and it is not expected that legislation will be passed through Parliament and come into force until July 2013.

[10] The first stage under the agreement was identification of mana whenua interests. That stage provided for each hapū to provide maps to the Iwi PSGE showing the extent of their mana whenua interests over cross-claimed resources.

[11] The agreement provides that the test of the mana whenua is the mana that hapū traditionally held and exercised over the land determined according to tikanga including the demonstration of ahi kā roa from 6 February 1840 to the raupatu of more than 290,000 acres in May 1865. Stage 1 was expected to take six months.

[12] Stage 2 was called kanohi ki te kanohi negotiation. This was expected to run to the end of the 12th month following the settlement date, which was expected to be in June 2013. Hapū with overlapping claims were to embark on a process of face-to-face negotiation to reach agreement. Mediators could take part. The agreement records that the expectation is of kōrero rangatira which is defined as open, principled, trustworthy dialogue by rangatira with authority to commit their hapū.

[13] Stage 3 is called finalising allocation agreement. This was to run for 12 months from 1 July 2013 to 30 June 2014. The total process through the three stages was therefore to take two years. On completion of stage 2, the Iwi PSGE was

to prepare a final draft of the "final allocation agreement" which would record agreements where they had been reached as to allocation of cross-claimed resources and also any remaining areas where agreement had not been reached.

[14] Broadly, Stage 3 provides first for mediation and, if mediation is unsuccessful, then or adjudication. The adjudication process provided that the Iwi PSGE was to appoint an adjudication panel that would comprise at least three members to determine the dispute. While the board would have complete discretion to decide who the members of the panel should be, there were requirements that the panel members had to be fluent in te reo, had to be knowledgeable on matters of tikanga, in particular how mana whenua is held and exercised by hapū . The panel members had to be independent of the dispute and not be members of any of the hapū involved in the dispute. The agreement goes on to provide the process for the adjudication panel to hear the parties and make a determination. The adjudication panel could obtain legal advice, but parties would not be entitled to legal representation before the panel unless all parties agreed.

[15] The adjudication panel would have to reach a decision by the 25th day of the 24th month in accordance with the mana whenua test. The adjudication panel could make a range of decisions. It had powers: to allocate disputed resources to one hapū; to allocate disputed resources to more than one hapū in joint or multiple ownership as tenants in common in equal shares or proportionally according to the respective interests of the hapū; to allocate the disputed resources to one hapū but acknowledge the relationship with the other hapū with the land in a specified manner; or to implement other solutions proposed by one or more of the parties subject to modifications determined by the panel. A decision had to be given with reasons. The decision of the adjudication panel would be final and binding on all parties.

[16] Once those stages had been all completed, the Iwi PSGE would then complete a final allocation agreement by the 25th month following settlement date. That final allocation agreement would be final and binding. Both Pirirākau and Ngāti Taka were parties to that confirmed mana whenua process agreement.

[17] Mr Bidois of Pirirākau says that Pirirākau traditional lands lie in the area which is the subject of this dispute, that is, the Te Puna peninsula and the land inland. He also says that Ngāti Taka also claim the same area as belonging to it, so that there was a complete overlap of claims between the two hapū. Mr Bidois says that members of Pirirākau thought that it would be better to try to resolve the cross-claim with Ngāti Taka before settlement occurred so as not to hold up the distribution of compensation. He says that there were then direct discussions, but these were unsuccessful.

[18] In November 2010, lawyers acting for Pirirākau wrote to Te Roopu Whakamana, asking it to activate the adjudication process in the mana whenua process agreement. That letter also recorded that Pirirākau did not accept that Ngāti Taka was a recognised functioning hapū of Ngāti Ranginui during the 1840-1865 period.

[19] There was a reply by Te Roopu Whakamana. Its letter made the point that Ngāti Taka had been recognised in both the Ngāti Ranginui deed of mandate and also the Ngāti Ranginui terms of negotiation, and that the Ngāti Ranginui mana whenua process did not address the issue of recognition of hapū. It said that the concerns of Pirirākau with respect to the recognition of Ngāti Taka would have to be addressed by Pirirākau separate to the Ngāti Ranginui mana whenua process.

[20] It then said that so far as the Ngāti Ranginui mana whenua process was concerned, the proposal was premature because it could not take effect until the legislation was enacted. It said that if Ngāti Taka and Pirirākau agreed to start the process now, and also to be bound legally by its process, then Te Roopu Whakamana could assist in implementing the process. It said it was important for Te Roopu Whakamana to note that both hapū must agree to start the process and be bound otherwise the timeline signed off by all hapū was clear.

[21] It also made the point that the reason for the mana whenua process not starting until the legislation had been enacted is because the costs of undertaking that process would be met out of funds received from the Crown and would be deducted from the redress for the hapū under the settlement.

[22] It appears that Pirirākau had tried negotiating matters with Ngāti Taka about entering into a pre-settlement arrangement to determine the mana whenua claims. Mr Bidois says that the Ngāti Ranginui's lead negotiator, Mr Te Aho, assisted and pointed out that going through the process in the mana whenua agreement would be expensive and take a lot of time. It seems that as a result of those considerations, Pirirākau and Ngāti Taka decided it would be better to enter into an arbitration agreement to reach a binding decision on mana whenua before the Ngāti Ranginui settlement was enacted.

