IN THE COURT OF APPEAL OF NEW ZEALAND

CA441/2013
[2015] NZCA 176

BETWEEN	COLIN BIDOIS, JENNY ROLLESTON, TAARI NICHOLAS, PATRICK NICHOLAS, CHRISTOPHER (KIRITOHA) TANGITU, RAWIRI KUKA AND SHADRACH ROLLESTON AS THE MANDATED REPRESENTATIVES OF THE HAPŪ OF PIRIRAKAU Appellants
AND	RAPATA (ROBERT) LEEF, STEPHANIE TERIA TAIAPA, NADINE HORINA PIRAKE, KAINE RAROA TAIAPA, DARREN WILLIAM LEEF, NEIL HIRAMA AND PANIA ANEISHA BROWN AS THE MANDATED REPRESENTATIVES OF THE HAPŪ OF NGĀTI TAKA Respondents

Hearing:	18 November 2014
Further Submissions:	5 December 2014
Court:	Miller, Cooper and Simon France JJ
Counsel:	F M R Cooke QC and M J Sharp for Appellants S P Bryers for Respondents
Judgment:	18 May 2015 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is allowed and the arbitral award is reinstated.

B The respondents must pay the appellants' costs for a standard appeal on a Band A basis plus the usual disbursements.

C The costs award in the High Court is quashed and the issue of costs is remitted back.

REASONS OF THE COURT

(Given by Simon France J)

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Introduction

[1] The parties to this appeal are representatives of two hapū – Pirirakau (appellants) and Ngāti Taka (respondents) – of the Bay of Plenty based iwi Ngāti Ranginui. In 2011 the two hapū entered into a one-off arbitration agreement to settle a dispute between them over who held mana whenua over certain lands between 1840 and 1865.

[2] The dispute had a financial element to it. At the time of the arbitration, a settlement between the Crown and Ngāti Ranginui concerning historic grievances was imminent. It was known that the settlement would include cash compensation for lands either confiscated or compulsorily purchased in the 1860s in breach of the principles of the Treaty of Waitangi. The eight hapū of Ngāti Ranginui had agreed that the major portion of this money would be allocated amongst the hapū in proportion to the share of land each hapū had lost by reason of the Crown actions. The determinant of which hapū's land had been taken by the Crown was who had mana whenua over the land during the years 1840 to 1865. Pirirakau and Ngāti Taka claimed mana whenua in relation to the same tracts of land. Hence, the reference to arbitration.

[3] Resolution of the dispute would not turn on issues as to who occupied the land. It was largely common ground that the paramount chief at the time, Te Ua Maungapohatu, had mana whenua over this land. The real issue, and one which has existed as a dispute between the hapū for many years, was whether Te Ua Maungapohatu was Ngāti Taka or Pirirakau. Pirirakau deny any separate hapū status for Ngāti Taka.

[4] Ngāti Taka had of recent times some measure of success in relation to this ongoing dispute. Within Ngāti Ranginui they had been accorded separate status, and were regarded as one of the eight hapū in the iwi. Further, the distribution formula settled on by Ngāti Ranginui for the settlement funds divided the anticipated funds 30/70. The 30 per cent was to be shared equally amongst hapū; the remaining 70 per cent was the share allocated to proportionate distribution based on the share of land lost. Concerning the 30 per cent, Ngāti Taka were to receive a one-eighth share, thus reflecting its separate status.

[5] Notwithstanding this recognition within Ngāti Ranginui of the separate hapū status, the formula settled upon for allocation of the 70 per cent brought the argument back into the forefront between these two hapū . Resolution of this particular mana whenua issue would turn only on whether or not Ngāti Taka were separate from Pirirakau.

[6] Unsurprisingly given the nature and longevity of the dispute, the parties themselves were unable to reach agreement. So it was decided to refer the matter to an independent panel of two. The decision of these two people, called arbitrators, was to be binding and final. The arbitrators found in favour of Pirirakau. Ngāti Taka successfully applied to the High Court under the Arbitration Act 1996 (the Act) to have the award set aside.

[7] The High Court case proceeded by way of affidavit evidence and cross-examination. Both arbitrators gave evidence. Andrews J concluded that the dispute between the hapū was not one which could in law be the subject of an arbitration agreement as that term is defined in the Act.[1] Accordingly, the arbitrators' decision was set aside. Alternatively, the High Court held that there were natural justice breaches in relation to conflict of interest and fair hearing rights that necessitated the award being set aside.[2]

[8] Pirirakau appeal all aspects, submitting that the dispute was validly referred to arbitration. Further, the natural justice breaches are denied, or submitted to be not of a nature justifying the setting aside of the award.[3]

The arbitration

(i) Preceding events

[9] The genesis for the disputed process was the decision of Ngāti Ranginui to try to sort its processes out prior to formal settlement with the Crown. Pursuant to this approach, the iwi decided upon the general distribution formula that has been referred to, the mana whenua criterion for determining eligibility under that formula, and a process for resolving mana whenua disputes (the Mana Whenua Agreement).

[10] The Mana Whenua Agreement was modelled on sch 2 of the Central North Island Forests Land Collective Settlement Act 2008. Called there the "Tikanga based resolution process", there are set out a sequence of stages, any one of which might produce resolution. The last of these stages, all else having failed, is the

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1 *Leef v Bidois* [2013] NZHC 1349 at [71–[73].
2 At [102], [126] and [128].
3 Leave to adduce further evidence was granted in *Leef v Bidois* [2014] NZCA 271.

"adjudication stage", at which point the dispute is referred to three independent panel members to reach a final and binding decision.

[11] A key aspect of Ngāti Ranginui's Mana Whenua Agreement was that everything was contemplated to occur after formal settlement with the Crown. At that time there would be in place a "Post Settlement Governance Entity" which would have responsibility for distributing the proceeds of settlement. It was this body which would oversee the implementation of the Mana Whenua Agreement, and it was this body that would appoint the three panel members if that stage was reached.

