IN THE COURT OF APPEAL OF NEW ZEALAND

CA415/2016
CA54/2017
[2017] NZCA 429

BETWEEN	NGĀTI HURUNGATERANGI, NGĀTI TAEOTU ME NGĀTI TE KAHU O NGĀTI WHAKAUE Appellants
AND	NGĀTI WAHIAO Respondent

Hearing:	14 and 15 June 2017
Court:	Harrison, Winkelmann and Gilbert JJ
Counsel:	D J Goddard QC, J P Kahukiwa and E M Gattey for Appellants J E Hodder QC, F E Geiringer and J C Adams for Respondent
Judgment:	26 September 2017 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The interim award issued by the arbitral panel on 7 June 2013 and adopted as the final award on 14 November 2014 is set aside.

C The respondent is ordered to pay the appellants costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

Contents

Introduction

[1] In the late nineteenth century the Crown, enabled by seminal decisions of the former Native Land Court, acquired from Māori certain ancestral lands near Rotorua known as Whakarewarewa and Arikikapakapa. In 2008, immediately following a critical report by the Waitangi Tribunal,[1] the Crown agreed to return the lands to Ngāti Hurungaterangi, Ngāti Taeotu me Ngāti Te Kahu o Ngāti Whakaue (Ngāti Whakaue) and those hapū comprising Tuhourangi Ngāti Wahiao (Ngāti Wahiao).[2] However, Ngāti Whakaue and Ngāti Wahiao were unable to agree on which of them was entitled to the lands. Each claimed exclusive beneficial ownership, a concept known in English law but not to Māori before colonisation. Te Ao Māori now provides a rough proxy to beneficial ownership through the tikanga concept of mana whenua — territorial authority over land — which assumes central importance in this case.[3]

[2] The lands consist of three reserves or blocks. They are the Roto-a-Tamaheke Reserve, comprising 4.304 hectares; the Whakarewarewa Thermal Springs Reserve, comprising 45 hectares; and the Southern Arikikapakapa Reserve, comprising 17.7228 hectares. Te Puia, the New Zealand Māori Arts and Crafts Institute, is located on the latter two reserves. The land is depicted in the map attached to this judgment as an appendix.

[3] Ngāti Whakaue and Ngāti Wahiao agreed to establish a joint trust (the Trust) to take title to the lands until determination of their competing claims. Its creation was pursuant to a deed entered into by iwi representatives (the Trust Deed) which provided that, if the competing parties were unable to agree on entitlement, their claims would be referred to an arbitral panel for determination. The Whakarewarewa and Roto-a-Tamaheke Vesting Act 2009 (the Vesting Act) was later passed to formalise the transfer process from the Crown to the Trust.

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1 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims: Stage One* (Wai 1200, 2008) [Report].

2 See the definitions of "Ngati Whakaue Interest" and "Tuhourangi Ngati Wahiao Interest" at [34] of this judgment.

3 Whether mana whenua should be used as such remains controversial. The term has been described as "an unhelpful nineteenth-century innovation that does violence to cultural integrity": Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (WAI 64, 2001) at 28.

[4] Ngāti Whakaue and Ngāti Wahiao were unable to settle their differences. An arbitral panel was later convened under the Trust Deed to determine the competing rights of beneficial ownership according to mana whenua. The panel's chair was Bill Wilson QC, a retired Supreme Court Judge who had earlier served for 10 years as a member of the Waitangi Tribunal. Its two other members were the late Erima Henare, a widely respected leader of Ngāti Hine and Ngapuhi and an authority on tikanga Māori; and Kevin Prime of Ngāti Hine, Ngāti Whātua and Tainui, another distinguished leader with impressive credentials in charitable and environmental governance. The panel held hearings over 13 sitting days between November 2012 and May 2013. The competing iwi were represented by legal counsel. Extensive evidence was called of both an oral and documentary nature.

[5] The panel's interim decision was delivered a month later on 7 June 2013 and adopted in whole as the final award delivered on 14 November 2014.[4] It determined that the lands should be apportioned equally between Ngāti Whakaue and Ngāti Wahiao but left implementation to be agreed between them.[5] Ngāti Whakaue was dissatisfied and challenged the award in the High Court for error of law. In 2014 this Court granted Ngāti Whakaue special leave under art 5(6) of sch 2 to the Arbitration Act 1996 to bring an appeal to the High Court on a number of questions of law.[6]

[6] Moore J heard Ngāti Whakaue's substantive appeal and its separate challenge to the award for breach of natural justice.[7] His judgment captures the essence of Ngāti Whakaue's complaint as being directed to:

> [87] … the ascertainment of the applicable law (including statute, common law and tikanga), the identification and interpretation of the principles under the Deed and the identification of those facts which the Panel was required to take into account in reaching its decision.

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4 *Arbitration over Whakarewarewa Valley Lands (Interim Decision)* (7 June 2013) [Award].