[23] In turn Mr Bidois drafted an agreement and provided it to Mr Leef. Mr Leef made changes and they agreed on a final version. Mr Leef signed on behalf of Ngāti Taka and Mr Bidois signed on behalf of Pirirākau.

[24] While there is an argument as to the validity of the agreement, and without any disrespect to the validity argument, I note that this agreement on its face provides that a particular issue as to mana whenua status was to be submitted to two arbitrators who were given the power to make a final binding decision. Under the Arbitration Act[1], it is an effective submission to arbitration.

[25] Each side appointed an arbitrator. Pirirākau nominated Judge Hingston. He was considered suitable because he had a legal background and also a great knowledge of tikanga Māori and he lived outside the area, in Rotorua. Ngāti Taka nominated Mr Wawatai. He was head of Māori Studies at the local polytechnic. He also has knowledge about tikanga Māori and was of Ngāti Porou descent and was therefore also considered to be independent.

[26] The hearing took place in January 2012. The arbitrators gave their decision on 23 March 2012. The conclusion of the award states:

> We acknowledge that our enquiry was restricted to the finite period 1840 to 1865. Therefore taking all of the evidence into account, we find that in the relevant period, the mana whenua in respect to the lands mentioned above was held by Pirirākau but the descendants of Maungapōhatu claimed to be Ngāti Taka are in our view, an integral part of Pirirākau and are thus entitled to be involved as Pirirākau, not as a separate entity.

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1 See definition of "arbitration agreement" in Arbitration Act 1996, s 2.

[27] The Iwi PSGE has drawn up a draft allocation of resources. It has not yet been finalised. It seems that it would not be able to be finalised because the legislation has not yet been enacted, but further I understand that the Iwi PSGE is also awaiting the outcome of this litigation.

[28] The document put in evidence shows that under the draft allocation, Pirirākau's settlement package is valued at approximately $10 million, including cash of $6.5 million as well as various real properties to be made over to Pirirākau.

[29] Ngāti Taka say that on the other hand, they will receive a cash distribution of about $1 million but nothing else. They feel a very strong sense of grievance as a result of this because they say that they have mana whenua over the land just as much as, if not more than, Pirirākau.

[30] Ngāti Taka have applied under Article 34 of the First Schedule of the Arbitration Act 1996 for an order setting aside the award. In summary, they say that the award should be set aside for these reasons:

(a) They say that the arbitration agreement of August 2011 was invalid because it did not comply with the provisions for adjudication in the mana whenua agreement of April 2010.

(b) They say that the arbitrators exceeded their jurisdiction by finding that the hapū of Ngāti Taka was an integral part of the hapū of Pirirākau. They say that the arbitrators had no authority to determine the identity or the mana of the hapū before them.

(c) They say that the composition of the arbitration panel was defective because it was not in accordance with the mana whenua agreement and also because one or both arbitrators had affiliations with Pirirākau through marriage and they were therefore not truly independent.

(d) They say that the award is in conflict with the public policy of New Zealand because the arbitrators reached their decision by perverse or

unreasonable reasoning. It had been an abuse of Court process to allow the award to be enforced.

(e) They also say that there is conflict with public policy because there were breaches of the rules of natural justice. They say that they were not given the proper opportunity to object to the arbitrators acting when the arbitrators had associations with Pirirākau. They say that the arbitrators breached the rules of the arbitration because they permitted Pirirākau to adduce evidence and submissions from non-mandated witnesses in breach of the arbitration agreement. They say thirdly that without the knowledge of Ngāti Taka, the arbitrators sought and obtained further information relating to the issues in dispute and did not give Ngāti Taka the opportunity to comment on or make submissions about that information before issuing their award.

[31] Under s 6 of the Arbitration Act 1996, both Schedule 1 and Schedule 2 of that Act apply to this arbitration. Schedule 1 must apply.[2] Schedule 2 applies because there is no agreement between the parties that Schedule 2 should not apply.[3]

[32] Leaving aside questions of appeal under Clause 5 of the Second Schedule, Article 34 of the First Schedule provides that recourse to a Court against an arbitral award can be made only by an application to set aside under paragraphs (2) and (3) of that article. That provision is consistent with article 5 which provides that in matters governed by the schedule, no Court shall intervene except where so provided in the schedule.

[33] It is important to understand why the Arbitration Act limits court intervention. There is a good explanation why courts have a limited role in dealing with arbitration awards in the advice of Lord Mustill in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd*:[4]

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2 Arbitration Act 1996, s 6(1)(a).
3 Arbitration Act 1996, s 6(2)(b).
4 *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338 (PC) at 338-339. Appendix to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).

> [1] Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complainant.
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> [2] Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.
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> [3] At the other extreme are complaints that the decision has been reached by methods which are unfair, contrary to natural justice, in breach of due process, or whatever other term is preferred. With very few exceptions all systems of law permit the injured party some means of recourse...

[34] Pirirākau have applied to strike out the setting aside application. I record the standard test for strike-out on the basis of no reasonable cause of action as set out in well-known authorities: *Attorney-General v Prince*[5] and *Couch v Attorney-General.*[6]

> (a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extent to pleaded allegations which are entirely speculative and without foundation.
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> (b) The cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.
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> (c) The jurisdiction is to be exercised sparingly and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of a trial.
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> (d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

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5 *Attorney-General v Prince* [1998] 1 NZLR 262 at 267.

6 *Couch v Attorney-General* [2008] 3 NZLR 725.

(e) The court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation.