[12] Ngāti Ranginui reached all these decisions, including the Mana Whenua Agreement, almost 30 months prior to anticipated settlement with the Crown. Perhaps not surprisingly given the length of time that was to elapse before settlement, the hapū decided not to wait, but embarked upon their own version of the Mana Whenua Agreement process.[4]

[13] When the two hapū who are parties to this litigation reached the adjudication panel stage, they asked the then-iwi governance authority[5] to instigate the appointment of a panel. They were told that was not possible because it was a post-settlement process and the intended new Post Settlement Governance Entity did not exist. It was, however, suggested that the two hapū could agree on their own process, the implementation of which would be facilitated by the iwi governance body. This is what was done.

(ii) The arbitration agreement

[14] The agreement reached by the two hapū reflected some aspects of the Mana Whenua Agreement model but was much less formal and prescriptive. The agreement was drafted by Mr Bidois of Pirirakau. Mr Leef made comments on

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4 There were other cross-claim disputes in addition to that existing between Pirirakau and Ngāti Taka. These were also all resolved prior to formal settlement. A consequence of this was that, all mana whenua disputes seemingly having been resolved, the Mana Whenua Agreement never became part of the settlement documentation.

5 For the purposes of negotiating a settlement, Ngāti Ranginui had established a representative mandated body, Te Roopu Whakamana o te Raupatu o Nga Hapū o te Iwi o Ngāti Ranginui. It was this body which the two hapū approached.

behalf of Ngāti Taka, and the agreement was signed by the two men. The agreement provides:

> The Following is an Agreement Between Pirirakau Hapū and Ngāti 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 Hapū have come to an agreement in using a Mana Whenua Arbitration Process which portrays which hapū 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.
>   (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 Ngāti Taka, Pirirakau Hapū and the Arbitrators.
> 4. Timeframe: Concluded by 30th November 2011
> 5. Costs: To be shared by the two Hapū Ngāti Taka and Pirirakau Hapū or as directed by the arbitrators.
> 6. Venue: To be decided by agreement of all parties ie Ngāti Taka, Pirirakau Hapū and the Arbitrators.
> 7. Litigation conduct: Mandated Te Roopu Whakamana representatives from each of the two respective hapū will speak for their hapū, 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 hapū 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 Hapū Negotiator | Ngāti Taka Negotiator |
> | [Signed C Bidois] 19/08/11 | [Signed R Leef] 21/8/2011 |

(iii) The implementation

[15] Each party nominated an arbitrator. Ngāti Taka nominated Mr Kuku Wawatai who was the head of Māori Studies at Bay of Plenty Polytechnic. At various points in these proceedings there were challenges concerning Mr Wawatai's appointment, but these were not pursued and need not be detailed further. Pirirakau nominated Mr Heta (Ken) Hingston, a retired Māori Land Court Judge.

[16] From the outset there was an issue concerning Mr Hingston on which it will be necessary to spend some time. For now, in order not to unduly interrupt the narrative, it can be noted that Mr Hingston's wife is Pirirakau. On its face this relationship gives Mr Hingston a direct interest in the matter, since the likely ultimate consequence of the arbitrators' decision was to settle whether Pirirakau or Ngāti Taka would be allocated the sum of money available for the particular land in dispute. The amount in issue is approximately $8 million. At the time of the hearing Pirirakau consisted of 1273 registered members (aged 18 years or older) and Ngāti Taka had 306. The fact that Mr Hingston's wife was Pirirakau was known to Ngāti Taka in advance of the hearing, and was again raised by Mr Hingston at the start of the hearing.

[17] The hearing process agreed upon was that each side would have mandated speakers who would orally present the parties' cases. A written summary of the intended evidence was to be given to the other side at that time. During this oral presentation the speakers could refer to, and table, documents in support. There was not to be cross-examination but rather questions from the arbitrators after the conclusion of all the evidence from one party. This is the process that was followed.

[18] Consistent with this, Pirirakau spoke on the first day. The evidence took about half a day. The next day Ngāti Taka presented their oral evidence which took a similar time. There was then a series of replies which followed the same order, and which allowed sequentially the two parties to comment more directly on aspects of the other's case with which they disagreed. The transcript reveals during this process a higher level of interaction both with the arbitrators and between the parties.

[19] At the end there was an effort by the arbitrators to encourage a compromise. It is not apparent from the transcript but we are advised this included not only the group discussion that is recorded, but also a caucusing. At the end Mr Hingston stated that it appeared to the arbitrators compromise was not possible and they would proceed to consider the case and deliver a formal decision. The arbitrators' decision was that Ngāti Taka are:

> … an integral part of Pirirakau and are thus entitled to be involved as Pirirakau not as a separate entity.

[20] Before addressing the appeal grounds, three aspects of the arbitration hearing require fuller description.

(iv) What happened in relation to disclosure of Mr Hingston's connection to Pirirakau

[21] As noted, Mr Hingston's wife has links to Pirirakau. This was seemingly well known, as one might expect given the reasonably small membership numbers of the respective hapū. The first written record of formal disclosure of this fact is contained in an email from Mr Bidois to Mr Leef, dated 29 November 2011, so about two months prior to the arbitration hearing.

[22] Mr Bidois stated:

> As we briefly discussed – Pirirakau approached Judge Hingston. He is willing to participate but insists you realise his wife has whakapapa to both Pirirakau and Ngāti Taka.

[23] It seems that Ngāti Taka dispute the accuracy of the claim of links to Ngāti Taka, but it is plain that the arbitrator's links to Pirirakau, if not known earlier, were disclosed by this point. Mr Leef did not respond to this aspect of the email.

[24] The next disclosure occurrences were at the hearing itself. After an initial setting of some ground rules, Mr Hingston raised the issue:

> Judge Ken 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.
>
> …
>
> Judge Ken Hingston: Not me, my wife.
>
> Colin Bidois: Your wife, someone also told me that somewhere along the lines, you fellas were obviously Ngāti Taka; is that right?
>
> Kuka Wawatai: Ngāti Taka.
>
> Judge Ken Hingston: I'm not sure. Rawiri would have to answer that one because he's cousin
>
> …
>
> Judge Ken Hingston: If there are no objections well, I'm quite happy to continue. If there are, we can't continue.
>
> Kuka 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.
>
> Judge Ken Hingston: Thank you, we'll get on with the job…

[25] It is relevant to the present proceedings to note that the "Rawiri" to whom Mr Hingston refers twice in this exchange is Rawiri Kuka. He is the subject of the second specific factual matter requiring further elaboration. As is apparent from the passage, he is a cousin of Mr Hingston's wife.