5 At [68].

6 *Ngāti Hurungaterangi v Ngāti Wahiao* [2014] NZCA 592. Duffy J earlier declined Ngāti Whakaue's application for leave to appeal under art 51(1)(c) of sch 2 to the Arbitration Act 1996 and declined leave to appeal against that determination: see *Ngāti Hurungaterangi v Ngāti Wahiao* [2014] NZHC 846 and *Ngāti Hurungaterangi v Ngāti Wahiao* [2014] NZHC 2311.

7 *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 [HC judgment].

[7] Ngāti Whakaue's primary challenge was to the adequacy of the panel's reasoning which the Judge introduced in this way:

> [120] The findings the Panel made in relation to this evidence and its accompanying reasoning are, however, undeniably sparse. Having heard evidence for a full 13 days from a range of sources, the Panel's ultimate reasoning is to be found in just five paragraphs. From the point of view of resolving the longstanding dispute between the parties and avoiding the need for litigation, this lack of engagement is regrettable.
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> [121] It follows that the task of determining whether the findings and the accompanying reasoning are adequate presents some difficulty. I am mindful of the case law which has repeatedly emphasised the extent of the duty to give reasons differs depending on the nature of the case.[8] This dispute centred on the single issue of which parties could demonstrate mana whenua in the Lands in accordance with Maori customary concepts prior to the [Native Land Court] decisions. …

[8] Moore J ultimately dismissed this ground of the panel's inadequate reasons and all other grounds of Ngāti Whakaue's appeal[9] but later granted the iwi leave to appeal on approved questions of law.[10] Those questions are whether the Judge erred in finding that the panel did not err by:

(a) failing to make findings (supported by reasons) as to who were the beneficial owners of the lands at issue before 1893; failing to determine the parties' claims to the lands having regard to those findings; and allocating beneficial ownership of the lands according to broad conceptions of fairness rather than identifying the persons entitled to beneficial ownership of the lands;

(b) finding the Crown's purchases of individualised interests in the lands after 1893 resulted in loss of the mana whenua of the hapu in respect of those lands;

(c) treating Crown purchases of individualised interests in land post-1893 as a relevant consideration in determining the dispute; and

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8 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 381–382; *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at [53]; *Casata Ltd v General Distributors Ltd* [2005] 3 NZLR 156 (CA) at [91].

9 HC judgment, above n 7, at [214].

10 *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 3156.

(d) its approach to s 348 of Te Ture Whenua Māori Act 1993.

[9] The first question is at the heart of Ngāti Whakaue's appeal. Whether the panel's reasons were adequate can only be determined against the unique cultural, legal and legislative background to this dispute. Our starting point is with the historical origins and nature of the parties' competing claims leading to the relevant Native Land Court decisions and the Waitangi Tribunal's criticisms of the Crown's acquisition process. We then review the Crown's response to the Tribunal's report and summarise the terms of the Vesting Act and the Trust Deed, which provide the legal foundation for the appeal. As we shall explain, that complex context informs the nature and extent of the panel's obligation to give reasons.

Background to the arbitration

(1) Native Land Court decisions

(a) Historical context

[10] The Fenton Agreement of 25 November 1880 was the genesis of the Crown's acquisition process, so named because it was negotiated by the Chief Judge of the Native Land Court, Francis Dart Fenton, with Ngāti Whakaue and other Arawa iwi.[11] Iwi in the so-called "Hot Lakes" district surrounding present-day Rotorua had previously resisted attempts by the colonial authorities to govern the area from Wellington such that the Native Land Court was banned from the region; European storekeepers and businessmen lived on customary land effectively as guests of local Māori. But some of the chiefs agreed to deal with Judge Fenton as the representative of a Government anxious to secure a slice of the burgeoning tourism centred on the Pink and White Terraces. The Agreement included a major concession from Ngāti Whakaue in allowing the Court into the region to begin adjudicating on titles to blocks of land.

[11] The Agreement was later given effect by the Thermal Springs Districts Act 1881, which made arrangements for the new town of Rotorua and provided powers for the Governor to bring all hot springs and thermal areas under public management

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[11] RP Boast "Treaties Nobody Counted On" (2011) 42 VUWLR 653 at 660–661.

as reserves.[12] Its effect was that the Government acquired "a complete monopoly of land purchase for itself in a substantial area stretching from Tauranga to Taupo".[13] In explaining the impetus for the Act, Richard Boast notes that "[t]he Government feared that … thermal areas would be sold by Māori owners to other private individuals. It wanted not merely to encourage a tourist industry; it wished to actively develop and promote the industry itself."[14] This pre-emptive regime was consolidated by the Native Land Alienation Restriction Act 1884.[15]

[12] In performing its statutory function of determining title under the Native Land Court Act 1880, the Native Land Court inquired into the competing claims of Ngāti Whakaue and Ngāti Wahiao to both the Arikikapakapa and Whakarewarewa blocks.