[35] To that standard approach I add further comments.

[36] It is permissible to use affidavits in a striking out application. Affidavits serve a useful purpose in showing uncontested background to an application, but where there is conflict on the affidavits and affidavit material sets out matters ca Pā ble of belief, then the preference is to accept the affidavit which is more favourable to the plaintiff. That is consistent with the approach that pleaded facts, whether or not admitted, are assumed to be true. In *Abraham's Wool Exchange v Norlake Wool Ltd*, Quilliam J said:[7]

> Affidavits have been filed in support of and in opposition to the application. This is a practice which is acceptable (*Peerless Bakery Ltd v Watts* [1955] NZLR 339, 351) but not so as to involve the resolution of disputed issues of fact. If there are disputed issues then the proper time for them to be decided is at the substantive hearing. Accordingly, the affidavits may be referred to only in so far as they do not conflict and the interpretation to be given to them must, in the case of doubt, be that which is the more favourable to the plaintiff.

[37] Strike out applications have been made in applications to set aside arbitration awards: examples are *Downer-Hill Joint Venture v Government of Fiji*[8] and *Ironsands Investments Ltd v Toward Industries Ltd*.[9]

[38] In this case, the application to strike out is made on the basis that the grounds do not show any tenable cause of action, but the arguments in submissions also claimed defences, in particular waiver. If a defence is to be advanced as a ground for a strike out application, the court must have complete confidence that that defence will stand up no matter what.[10]

[39] Article 34 provides that an arbitral award may be set aside by the court only if certain grounds are made out. Even if those grounds are made out, the court

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7 *Abraham's Wool Exchange v Norlake Wool Ltd* (1986) 1 PRNZ 101 at 102 (HC).
8 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC).
9 *Ironsands Investments Ltd & Ors v Toward Industries Ltd* [2012] NZHC 1277 (HC).
10 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 at 532 and *Murray v Morrell & Co Ltd* [2007] 3 NZLR 721 (SC).

retains a discretion whether to set aside the award. Some of the arguments have been directed at the exercise of the discretion. While I do not say that it is impossible to strike out on the basis of the exercise of the discretion, it is a matter where the court must exercise very real care. That is especially so when an associate judge hears a striking out application. An associate judge can only decide whether pleadings can be struck out, but cannot decide ultimate issues.[11] The exercise of the discretion is more a matter that should be run through to a final hearing.

[40] I consider the particular grounds for setting aside and whether they are tenable.

Is the arbitration agreement invalid?

[41] The ground arises under Article 34(2)(a)(i):

> **(2)** An arbitral award may be set aside by the High Court only if—
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> (a) The party making the application furnishes proof that—
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> (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;

New Zealand law governs the arbitration agreement.

[42] The invalidity claimed by Ngāti Taka is that as an agreement to arbitrate issues of mana whenua, the agreement has to comply with the provisions of the mana whenua process agreement of April 2010. Ngāti Taka point to the inconsistency between the arbitration process run in this case and what was required under the mana whenua process agreement. For example, the Iwi PSGE was to appoint an arbitration panel rather than the parties themselves; there were to be three adjudicators instead of two; and the process was to start after the legislation had come into force rather than before. They also say that the arbitrators who were appointed were not independent. I will deal with the question whether the arbitrators

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[11] An associate judge can hear an interlocutory application, but an application to set aside an award under Article 34 is not an interlocutory application and is not within an associate judge's court jurisdiction under s 26I(2) of the Judicature Act 1908.

were independent later because that bears more properly on the claims of breach of natural justice. Putting that aspect into the invalidity ground does not add to Ngāti Taka's case as to the questions of the correctness of the appointment of the arbitrators.

[43] Pirirākau do not dispute that the process that was followed under the arbitration agreement does not comply with the provisions of the mana whenua process agreement. Pirirākau simply say that the agreement was valid and that it can stand on its own as an arbitration agreement.

[44] Considered on its own, the arbitration agreement of August 2011 is an arbitration agreement as defined in the Arbitration Act 1996.[12] Under Article 7 of the First Schedule, an arbitration agreement may be made orally or in writing. This one was certainly in writing and was signed. It was made by duly authorised agents of Pirirākau and Ngāti Taka. It is clear that it records a consensus ad idem by the parties to submit a defined dispute to arbitration. The agreement cannot be challenged on account of lack of capacity, lack of certainty, mistake, duress, unconscionable bargain, undue influence, ultra vires or any other vitiating factor. It is not void and it is not illegal. On all the standards under New Zealand contract law, it is a valid agreement.

[45] The fact that the agreement to arbitrate does not follow the requirements for an adjudication under the mana whenua process agreement does not mean that the agreement is invalid under Article 34(2)(a)(i) of the First Schedule of the Arbitration Act 1996. The question is simply one of legal validity.

[46] The submission for Ngāti Taka was that this was an abortive process because the parties were required to arbitrate their differences in accordance with the mana whenua process. That question is a separate matter. It goes to whether the arbitration was effective in terms of the mana whenua process. There may be a separate argument for Ngāti Taka that even though they went through this arbitration

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[12] Arbitration Act 1996, s 2: **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.

under the agreement of August 2011, the result does not serve any useful purpose under the mana whenua process agreement because the only authority given to the Iwi PSGE entity is to make a final allocation when there has been an adjudication in terms of the mana whenua process agreement.