[26] The only other time this issue arose at the hearing was at the beginning of Ngāti Taka's presentation on the second day. Mr Leef began by raising two process matters from the previous day, the second of which was:

> The second point is, 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.[6]
>
> So from there on we'll begin my presentation …

[27] There was further evidence on this matter in the High Court and it is convenient to record the gist of it at this stage. In evidence-in-chief Mr Leef of Ngāti Taka accepted he knew of Mr Hingston's connection, through his wife, with

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[6] In his High Court evidence, Mr Hingston notes it is not recorded on the transcript, but he believes he confirmed at this point that he would be unbiased.

Pirirakau. The affidavits display a primary concern not about this relationship, but about Ngāti Taka's lack of prior knowledge of the connection between Mr Hingston and Rawiri Kuka who was to become a witness (to be addressed next). In cross-examination in the High Court, Mr Leef again acknowledged his awareness of the relationships, but sought to draw a distinction between not objecting, and not giving up the right to object.

(v) Mr Rawiri Kuka becomes a witness

[28] As can be seen from the arbitration agreement, each party was to present its evidence through mandated representatives. When a Mr Tom Wilson opened the case for Pirirakau, he advised that Mr Kuka was to be one of the speakers. As earlier noted, Mr Kuka is a cousin of Mr Hingston's wife.

[29] It appears that Mr Kuka had been present at several of the meetings between the two hapū that had taken place prior to the hearing. However, he was not on the list of mandated representatives held by the central iwi authority. It transpires that two of the original Pirirakau representatives had died, and Mr Kuka was one of the replacements. Although he was duly mandated by internal Pirirakau processes, this had not been notified either to the central authority, or apparently to Ngāti Taka.

[30] Mr Leef interrupted Mr Wilson's opening remarks to object to the suggestion that there were to be non-mandated speakers, of whom he believed Mr Kuka was one. The focus of his complaint was solely on this issue of mandate. There was no reference by him at the time to Mr Kuka's connection with Mr Hingston.

[31] It is clear from the transcript that Mr Hingston was unimpressed by the mandate challenge. Once it was stated by Pirirakau that Mr Kuka was properly mandated, Mr Hingston clearly saw it as a technical paperwork issue that should not delay matters. Ngāti Taka did not then press the point although the following day it was one of two matters Mr Leef initially raised when beginning his presentation. His comment was that "at present Ngāti Taka has given way" to Mr Kuka giving evidence in breach of the agreement that speakers would be limited to mandated representatives.

[32] In the evidence before the High Court, Mr Leef says he was unaware that Mr Kuka was a cousin of Mr Hingston's wife and that he would be giving evidence. More particularly it was emphasised by Mr Leef that he did not know of this at the time he took no objection to Mr Hingston at the start of the hearing. Mr Leef does not comment on why, when he learned of Mr Kuka's involvement, the only objection he took related to the mandate issue.

(vi) Opportunity to comment on documents

[33] The third factual matter requiring fuller consideration is the treatment of documents at the hearing. The gravamen of Ngāti Taka's complaint is that documents were presented to the hearing on which Ngāti Taka had an inadequate opportunity to comment.

[34] The evidence as to the prior agreement in relation to documents is somewhat lacking in specificity. Consistent with this, the record of what exactly happened at the hearing is equally sketchy, both matters no doubt reflecting in part the parties' prior choice to exclude lawyers from the process.[7]

[35] The somewhat loose arrangement reached was that each party would provide the other with a written version of the evidence they were presenting, and a copy of documents referred to. Concerning the actual evidence of witnesses, this arrangement was largely complied with. A written summary of each party's speakers was provided to the other side at the time of presentation – Pirirakau on the first day, and Ngāti Taka on the second.[8]

[36] Where the plan seems to have come somewhat unravelled is in relation to documents relied on. The bulk of documents given to the arbitrators was provided by Pirirakau. They were presented to the arbitrators who placed them on the table. The idea seems to have been that anyone could then look at them or access them

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[7] There was at one point an issue as to whether the arbitrators had obtained information subsequent to the hearing. This was denied by both arbitrators and by the person alleged to have provided the further information. Andrews J appears to reject the proposition and our reading of the transcript and affidavits leads us to the same conclusion. Accordingly, the focus is on what occurred at the hearing.

[8] There was an oversight in relation to one Pirirakau witness, Mr Shadrach Rolleston. It is not material to this decision.

from there. Separate copies were not provided to the other side. This was either because it was already known the other side had them (though not necessarily at the hearing) or they were very large and the cost seemed prohibitive or, almost always, both these reasons.

[37] An issue arose subsequent to the hearing as to when a report by a Dr Ord-Nimmo was presented. By way of background, the Ngāti Ranginui grievances had been the subject of various Treaty of Waitangi Tribunal claims initiated by different members of the iwi. In relation to two of these claims by persons affiliated with Ngāti Taka, the Tribunal had commissioned an independent historical report. This was completed by Dr Ord-Nimmo. The report consists of two "documents" – the report itself, and what is known as "the document bank" on which the report is largely based.

[38] It seems common ground that Mr Bidois of Pirirakau filed the document bank on the second day during the reply phase of the arbitration. If and when the report itself was filed is less clear, although there is no doubt the arbitrators eventually had it. The transcript of proceedings does not record when it happened. Mr Bidois now believes he filed it on the first day, although that was not always his recollection. Mr Bidois says the report was part of the material he received back from the arbitrators once the entire process was over, and he never filed anything subsequent to the hearing. Andrews J makes no specific finding on the matter.

[39] It seems clear that the report was filed during the arbitration process and not provided subsequently. However, whether this was on the first or second day is less clear. There is also no doubt Ngāti Taka had seen the report previously; they had just assumed it to be irrelevant because the focus of that Tribunal claim, and the report, was on events subsequent to 1865. Pirirakau suggested, however, that some of the historical material contained in the report was nevertheless relevant to the present issue.

[40] Finally, in relation to this issue of documentary material, two other points need to be noted. First, it is unclear whether the copies of documents which Pirirakau provided to the arbitrators were marked or highlighted in any way.

Mr Bidois thought not, but if they were it would only be brief passages referred to in the evidence. Second, at the hearing in the High Court the Ngāti Taka witnesses were asked about the claimed detriment of not having had an opportunity to comment on the documents. We will return to this when setting out our conclusions.