[47] There are, I acknowledge, contrary arguments for Pirirākau. Pirirākau would say that the mana whenua process agreement allows the parties to enter into consensual arrangements and the arbitration is nothing more than a consensual arrangement to resolve differences. They would say that this arbitration has not been abortive. It has served a useful purpose because it has made a determination as to mana whenua status by an agreed process and it is not open to Ngāti Taka to resile from that.

[48] Those arguments as to whether the arbitration agreement is abortive, whether the arbitration process itself has been abortive or whether it is effective so as to be used against Iwi PSGE, are matters to be determined between the parties in this proceeding and Iwi PSGE, not just between the parties to this proceeding. The point is that the arbitration agreement itself was valid in terms of the First Schedule of the Arbitration Act. The arguments as to not following the mana whenua process agreement do not give grounds for invalidity under Article 34.

Did the arbitrators go beyond their jurisdiction?

[49] The second ground is that the arbitrators exceeded their jurisdiction by finding that the hapū of Ngāti Taka was an integral part of the hapū of Pirirākau. It is said they had no authority to determine the identity and mana of the hapū before them. That ground relies on Article 34(2)(a)(iii) of the First Schedule:

> (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

[50] Ngāti Taka's argument is that the matter to be decided was which hapū and its rangitira had mana whenua status from 1840 to 1865. That is what the arbitrator said they had to determine. Their finding is that in the relevant period the mana whenua for the land was held by Pirirākau, but the descendants of Maungapōhatu, who claimed to be Ngāti Taka, were an integral part of Pirirākau and are thus entitled to be involved as Pirirākau, not as a separate entity.

[51] It is that finding that Ngāti Taka did not have mana whenua as a separate entity that is the subject of Ngāti Taka's complaint. They say that the arbitrators were not given any jurisdiction to decide whether Ngāti Taka existed as a separate group of people between 1840 and 1865 so as to hold mana whenua in their own right independently of Pirirākau. Under Ngāti Taka's argument, the arbitrators had to accept it as a given that Ngāti Taka existed as a separate identifiable group of people, independent of Pirirākau, from 1840 to 1865.

[52] The arbitration agreement accepts that Ngāti Taka is a hapū as at the date of the agreement in August 2011. It is apparent from the references to "both hapū", the "two hapū" and the "two respective hapū". But the fact that Ngāti Taka held itself out as an independent group of people constituting a hapū at the beginning of the 21st century does not mean that they necessarily existed as a hapū independent of Pirirākau in the mid-19th century.

[53] Mr Bryers referred me to extracts from *Māori Land Law*.[13] He drew my attention to the fact that it can be simplistic to regard Māori society as static. The text makes it clear that Māori descent groups tend to wax and wane over generations. Those statements provide useful background to this case.

[54] I accept that it can be difficult to look back to a period some 150 years ago when there were scant historic records to determine whether a body existed independently of another body. It seems clear that in the course of the hearing the arbitrators made known that they were of the view that there was an issue whether

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[13] Boast and others *Maori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at 3.31.

Te Wanakore, the son of Maungapōhatu, regarded himself as Ngāti Taka. The transcript shows Judge Hingston as saying:[14]

> ... but that man in that piece I read out earlier, Te Wanakore, was in the 1860s at Whakamarama. When he gave evidence at another matter, he referred to his father and himself as being Pirirākau. He said that in Court. He did not say he was Ngāti Taka. He could have been both.

[55] Later he said in response to discussion with others in the arbitration:

> ... it still does not answer what he said, "My father and I are Pirirākau". He did not say, "We are not Ngāti Taka", I will grant you that. It is significant that he was also a trustee for the land that was given to Pirirākau, that 300 and something acres. He is not disclaiming Ngāti Taka, but I have a problem, not disbelieving anything that you have said, but nowhere can I see where any of these koro have got up and said, "We are Ngāti Taka", in a formal atmosphere.

[56] It is clear that in the course of the hearing, Judge Hingston made it known to the parties that there was an issue for him whether Ngāti Taka existed as a group distinct from Pirirākau at the relevant time. There was evidence before him in the form of a statement made by Te Wanakore in a Native Land Court hearing, which suggested to him that Ngāti Taka were not a separate group, that people who identified themselves as Pirirākau also identified themselves as Ngāti Taka, and that the terms may have been used interchangeably.

[57] Certainly, it was within the scope of the dispute that the arbitrators had to decide that they could find that only one of the parties had mana whenua. That, after all, was also a finding open to an adjudication panel under the mana whenua process agreement.

[58] Against a social background where descent groups can wax and wane, it can be open to arbitrators needing to determine whether one group has mana whenua or whether two groups have mana whenua to find that one of those groups may not have existed as a separate stand alone group at the relevant period. The arbitrators were conscious that they were confined to making a determination as to mana whenu from 1840-1865. They were not purporting to make any decision as to mana whenua status after that period.

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[14] At page 139 of the case book used in this hearing.

[59] For striking out purposes, it is possible to decide whether the arbitrators went beyond the terms of the submission to arbitration by considering the agreement to arbitrate and the award. It is not necessary to look into further materials. I find that Ngāti Taka have not shown that the arbitrators went outside their jurisdiction. That proposition is not arguable.

Were the arbitrators independent?