The appeal issues

[41] Against that factual narrative it is possible to identify the issues now arising on the appeal:

(a) First, was the High Court correct to hold that the nature of the dispute between Pirirakau and Ngāti Taka was not such as could be the subject of an arbitration agreement as defined in the Act?

(b) Second, if it could be an arbitration, was the High Court correct to find that there were breaches of natural justice in relation to the conflict of interest Mr Hingston had, and the lack of opportunity afforded to Ngāti Taka to comment on documents filed by Pirirakau?

(c) Third, if there were breaches of natural justice, was the High Court correct to exercise its discretion under the Act to set aside the arbitrators' decision?

Issue one – was the dispute legally capable of being the subject of an arbitration agreement?

[42] The issue of whether the dispute between Pirirakau and Ngāti Taka was legally capable of being the subject of arbitration was not one initially advanced by the parties. Its genesis seems to have been the oral evidence of Mr Hingston in the High Court. He was the first witness and early in cross-examination he queried whether the proceeding was an arbitration. He felt the hearing before him was more a procedure that was common in Māori land matters. He himself did not look at the Act.

[43] Andrews J raised the issue of whether it was arbitration with counsel at the end of the first day, and asked them to consider the issue overnight. We are advised

that both counsel returned to confirm their positions that it was an arbitration agreement. However counsel for Pirirakau sought to protect their position by seeking leave to amend their case to advance the position that it was reference not to arbitration but to expert determination. The hearing then proceeded.

[44] At the end of the hearing, in submissions, Ngāti Taka maintained the proceeding was an arbitration. Pirirakau contended the intention of the parties was not arbitration but expert determination. If the Court did not accept that, then Pirirakau agreed with Ngāti Taka that the matter had validly been submitted to arbitration. Andrews J disagreed on both points. Andrews J found that the parties had not agreed to refer the dispute to expert determination, and that they had intended an arbitration. However, she held the dispute was not one that could be the subject of arbitration because it was not in respect of a defined legal relationship. It is the last conclusion that is challenged on appeal.

[45] The Act governs arbitrations that have their genesis in what is called an arbitration agreement. That term is defined in the Act, and Andrews J's decision turns on her Honour's assessment that the parties' agreement did not come within the definition. The definition provides:[9]

> **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
>
> (emphasis added)

[46] Her Honour concluded that the dispute between the parties did not arise in respect of a defined legal relationship, and therefore the agreement was not an arbitration agreement within the meaning of the Act. The key aspects of the judgment read:[10]

> [64] In my view, the only way in which Ngāti 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

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

10 *Leef v Bidois*, above n 1.

> 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 hapū 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 Ngāti 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.
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> [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.

[47] The focus in [64] and subsequently on whether the arbitration would lead to an entitlement to a legal remedy stems from the discussion of defined legal relationship by Fisher J in *Methanex Motunui Ltd v Spellman*.[11] His Honour's reasoning in that case was affirmed on appeal.[12] Fisher J had observed:[13]

> [83] The next phrase traversed in argument was "a defined legal relationship". Several factors suggest that this phrase has a particularly broad meaning. First, the relationship need not be contractual ("whether contractual or not"). Secondly, s 10(1) appears to envisage that arbitration agreements can embrace any dispute which the parties have agreed to submit to arbitration so long as the arbitration agreement is not contrary to public policy or, under any other law, is not capable of determination by arbitration. Thirdly, the survey of policy considerations and implied legislative intentions conducted earlier suggests that Parliament would not have intended to reduce the range of disputes previously amenable to arbitration.
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> [84] Those considerations support the view that "defined legal relationship" is neither confined to relationships recorded in documents nor

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11 *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 (HC).
12 *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at [60].
13 *Methanex Motunui Ltd v Spellman*, above n 11.

> to formal relationships such as contracts, trusts or partnership agreements. Consistent with this view, it has been held that they include relationships between persons in breach of statutory duty and their victims: *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1997) 145 ALR 500 (arbitration clause upheld where dispute under Trade Practices Act 1974 (Aust), the Australian equivalent of the Fair Trading Act 1986 (New Zealand), appeal allowed on another aspect (1998) 149 ALR 142).
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> [85] There must be some limitation imposed by the expression "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 which provides:
>
> > **35. Recognition and enforcement** – (1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the High Court, shall be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36.
>
> 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.

[48] We agree that a broad purposive approach is required. In our view emphasis is to be given to s 5 of the Act which identifies that the first purpose of the Act is to encourage the use of arbitration in New Zealand, and then to s 10 which provides that *any* dispute between the parties may be referred by arbitration agreement to arbitration as long as to do so would not be contrary to public policy or a particular law preventing it.[14]

[49] Despite the fact that this requirement of a "defined legal relationship" appears in many international arbitration provisions,[15] it has been noted that there are virtually no reported cases in which an arbitration agreement has been held to be invalid for failure to meet this requirement.[16] That does not of course mean the

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[14] Examples of matters that are traditionally seen to be outside the proper scope of arbitration are employment or criminal disputes.

[15] Gary Born *International Commercial Arbitration* (Wolters Kluwer Legal, New York, 2009) notes, amongst others, the New York Convention, the UNCITRAL Model Law, the French Code of Civil Procedure and the Italian Code of Civil Procedure as examples.

[16] At 256. To like effect is David Sutton, Judith Gill and Matthew Gearing *Russell on Arbitration* (23rd ed, Sweet & Maxwell, London, 2007) at [1–033]. It is there noted that the wider issue of "arbitrability" has received little attention because of the "huge range of different disputes" that are referred to arbitration, thereby rendering pointless any attempt to limit arbitrability. As noted, we see nothing in the scheme of the Act to suggest the Act was intended to have a restrictive effect.

element is of no effect, but it is indicative of a broad interpretation being required, given the Act's stated purpose of allowing parties to refer disputes to arbitration.

[50] In the present case we consider this requirement is satisfied. We differ from the High Court judgment in two respects. First, we consider it incorrect to suggest the issue being arbitrated must be ultimately determinative of the whole contest between the parties. We are unaware of any authority that excludes reference to arbitration for only part of a dispute. It is readily possible that parties may seek independent resolution by arbitration of a preliminary matter, before continuing with alternative negotiation processes. On the matter that was submitted here, the arbitrator's decision was to be final and binding, and it was an integral step in an existing significant process – namely allocation of settlement funds.