[60] Ngāti Taka say that the composition of the arbitration panel was defective. Their first argument is that the composition of the panel was not in accordance with the mana whenua process agreement. I have already dealt with that question in addressing the argument as to validity of the arbitration agreement. The agreement is capable of being a stand-alone arbitration agreement under which the parties could choose their own arbitrators rather than have arbitrators chosen for them by the board of the Iwi PSGE.

[61] It is the second ground for attacking the composition of the panel which is more important. Ngāti Taka say that both or either of the arbitrators had affiliations with Pirirākau through marriage and they were therefore not truly independent. This goes to questions of natural justice. It is a requirement of the First Schedule of the Arbitration Act that arbitrators must be impartial and independent. That can be seen in Article 12(1) which requires an arbitrator to:

> ... disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence ...

[62] If an arbitrator hears a dispute and he is not independent and impartial then there is an arguable breach of the law of natural justice. There can be lack of impartiality and independence not only if an arbitrator is actually biased. It can also arise if there grounds for a suspicion of bias, what is called "apparent bias".

[63] It is not contended that the arbitrators themselves are Pirirākau. Instead Judge Hingston's wife is Pirirākau. It is also said that she is related to one of Pirirākau's witnesses, Mr Rawiri Kuka. As for Mr Wawatai, it is said that his former

wife, Matahera Kakau, is a daughter of Wai Kakau who is also said to be Pirirākau. Mr Wawatai's marriage to Matahera Kakau was dissolved in 1989.

[64] Judge Hingston made it clear in the hearing that his wife was Pirirākau. On the other hand, Mr Wawatai made no disclosure of his former wife's connection with Pirirākau. Affidavits, which have been filed late but accepted by Pirirākau, show a connection between Mr Wawatai's former wife and Pirirākau. It is enough to show an arguable connection. That affidavit evidence cannot be dismissed out of hand.

[65] Arguments as to independence and impartiality can raise three questions:

(a) As to independence;

(b) As to disclosure under Article 12 and Article 13 of the First Schedule of the Arbitration Act; and

(c) As to waiver.

I note that on the question of waiver, there is a difference of opinion whether it is possible to waive the requirement for an arbitrator to be impartial and independent. Mr Bryers referred to *Williams and Kawharu on Arbitration* at paragraph 5.8.6 where the authors set out the argument that it is not possible to give a waiver, even if there is a failure to challenge under Article 13. They say that the need for impartiality and independence is mandatory and cannot be waived. On the other hand, Mr Sharp referred to *Duncan & Davies Nurseries New Plymouth Ltd v Honnor Block Ltd*[15] as showing that there can be waiver in fact, so that an arbitrator can be allowed to continue even when independence may have been open to question.

[66] I have decided that I cannot find in favour of Pirirākau on a strike out basis on this ground. The question of independence and impartiality becomes a matter of fact and degree. It can turn on the extent of connection between the arbitrators and the parties; it can also turn on the extent of disclosure; and, if waiver is possible, on

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

whether there has been sufficient disclosure to say that there has been effective waiver.

[67] So far as Judge Hingston is concerned, Ngāti Taka acknowledge that he did disclose during the arbitration that his wife was Pirirākau. They say however that he did not disclose his wife's connection to Rawiri Kuka, who was one of those to speak on behalf of Pirirākau. I have considered the record of the hearing at page 150 of the case book. Judge Hingston goes quite some way to setting out all the facts, but I have to accept that Ngāti Taka have an arguable case that there was not the complete disclosure which they say ought to have been made. There is a possible argument, which I cannot dismiss entirely, that complete disclosure was not made. That is a matter that should go to a hearing.

[68] As for Mr Wawatai, the point needs to be made that his marriage was dissolved in 1989. I can quite understand that from his point of view he would not have conceived that his marriage to someone with Pirirākau connections, which was terminated in 1989, could have any relevance today. However, it may also be relevant that his children may also whakapapa to Pirirākau. That may still be a relevant connection. Again, it is not something that I can decide today on a strike out basis. It is a matter that ought to go to hearing. I bear in mind that the judge hearing the matter may decide that even if there were possible breaches of the rules of natural justice in this respect, they may be inconsequential so that the award ought not to be set aside, but that would involve the exercise of the residual discretion. I do not regard it as proper for me to exercise that discretion now. This part of Pirirākau's strike out application does not succeed.

Is the award in conflict with public policy?

[69] The next question goes to the argument for Ngāti Taka that the award is in conflict with public policy. Mr Bryers put the matter cumulatively that the award was perverse and unreasonable because it did not recognise the existence of Ngāti Taka, it went beyond what the arbitrators had to decide, the process departed from the mana whenua process agreement, and there was not a proper basis for the decision.

[70] The other aspects have already been separately considered. It is the question whether there was a proper basis for their decision that I am addressing here.

[71] According to Ngāti Taka, there was no evidence upon which the arbitrators could have found that any members of Pirirākau had any mana whenua interest in the land at the beginning of the period, that is in 1840, or for most of the period between 1840 and 1865. The arbitrators concentrated entirely on evidence of events which occurred about or after 1865 and accordingly failed to address the issue before them which involved the whole of the period 1840 to 1865. The arbitrators failed to have any regard or any proper regard for the different whakapapa of Ngāti Taka and Pirirākau and wrongly found that neither party disputed the other's whakapapa . In fact, Ngāti Taka had directly raised the different whakapapa of the two hapū as a central issue. They therefore reached perverse and unreasonable conclusions. The arbitrators failed to recognise or acknowledge that the term "Pirirākau" was a convenient description used by government officials to describe all Māori living in the area west of the Wairoa River in or about 1865, whatever their true origin. The fact that the Crown found it convenient to lump Ngāti Taka in with Pirirākau for purposes such as Crown grants of land, is not a proper basis for determining that Ngāti Taka are of Pirirākau and have no separate identity. The arbitrators assumed, without justification, that the court battles over land between Ngāti Taka and Pirirākau after 1864 were an internal battle by Pirirākau.