[51] Second, and related to this, we respectfully disagree with the Judge's reasoning that the arbitral award does not affect the allocation of settlement proceeds. As matters presently stand,[17] the arbitration initiated a process that has been determinative of the wider fiscal issue. The dispute between Pirirakau and Ngāti Taka was seemingly the last outstanding inter-hapū dispute concerning who had mana whenua at the relevant time. Consequent on this, the iwi governing entity created a Ratification Information Booklet which contained conclusions on the mana whenua issue and the proposed allocations. As regards the land in dispute between these two hapū, the allocation reflected the arbitration outcome – namely, all the money attaching to this land was allocated to Pirirakau. This Ratification Booklet was adopted by a majority vote of iwi members. The allocations then found their way into a Settlement Trust Deed. This Deed, another internal iwi document, establishes a trust to receive the funds from the Crown and to distribute those funds in accordance with the terms of the Settlement Trust Deed.

[52] Relevant to the present issue, the Settlement Trust Deed in its initial recitals notes:

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[17] We say "as matters presently stand" because we are aware there may be future disputes over whether these subsequent steps are binding and correct. It may be that the Settlement Trust trustees bring proceedings to clarify the point or that one of the affected hapū challenge a decision of the trustees. We emphasise we are not indicating any view of the merits of any such litigation if it eventuates, but are dealing with matters as they now stand.

> D. It is the intention of the Initial Trustees to receive the settlement property and on transfer the settlement property to each of the hapū of Ngāti Ranginui in accordance with the Ratification Process [ie the Booklet allocation].

Clause 2.4 of the Settlement Trust Deed is to like effect, and makes express reference to the Ratification Booklet. Then finally, the relevant parts of the Booklet (the allocations) are included as a Sixth Schedule to the Settlement Trust Deed. It is clear, therefore, that the arbitration has had direct consequences on the entitlement to a share of the settlement funds proceeds.

[53] The judgment under appeal refers at one point to stage 3 of the Mana Whenua Agreement not having been completed by the parties, and at another to the parties still needing to follow the adjudication procedure under the Mana Whenua Agreement.[18] Contrary to the proposition underlying these statements, in fact the adjudication process contemplated by the Mana Whenua Agreement is no longer available. Because all other hapū had also settled their disputes, the Mana Whenua Agreement was seen to be unnecessary and was not included as part of the settlement agreements. Recital D cited above makes it plain that as matters presently stand the issue is considered to be resolved. In this regard the judgment under appeal proceeds under a misunderstanding of the correct factual situation.

[54] Standing back and looking at the overall context, we equally have no doubt that the issue between the parties could properly be the subject of an arbitration agreement. The starting point is that there were extant claims before the Waitangi Tribunal. The Tribunal had issued an interim report identifying breaches of the principles of the Treaty of Waitangi in relation to the land. In the context of settling these Tribunal claims, an allocation formula for distribution of the anticipated settlement money was agreed within the iwi. The two parties to the arbitration had each claimed to satisfy the formula in relation to the same land. Arbitration was chosen as the method of resolution. The process agreed for determining who satisfied the formula was accepted by the disputants, and also the iwi, to deliver a result that was final and binding. The consequence to the victor would be a very significant financial payout.

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[18] *Leef v Bidois,* above n 1, at [67] and [72].

[55] Mr Cooke QC also emphasised that the mana whenua issue is akin to a dispute over customary title, and that rights in relation to land plainly fall within the concept of a dispute in relation to a legal relationship. He relied on *Attorney-General v Ngati Apa*.[19] Of interest on this point, in evidence Mr Hingston observed that mana whenua is a recent concept and he considered the real issue was who had customary rights in relation to the land. We accept the strength in Mr Cooke's submission, and make the obvious point that what might otherwise be a matter of historical dispute is very much given currency by the impending settlement with the Crown and the significant sums of money that would turn, in whole or in part, on the resolution of this issue.

[56] It does not in any way stretch the *Methanex* principles to see this as a dispute in relation to a defined legal relationship. The outcome of an arbitral award concerning the dispute is of legal consequence because the arbitrator's decision has been incorporated in the proposed allocation. The fact that the iwi as a whole needed to ratify an allocation based on the arbitration outcome does not diminish its significance, or deprive the arbitration of sufficient consequence to take it outside the scope of the Act. The award was intended to bind the parties and be final as regards their dispute. It was also recognised that fiscal consequences would then flow, as they have.

[57] We accordingly differ from the High Court on this aspect and conclude that the matter was properly the subject of arbitration. It is, therefore, not necessary to address the related challenges advanced by the appellant in relation to this issue – first, that the Judge was not entitled to address the issue given the parties were agreed on it; and alternatively, that if it was not an arbitration agreement within the meaning of the Act, then there was no power in the High Court to set the award aside under the Act.

[58] We turn to the process breaches identified in the Court below.

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[19] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

Issue two – natural justice issues

(a) Was Mr Hingston's conflict waived?

[59] The factual situation in relation to this topic is easy to state, but the legal implications are less straightforward. Factually, we consider it is plain that Ngāti Taka waived any concerns over the conflicts of interest, both pecuniary and familial, presented by Mr Hingston. The more difficult issue is whether such waiver is possible.

[60] Addressing first the factual issues, in relation to Mr Hingston's wife the waiver could hardly be clearer. Disclosure was made two months before the hearing, and again at the start. We accept that the countdown method "four, three, two, one" – though refreshingly robust – would struggle to withstand scrutiny if standing alone. However, Ngāti Taka had had ample prior opportunity to object and had not done so.

[61] In the judgment under appeal Andrews J placed weight on the remarks by Mr Leef at the beginning of his address where he observed to Mr Hingston on the second day that he wanted to ensure "everything is as unbiased as we can". Whereas her Honour saw this as a sign that there had not been waiver, we view it the opposite way. We see it as a recognition by Mr Leef that there had been waiver, and as merely a reminder to Mr Hingston that he had committed to being impartial and that Ngāti Taka had accepted that commitment. As noted, Mr Hingston advised he acknowledged the reminder at the time.

[62] The position concerning Mr Rawiri Kuka is less clear, and troubled Andrews J more than the issue of Mr Hingston's wife. Her Honour assessed Mr Kuka's evidence as being important in the context of the case. The obvious point of difference with this conflict issue is that Ngāti Taka did not have prior notice in the way they did as regards Mr Hingston's wife. So there was plainly less time for reflection on their part.

[63] That said, the conflict issue is not a complex one to process. Mr Kuka is Mr Hingston's wife's cousin, and he was to be one of the four mandated speakers for

Pirirakau. As with other speakers he was to recount his learned understanding of the events back in 1840–1865, and prior, in terms of whakapapa.

[64] We consider that on balance any objection to Mr Kuka was waived. We accept that at the time the first waiver was given in relation to Mr Hingston, this issue was not known. However, when it was known, there was opportunity to object and none was taken. Even if it was difficult in the circumstances for lay people to reach such an instant assessment, the reality is that objection could have been taken on the second day but was not. By that time Ngāti Taka had had a considerable period to reflect on the issue. Further, Mr Leef plainly did not feel inhibited as he did raise two matters arising from the previous day; just not this one.

[65] Recognising it is not as clear an informed waiver as that which occurred in relation to Mr Hingston's wife, we note it is plain from the transcript that at the time of the hearing there was actually no concern from Ngāti Taka about this conflict. Mr Leef's sole issue with Mr Kuka was the mandate issue. It is the point he argued on the first day, and the same point he returned to the next day. We consider this lack of concern at the time about the conflict would be relevant to the exercise of the discretion under art 36 to set aside, or not, the arbitral award.[20]

(b) Can this conflict be waived?

[66] In addressing this point we take the view that the conflicts which Mr Hingston had – being both a relationship to a key witness and an indirect pecuniary interest – would require him not to accept appointment without there being an informed waiver. But, for the reasons given, we conclude such a waiver occurred. However, Mr Bryers repeats a submission accepted by Andrews J that fundamental requirements such as the components of natural justice, and apparent bias, cannot in law be waived.

[67] The statute is not altogether clear on the point.

[68] The starting point is art 4 of sch 1 which provides:

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[20] Arbitration Act 1996, sch 1, art 36.

> **4 Waiver of right to object**
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> A party who knows that any provision of this schedule from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating that party's objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived the right to object.
>
> (emphasis added)

[69] Whilst that seems clear enough, the Act does not identify which of its provisions may or may not be derogated from. A commonly cited example of that which cannot be waived are the principles of natural justice, with reference particularly being made to equal treatment of parties (art 18).[21] In *Methanex Motunui Ltd v Spellman* Fisher J held that natural justice was essential to a valid arbitration, and any contractual exclusion of the right to review for breach of natural justice would be ineffective.[22] It can also be noted that art 34, which allows limited challenge to arbitral awards expressly lists non-compliance with natural justice as a basis for challenge.

[70] However, balanced against these apparent entrenchments of natural justice, regard must be had to arts 12 and 13 of sch 1 which provide:

> **12 Grounds for challenge**
>
> (1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator, from the time of appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by that arbitrator.
>
> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons of which that party becomes aware after the appointment has been made.

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21 See for example David Williams and Amokura Kawharu (eds) *Williams and Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at [5.8.6]; and therein citing for support H Holtzman and J Neuhaus *A Guide to UNCITRAL Model Law on International Commercial Arbitration*: *Legislative History and Commentary* (Kluwer, The Hague, 1989) at 409.

22 *Methanex Motunui Ltd v Spellman*, above n 11, at [130].

> **13 Challenge procedure**
> (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3).
>
> (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
>
> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

[71] It would seem a rather odd scheme that provided for compulsory disclosure of matters that go to impartiality and independence, and which set a time frame by when objection must be taken in relation to such disclosure, and yet ultimately denied any ability for the parties to actually waive the disclosed conflict, or left a party free to withdraw the waiver after the arbitration outcome is known. The existence of arts 12 and 13 recognises that arbitrators may be appointed because they possess specialised knowledge in the particular field. The parties may value that specialised knowledge to an extent that means they will set aside matters that might otherwise disqualify the arbitrator.[23]

[72] In terms of New Zealand authority, in *Banks v Grey District Council* this Court left open whether the failure to comply with the time frames set out in art 13 meant that the apparent bias could not be the subject of a subsequent application under art 34 to set aside the award.[24] In a passage adopted by Andrews J, the learned authors of *Williams and Kawharu on Arbitration* contend that the effect of non-compliance with art 13 is only to prevent further recourse to that process, and does not preclude subsequently raising the apparent bias in an art 34 challenge. The

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[23] See *Rustal Trading Ltd v Gill and Duffus SA* [2000] CLC 231 (QB) at [236] and *Tracomin SA v Gibbs Nathaniel (Canada) Ltd* [1985] 1 Lloyd's Rep 586 (QB) at 588–589. In that latter case the Court notes that there are many established features of commercial arbitration that do not have a parallel in the more formal procedures of a court of law.

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

authors suggest, however, that the failure to challenge in a timely way under arts 12 and 13 will be "a relevant factor for the reviewing court to take into account when assessing the genuineness and strength of the party's objection".[25]

[73] Notwithstanding the importance of independence and impartiality, there is considerable authority to support the proposition that informed waiver is permissible. The capacity to waive fundamental matters has been recognised in both New Zealand and other overseas decisions. In *Alexander Property Developments Ltd v Clarke*, Baragwanath J rejected the proposition that the requirements of art 23(3) of sch 1 could not be waived.[26] That provision concerns communication of the evidence of one party to the other, something which is clearly a fundamental component of a fair hearing. Likewise, in *Duncan & Davies Nurseries New Plymouth Ltd v Honour Block Ltd*, Ellen France J noted textbook commentary that waiver was not possible but took the view that a proper waiver was effective.[27] In that case the arbitrator had initially been a mediator in the same matter (obviously to the parties' knowledge). It was viewed as being open to the parties to waive this potential impediment to impartiality.