[72] They also say that the arbitrators wrongly found that Maungapōhatu had acknowledged both Ngāti Taka and Pirirākau lineage when there was no evidence of this. The arbitrators wrongly interpreted statements of Maungapōhatu's descendants that they were Ngāti Taka, but could also claim association with Pirirākau as meaning that Ngāti Taka were an integral part of Pirirākau. The arbitrators ignored evidence of use and occupation of the disputed rohe by Maungapōhatu and his whanau during the relevant period. The arbitrators wrongly ignored evidence that the local iwi, Ngai-te-rangi and at least one Pirirākau chief, Rawiri Tata, considered in or about 1866 that Maungapōhatu had a different and superior status to Pirirākau, and had a different claim to land from that of Pirirākau. Had the arbitrators acted reasonably and relied upon the evidence presented to them, they must have found that the mana whenua of the rohe was with Te Ua Maungapōhatu as the paramount

chief, occupying the rohe between 1840 and 1865, that Maungapōhatu was Ngāti Taka and not Pirirākau, (although having a relationship with Pirirākau because of proximity). There was no evidence of Pirirākau having any mana whenua rights in the rohe until, at best, near the end of the 1840-1865 period and mana whenua lay with Ngāti Taka during the relevant period. Alternatively, the arbitrators could reasonably have found that by 1865 both Ngāti Taka and Pirirākau had established mana whenua rights in the disputed rohe and it would be appropriate to allocate shares to be negotiated or determined by adjudication.

[73] In setting out all those grounds, the Ngāti Taka say that the award should be set aside as being in conflict with the public policy of New Zealand. The courts have traditionally taken a conservative approach to questions of public policy when it comes to recognition of awards. The most relevant authority is the decision of the Court of Appeal of *Amaltal Corporation v Maruha (NZ) Corporation Ltd*.[16] The Court of Appeal referred, with approval, to the dictum of Lord Donaldson MR in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Company Ltd*[17] that although considerations of public policy could never be exhaustively defined, it has to be shown there was some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that it will be wholly offensive to the ordinary reasonable fully informed member of the public on whose behalf the powers of the state are exercised.

[74] In *Amaltal* the Court of Appeal also went on to say that another way in which the matter has been expressed has been to say that the enforcement of the award will be contrary to public policy where the integrity of the court's process and powers will thereby be abused. Any award whose confirmation can be said to damage the integrity of the court system will not be enforced.

[75] Ngāti Taka's argument became more specific. If there was no probative evidence that could support the award, then that award was in breach of natural justice, and if the award was in breach of natural justice, it should be set aside as being contrary to public policy of New Zealand.

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16 *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA).

17 *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v Shell International Petroleum Company Ltd* [1990] 1 AC 295 at 316.

[76] In administrative law, the authority for setting aside for breach of natural justice, if there is no probative evidence, is the decision of the Privy Council in *Erebus Royal Commission*.[18] In *Downer-Hill Joint Venture v Government of Fiji*,[19] a full court applied that to decide whether an arbitration award was contrary to public policy.

[77] The response from Pirirākau is to point to the award and to evidence that was put before the arbitrators and also to refer to changes, amendments to the Arbitration Act since the *Downer-Hill* decision. First, on the provisions of the award and evidence before the arbitrators, Pirirākau refer to a document which formed Part of the evidence of Mr Bidois in the arbitration. This document refers to proceedings in the Native Land Court in 1910. Te Wanakore, the son of Maungapōhatu, gave evidence. Maungapōhatu is relevant because he is the person to whom Ngāti Taka whakapapa. The evidence which Te Wanakore is recorded as giving to the Native Land Court is this:

> I did not take part in the fight at the Gate Pā . I do not remember the year of that fight. My father, Maungapōhatu, did not take up arms and fight at the Gate Pā . In 1864, we were at the time at Whakamarama, my father and I. Pirirākau was our tribe when we lived at Whakamarama. I and my hapū, Pirirākau were at Whakamarama at the time of the fight at the Gate Pā . The fight did not extend to Whakamarama but the people from Whakamarama came to the Gate Pā ...

[78] The arbitrators relied on that to say that Maungapōhatu did see himself as Pirirākau in that passage and that Te Wanakore, his son, did likewise. They also refer to a proclamation in 1909 under which the Crown granted land to Maungapōhatu to hold in a trust for Pirirākau, the relevant wording in the proclamation being that the land was to go to Maungapōhatu and Te Wanakore and their descendants. The wording that the land was held in trust by them for Pirirākau is said to show that Maungapōhatu could be identified with Pirirākau.

[79] Mr Bryers offered arguments that those statements were not capable of supporting the case of Pirirākau. For my purposes, I have to recognise that in matters of arbitration, the arbitrators are the masters of the facts. That is the way that

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[18] *Erebus Royal Commission* [1983] NZLR 662 (PC).
[19] *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554.

the Court of Appeal referred to them in *Gold Resource Developments NZ Ltd v Doug Hood Ltd*.[20]

[80] Pirirākau can point to evidence available to the arbitrators on which they could make their findings. Pirirākau also point out findings by the arbitrators as to the absence of a record showing the separate existence of Ngāti Taka.