[74] Looking to overseas authority, in *Sellar v The Highland Railway Company* the House of Lords considered the position of an umpire who held a small quantity of shares in an affected company, a fact that had not been disclosed.[28] Their Lordships held the award of the umpire was required to be set aside because of this, but in so doing recognised that had there been disclosure, waiver was possible. More recently, Moore-Bick J in *Rustal Trading Ltd v Gill & Duffus SA* held waiver of apparent bias was possible.[29] The significance of the decision to the present issue is lessened by virtue of the equivalent English provision, s 73 of the Arbitration Act 1996 (UK), not containing the non-derogable qualification that is found in our art 4. Nevertheless, it is an illustration of waiver of apparent bias being upheld. In *Rustal Trading Ltd* the waiver point was an alternative conclusion, no apparent bias

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25 Williams and Kawharu, above n 21, at [5.8.6].

26 *Alexander Property Developments Ltd v Clarke* HC New Plymouth CIV-2004-443-89, 10 June 2004 at [33].

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

28 *Sellar v The Highland Railway Company* (1919) 2 SLT 149 (HL).

29 *Rustal Trading Ltd v Gill & Duffus SA*, above n 23.

having been found. However, in *ASM Shipping Ltd of India v TTMI Ltd of England*, although the apparent bias claim was established, the Court held the ability to object had been lost.[30] There the apparent bias was the previous participation of the umpire as counsel in an arbitration in which he was instructed by a party to the subject arbitration. In the course of that earlier arbitration allegations were made against personnel of that party. It was therefore a strong case for a conclusion of "apparent bias", yet the failure to object in a timely way prevailed.

[75] *Ghiradasi v The Minister of Highways for British Columbia* is a Canadian decision referred to by *Williams and Kawharu*.[31] There the Supreme Court set aside an arbitral award for apparent lack of independence. The arbitrator was, on another similar dispute, acting as counsel for one of the parties. The Court observed:[32]

> … the disqualification arises from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times …

[76] We consider it is important that the Court emphasised that the disqualifying feature was unknown to the appellant. The inference we draw is that the outcome might have been different had the appellant known.

[77] The position reached in these various authorities is consistent with the assessment of international authority advanced by Gary Born in his text *International Commercial Arbitration*. He there notes:[33]

> If a party fails to challenge an arbitrator's impartiality and independence pursuant to either statutory or institutional challenge mechanisms, notwithstanding notice of the factual grounds for challenge to the arbitrator, it will generally be held to have waived the right to seek annulment of the award on these grounds. A party is not entitled to adopt a "Heads I win, tails you lose" approach by holding objections to an arbitrator in reserve until an award is rendered. This approach has been taken by courts in the U.S., France, Switzerland, England and other jurisdictions.
>
> (footnotes omitted)

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30 *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (QB) at [49].
31 Williams and Kawharu, above n 21, at [5.8.6].
32 *Ghiradasi v The Minister of Highways for British Columbia* (1966) 56 DLR (2d) 469 at 474.
33 Gary Born, above n 15, at 2614–2615.

[78] The competing views on the effect of the time limits imposed by art 13 are either that they only limit the ability to make s 13 challenges prior to determination of the arbitration, or alternatively that they represent the only opportunity to object to an arbitrator on these grounds (once the objecting party has knowledge). We consider the latter interpretation is more consistent with the Act's policy of facilitating arbitration, and party control of that arbitration.[34] The prospect of allowing parties to an arbitration to hold back on an objection until the outcome is known is unappealing and potentially very inefficient. It also gives very little weight to the enactment of specific provisions dealing with such conflicts, namely arts 12 and 13.

[79] Either the right to an independent tribunal is derogable or it is not. The very existence of a discretion to grant a remedy suggests the former. We recognise that those who advocate for a more limited interpretation of art 13 emphasise that the earlier failure to object will be a "relevant factor" in the exercise of discretion under art 34 but it is difficult to give that much weight. If the objection can still validly be raised, and if after inquiry a case of apparent bias or lack of independence is made out, there will in reality be very little scope for a reviewing court to withhold a remedy, regardless of the prior inactivity of the objector. This is so because the Court would be required to adopt the premise that independence and impartiality in the Tribunal are fundamental requirements that cannot be derogated from by agreement or waiver. The present facts provide an illustration. The available objections to Mr Hingston acting as arbitrator are obvious and irresistible, if taken. He has a clear conflict, and an indirect pecuniary involvement.

[80] We consider it is wrong in principle that a party, with full knowledge of the facts as we have held Ngāti Taka had, can fail to take a timely objection but then be allowed to object later. If that were possible then it would indeed be in a no-lose situation from the outset. Either its case is accepted, or the award is invalidated. We reject that interpretation of the Act and conclude that a valid waiver of matters that could be raised under art 12 is effective and binding.

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[34] *Gold and Resource Developments (NZ) v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [14]; and *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* [2015] 2 NZLR 180 (CA) at [32].

[81] We do not need to consider what scope that leaves for the non-derogable part of art 4. We are concerned with the interpretation of the specific provisions contained in arts 12 and 13, and what effect they have on the applicability of arts 4 and 34. What cannot be denied is that as regards impartiality and independence, the statutory scheme provides a specific process under which objections must be taken. Whether the absence of such processes for other fundamental natural justice provisions affects an assessment of whether they may be waived is best left for a case in which the issue arises.

[82] Accordingly on the issue of apparent bias or lack of independence, we conclude that the test for apparent bias was met by Mr Hingston's circumstances, but that Ngāti Taka, knowing the facts which give rise to the potential disqualifying status, chose not to object. We do not consider it was open to them to raise an objection under an art 34 challenge subsequent to the issuing of the determination.

(c) Did Ngāti Taka have insufficient opportunity to comment on documents tabled by Pirirakau?

[83] We accept this is a matter properly raised under the art 34 challenge. The rather ramshackle way in which documents were handled and tabled,[35] and the lack of any proper reliable record of what exactly occurred, make it inappropriate to have resort to any idea of waiver or estoppel.

[84] That said, we do not share the High Court Judge's concern over the fairness of the proceedings. First, what occurred is in broad terms the exact process the parties agreed to. It is to be emphasised that the parties chose to exclude lawyers, and not to require any prior disclosure of the other's case. We suspect the reality is that the competing arguments were well known to each other, and had been expressed on many occasions in the context of what is a long-standing dispute on a matter of fundamental significance to each of the parties.

[85] The documents on which Pirirakau relied were tabled, as the agreement called for. The only possible objection in terms of the agreed position is that a separate copy was not provided to the other party. However it is to be noted that

[35] The relevant default provision in sch 1 is art 24(3).

there is no suggestion that Ngāti Taka sought access to the tabled documents at the conclusion of Pirirakau's case. The Pirirakau case took only a half day, and Ngāti Taka did not start until the next morning. During this time the documents were there, and as Mr Hingston observed in his evidence, available to whoever wanted them.

[86] In the High Court the main focus of the challenge put to the arbitrators on this aspect was the impracticality of Ngāti Taka absorbing thousands of pages and then responding. In relation to this we first observe that the situation which arose was directly the product of the process agreed upon by the parties. Nor was any application made by Ngāti Taka to allow more time. It might be said that lay people were not aware of this capacity, but again the presence of only lay people was a choice that these parties to the arbitration made. They preferred to rely on themselves and the experience and wisdom of the arbitrators.

[87] Next, it should not be thought that the documents being proffered by Pirirakau were in any way new. They were historical documents. The report by Dr Ord-Nimmo had been prepared in relation to a Waitangi Tribunal claim brought by Mr Leef himself.[36] The document bank was simply a collection of the documents that Report drew on. Dr Ord-Nimmo's report was produced in September 1998, so had been around for almost 15 years prior to the arbitration hearing.

[88] The situation concerning the documents was the focus of considerable endeavour during oral evidence in the High Court. Having read both the underlying affidavits and this testimony, it is very difficult to identify what the claimed prejudice is from Ngāti Taka not allegedly having an opportunity to comment on the documents at the time. Pirirakau tabled them as a resource, and it seems the arbitrators used some of them in that way. Again this was the agreed process. It does not appear that any attempt was made in the High Court to identify specific parts of the documents that are said to prejudice Ngati Taka.

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[36] There were two claims concerning the way in which the Report was prepared – 727 which was Mr Leef's claim, and another related claim, 707.

[89] We gave the parties further opportunity to do so. That having been done, the real complaint, it seems to us, flows from disagreement by Ngāti Taka with the conclusions the arbitrators have drawn from the material. This is not a complaint stemming from a process breach at the hearing itself. Rather it is a complaint about the arbitration decision and it was not argued before us that the conclusions were in some way unreasonable or irrational.

[90] To summarise on this aspect, the parties had agreed to provide each other, during the presentation and not before, with copies of each other's evidence, together with material being relied upon. The former was done, but the latter requirement was only partly met. Whilst a copy of the material relied upon was tabled, a separate copy was not given to the other party. Some of this material was used by the arbitrators in reaching their decision.

[91] It is unclear when all the material was tabled. The only direct evidence on the Ord-Nimmo Report is from Mr Bidois who thinks he tabled it on the first day. However, he was far from sure. It seems clear that the underlying document bank was tabled on the second day, and all other documents (bar the Ord-Nimmo Report) on the first day. The documents tabled on the first day were available to Ngāti Taka prior to their presentation, but were not accessed by them.

[92] The general circumstances that are the subject of complaint arise directly from the process agreed upon by the parties. Whether or not Ngāti Taka were given a separate copy of the documents, there was never going to be time within the scheduled arbitration to read all of them and respond. If it was thought about at all, it must have been anticipated by the parties that each would know the contents of any documents that were likely to be tabled. The subsequent evidence does not undermine that expectation. Extra time was never sought by either party and complaint was only raised subsequent to release of the arbitrators' decision. This reflects the reality that the complaint is a dispute with the conclusions the arbitrators have drawn from the material, and there is no reason at all to think that Ngāti Taka would have addressed these issues prior to seeing the decision.

[93] For these reasons we do not consider there has been a process breach. What occurred flowed directly from the process that the parties agreed to, and the non-compliance by Pirirakau with provision of a separate copy of its material to Ngāti Taka did not lead to any discernible prejudice.

[94] Given these conclusions it is not necessary for us to consider the third appeal ground, namely the exercise of the discretion afforded by art 34 of sch 1 of the Act.

Conclusion

[95] The appeal will be allowed.

[96] We do not for a moment suggest that what occurred could in any sense be regarded as a model arbitration. It is regrettable that in fixing upon their own arbitration process, the parties chose to depart so markedly from the adjudication stage model that was contained in the Mana Whenua Agreement. Most of the issues that have been raised would thereby have been avoided.

[97] That said, the essence of referral to arbitration is that it accords the parties the ability to control process. There are some limits on this but in this regard we have no concerns that overall what occurred was not a fair hearing. The arbitrators, particularly Mr Hingston, were very experienced in hearing and determining issues of this type. Each party had an appropriate opportunity to present its case in the manner agreed upon and in a manner which was broadly reflective of its traditions. The reply phase was on its face robust and was controlled by the experienced arbitrator. The resource material that was introduced was not in any sense new or unknown to the parties. One of the arbitrators had connections to the dispute which undoubtedly meant it would have been preferable for a different arbitrator to have been selected. But there is no allegation of actual bias, and the appropriate disclosures were made at an early point and again at the hearing.

[98] On the specific matters that have been addressed, we have no doubt that the parties determined to refer their dispute to arbitration, and that the nature of the dispute was suitable for arbitration. The process deficiencies that subsequently

occurred were a product of the arrangements agreed upon and did not mean the arbitration was unfair.

[99] Accordingly we allow the appeal and reinstate the arbitral award. We conclude by observing that this judgment says nothing about the legitimacy or otherwise of the iwi processes that followed the making of the award, but is limited to a conclusion that it was a valid arbitral determination.

Costs

[100] If unsuccessful, Mr Bryers asked the Court to have regard to the shifting nature of the appeal grounds. For example, the appellant's written submissions, and indeed grounds, did not address the conclusions of Andrews J concerning the breaches of natural justice. Yet it was inevitable, if the primary challenge succeeded, that these other conclusions required addressing. Otherwise the appeal would be pointless.

[101] We are not persuaded any adjustment to the usual rule is required. Whilst we accept there was a need to provide the respondent with an opportunity to make further submissions, we do not consider the way in which the appeal was advanced has resulted in unnecessary effort on the part of the respondent. We accordingly award the appellant costs for a standard appeal on a Band A basis. A costs award was made in the respondents' favour in the High Court. In the normal way, we quash that order and remit the matter back to the High Court for decision.

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