[81] For the strike out application, I can say that there is on the record a basis for the arbitrators to have found the way they did, even though there may have been submissions and evidence to the contrary. It was a matter for the arbitrators to sift through the conflicting submissions and conflicting evidence placed before them to reach their findings. The court will not disturb those findings of fact.

[82] But the matter goes beyond that. Since the *Downer-Hill* decision, the Arbitration Act was amended in 2007.[21] The Second Schedule was amended by adding clause 5(10):

> (10) For the purposes of this clause,
> **question of law** —
>
> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
>
> (b) does not include any question as to whether—
>
> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
>
> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[83] The effect of that amendment is that when there is an appeal on a question of law, the appellant is not entitled to argue that the arbitrators could not reach their decision because of the absence of any evidence or any sufficient or substantial

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[20] *Gold Resource Developments NZ Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [55].

[21] Arbitration Amendment Act 2007, s 9.

evidence, or to argue that the arbitrator erred in drawing factual inferences from primary facts.

[84] In *Ironsands Investments Ltd v Toward Industries Ltd*, Ellis J drew on that to say that on an application under Article 34 of the First Schedule, it would be inappropriate to use arguments relying on the *Erebus Royal Commission* case to advance an argument that the decision was in breach of natural justice and therefore contrary to public policy. She said:

> [88] The effect of cl 5(10) is expressly to prohibit any appeal which raises the issue of whether the award or any part of it was supported by any evidence or any sufficient or substantial evidence. It would be decidedly odd if challenges of the sort expressly proscribed by that clause could still be mounted on the grounds that a breach of natural justice had occurred during the arbitral proceedings or in connection with the making of the award. Indeed cl 5(10) would be rendered otiose if such challenges were allowed.

[85] In effect she held that arguments as to breach of natural justice founded on lack of probative evidence cannot be used to circumvent the limits on appeals on grounds of law under clause 5 of the Second Schedule of the Arbitration Act.

[86] In response Mr Bryers argues that there can still be cases which are so extreme that it would be an affront to allow the award to stand. I leave open the possibility that there may be some extreme cases, but I do not regard this one as an extreme case. At the end of the day, this was a case where there was conflicting evidence before the arbitrators. They had to weigh up conflicting submissions and conflicting evidence. They had to look back into history to determine which of two bodies in dispute had mana whenua status. There was some evidence on which they could found a decision.

[87] If I were now to say that it is arguable that the court should entertain an enquiry whether they could reasonably reach that decision, that would in effect open up the award to a review on the facts. I follow Ellis J in *Ironsands Investments Ltd v Toward Industries Ltd* and say that that approach should not be available here. Therefore I reject that as a ground for attacking the decision of the arbitrators.

Was Pirirākau's use of non-mandated representatives a breach of procedure?

[88] Ngāti Taka next say that there was a breach of the rules of natural justice because the arbitrators permitted Pirirākau to adduce evidence and submissions from non-mandated witnesses, in breach of the arbitration agreement. They rely on clause 7 of the agreement:

> 7. Litigation conduct: Mandated Te Roopu Whakamana representatives from each of the two respective hapū will speak for the hapū, i.e. there will be no professional legal representatives.

[89] The deed of mandate of August 2007 provides for the appointment of mandated representatives. Ngāti Taka say that at the arbitration hearing there was an introduction where Pirirākau introduced those who would speak. Some of those who were to speak were not themselves mandated representatives. The three people concerned were Tommy Wilson, Rawiri Kuka and Shadrach Rolleston.

[90] Ngāti Taka take exception to those people having spoken on behalf of Pirirākau because those were the people who claim to whakapapa to Maungapōhatu. The record shows that Mr Bidois responded that there had been some replacements to the Pirirākau committee and that these people had been formally appointed as representatives at a legitimately called meeting of the Raupatu Committee. That committee had the ability to replace and co-opt. Pirirākau took the point that Pirirākau had the authority to decide who will represent it. On the other hand, Ngāti Taka said in the hearing that they were not prepared to listen to those who were not mandated. They made their objections clear and known at the time.

[91] The arbitrators gave directions to Pirirākau to provide paperwork showing that these people were authorised. Mr Bidois' affidavit has attached to it a handwritten document which he asserts is the Raupatu Committee's authorisation for these people to act on its behalf.

[92] Clause 7 is intended to have two effects. First, the parties would not use lawyers. Second, the representatives were to be mandated Te Roopu Whakamana representatives.

[93] Certainly there is no question that the first requirement was met because both sides did without lawyers. Next, Pirirākau are correct that they can appoint who they want to be their representatives. Even if the appointment were late, Pirirākau could ratify their appointment after the fact. There has been such a ratification after the fact by Pirirākau opposing this ground for setting aside the award. By opposing this ground, Pirirākau have made it clear that those who appeared on their behalf had their authority to appear for the hapū.

[94] Moreover, I cannot see how that particular argument advances matters to where it would be arguable that the award should be set aside. Even if for argument's sake, those who spoke on behalf of Pirirākau did not have authority and that was a departure from the arbitration agreement, it is not a departure of such gravity and seriousness that a court would say that the award ought to be set aside on that account.

[95] In *Downer-Hill Joint Venture v Government of Fiji*, a decision under the present Arbitration Act, the High Court referred to *Honeybun v Harris*.[22] In that case, Penlington J indicated that an award (admittedly a decision made under the 1908 Act) would only be set aside if a breach of procedure may have caused a substantial miscarriage of justice. Penlington J in turn referred to a decision of McNair J in *E Rotheray & Sons Ltd v Carlo Bedarida & Co*:[23]

> The determination of that issue, as it seems to me, depends upon whether the Court is satisfied that there may have been — not must have been — or that this irregularity may have caused — not must have caused — a substantial miscarriage of justice that would be sufficient to justify the setting aside or remitting of the award, unless those resisting the setting aside or remission could show that no other award could properly have been made than that which was in fact made, notwithstanding the irregularity.

[96] The fact that allegedly non-mandated representatives spoke on behalf of Pirirākau is not by itself enough to say that the award would be set aside on that point. A court would exercise its residual discretion against Ngāti Taka.

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[22] *Honeybun v Harris* [1995] 1 NZLR 64 (HC).
[23] *E Rotheray & Sons Ltd v Carlo Bedarida & Co* [1961] 1 Lloyd's Rep 220.

[97] Mr Bryers cited the decision of *London Export Corporation v Jubilee Coffee Roasting* where Diplock J said:[24]

> Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by the award made by the procedure in fact adopted.

[98] Mr Bryers argues that it follows from that decision of Diplock J, that any breach of procedure means that the award must be set aside. Even if Diplock J's dictum based on contract law is applied, it is plain that not every breach of procedure must result in the award falling away. Under contract law, not every breach of contract results in cancellation of the contract. Some breaches are minor, not serious enough to give rise to cancellation. Similarly, not every breach of procedure in an arbitration is serious enough to warrant the award being set aside under article 34. The objection based on non-mandated representatives appearing for Pirirākau does not give an arguable ground for setting aside the award.

Did the arbitrators breach the rules of natural justice by making further inquiries after the hearing?

[99] The final ground is that the arbitrators are alleged to have made factual enquiries after the hearing. Ngāti Taka say that after the hearing, without their knowledge, the arbitrators sought and obtained further information relating to the issues in dispute. They say that the arbitrators did not give Ngāti Taka the opportunity to comment on or make submissions about that information before they delivered their award. That is said also to be a breach of natural justice.

[100] In *Rotoaira Forest Trust v Attorney General*,[25] Fisher J extracted certain principles of natural justice from earlier authorities. His outline of the principles of natural justice has been referred to frequently since. The fifth principle was this:

> In the absence of expressed or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

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[24] *London Export Corporation v Jubilee Coffee Roasting Co Ltd* [1958] 1 All ER 494 at 497.

[25] *Trustees of Rotoaira Forest Trust v Attorney General* [1999] 2 NZLR 452 (HC) at 463.

[101] Both sides accept that that is a relevant rule of natural justice. Neither side contests that it does not apply here. There is no suggestion that there was any expressed or implied agreement that would allow the arbitrators to go off and make further enquiries about the hearing.

[102] While Pirirākau say that they have no knowledge of the arbitrators making such enquiries, they say that the enquiries they made must have been irrelevant because there was adequate evidential basis for the arbitrators' decision on the basis of the material that was put in evidence. Those responses are in my view insufficient. Ngāti Taka have put forward evidence capable of giving rise to a reasonable argument that this part of the rule of natural justice has been breached. They have put forward evidence showing that the apparent subject-matter of the arbitrators' further enquiries, Native Land Court decisions allegedly researched by Judge Hingston, had an arguable bearing on the outcome of the case. They say that they dispute those findings. That matter is clearly an arguable breach of natural justice and that matter ought to stay as an arguable pleading. Pirirākau said that the matter was inconsequential but I cannot accept that submission. That matter ought to be fully explored at a full hearing.

Result

[103] This means that some of the grounds relied on by Ngāti Taka have been struck out but some of them have survived. The ones that have survived are the allegations that there have been breaches of natural justice in respect of the appointment of the arbitrators on the grounds that they may have affiliations with one of the parties, Pirirākau, and also that after the hearing, the arbitrators obtained further information, but did not give the parties opportunity to submit on it. The ground that Ngāti Taka were not given the opportunity to comment on any connection between the arbitrators and Pirirākau is tied up with the validity of the appointment and also stands. In all other respects the other grounds in the application to set aside are struck out.

Further directions

[104] I have discussed timetable arrangements with counsel. I give these directions.

(a) By *1 November 2012* Ngāti Taka are to file and serve an amended setting-aside application reflecting the surviving grounds of the application;

(b) Any further evidence in support of the application by Ngāti Taka is to be filed and served by *1 November 2012*.

(c) Any fresh notice of opposition from Pirirākau and any evidence in opposition are to be filed and served by *6 December 2012*.

(d) Any reply evidence from Ngāti Taki is to be filed and served by *15 February 2013.*

(e) The setting-down date is *1 March 2013.*

(f) A casebook and submissions by Ngāti Taka are to be filed and served by *1 March 2013.*

(g) Submissions by Pirirākau are to be filed and served by *15 March 2013*.

(h) There is a back-up fixture for ***2 days*** on ***17 April 2013***.

Costs

[105] Mr Bryers proposes that costs be reserved. There has been a split result for the parties. I reserve costs.

.....
R M Bell
Associate Judge