(b) Arikikapakapa

[13] The Native Land Court's inquiry into the Pukeroa Oruawhata Block covered the area between the township of Ohinemutu and the thermal springs at Whakarewarewa, embracing what is now the city of Rotorua and the Southern Arikikapakapa Reserve.[16] The hearing before Judge Symonds from January to June 1881 was the first full investigation of title to take place in the Rotorua region following the Fenton Agreement.[17] The Court found that Ngāti Wahiao "have no claim on [the] block" having "never returned to occupy [the] block" after "a succession of battles and murders ensued" relating to an ancient quarrel about adultery.[18] The Court found essentially for Ngāti Whakaue "under the heads of conquest and occupation".[19] It apparently accepted the evidence of Maihi Te Rangikaheke that "Ngāti Whakaue hold the Mana over this land and were a race of Chiefs and always led the allies in all their fights against foreign foes" who

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12 Thermal Springs Districts Act 1881, ss 5 and 6.
13 Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 172.
14 At 172–173
15 At 175.
16 Richard Boast *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary* (Brookers, Wellington, 2013) at 888.
17 At 889.
18 *Pukeroa-Oruawhata* (1881) 1 Rotorua MB 344 at 344–345.
19 At 344 and 347.

had endeavoured to encroach on the block.[20] The Court awarded almost the entire block to Ngāti Whakaue and none of it to Ngāti Wahiao.

[14] However, as the Waitangi Tribunal would later affirm, the decision was tainted by allegations of collusion with the Crown to establish the township of Rotorua. By 1889 the Crown had purchased most of the block directly from Ngāti Whakaue and proceeded with its ambition to develop tourism under state control.[21]

[15] Also relevant is an 1897 case concerning the same parties, although not the lands at stake in the present appeal, in which the Native Land Court revisited the competing interpretations of Ngāti Whakaue and Ngāti Wahiao of the early history of the Rotorua region.[22] The Court summed up the interpretations as follows:[23]

> The Claimants [including Ngāti Wahiao] state that Umukaria having been murdered by the then owners of this block, Ngati Wahiao a Chief of Rotorua [and son of Umukaria] raised a war party to avenge him and conquered the murderers at Titaka a pa a little on the E side of the boundary of the Block; they allow that Tutanekai an ancestor of Ngati Whakaue accompanied Wahiao but in a subordinate position and state that the latter have no claim to the land because they did not occupy it but returned to Rotorua. On the other hand the Ngati Whakaue say that Tutanekai was chief of the war party and Wahiao the subordinate while the Ngati Rangitihi the present representatives of the people said to have been conquered say that according to their traditions Wahiao was not with the war party but only Tutanekai. Of course it is impossible for Court to be sure which tribe's story is the true one but that of the Ngati Rangitihi seems to be improbable.

[16] The Court was unable to resolve these competing accounts and instead decided the dispute mostly on the basis of occupation.[24] Boast views this case as "a typical example" of an investigation of title where the process became "almost impossibly complicated, characterised by large numbers of overlapping claims and claimant groups".[25] He believes that "[p]robably the Court's allocations were in a

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20 At 345–346.
21 Boast, above n 16, at 889.
22 *Rotomahana-Parekarangi Rehearing* (1897) 13 Rotorua MB 193.
23 At 197.
24 At 197–198.
25 Boast, above n 16, at 1275.

broad sense reflective of the reality of customary occupation rights".[26] But, he observes, "a substantial rearrangement of the boundaries took place as well".[27]

(c) Whakarewarewa

[17] The Native Land Court inquired separately into the Rotorua Patetere Paeroa Block, which included Whakarewarewa. On 20 April 1883 the Court awarded the land to members of the hapū who could prove substantial occupation by reference also to ancestry, mana and the power to retain possession. Because no hapū could establish exclusive and continuous occupation, the Court awarded the land to the hapū of Ngāti Wahiao and Ngāti Whakaue but with no particular division expressed.[28] Ngāti Whakaue contested this finding and Ngāti Wahiao requested a partitioning.

[18] In 1889, after hearing both proceedings together, the Court determined Ngāti Whakaue were entitled to a larger share on the ground of their greater occupancy. In the Court's judgment, the relevant inquiry was directed to rights prior to Ngāti Wahiao's 1878 forceful occupation of part of the land; during that earlier period "the occupation of Ngāti Whakaue if not almost exclusive was greatly in excess of any occupation by Ngāti Wahiao".[29] The Court's decision "cut the hot springs at Whakarewarewa more or less in half, allocating the two sections to Ngāti Whakaue and Ngāti Wahiao".[30] However, of the total block at stake, the Court awarded 967 acres to Ngāti Whakaue and only 176 acres to Ngāti Wahiao. Dissatisfaction with that apportionment led to another rehearing. But that proceeding in 1893 led to the further reduction of Ngāti Wahiao's stake to a minimal eight per cent of the total block.

(2) Waitangi Tribunal report

[19] The Waitangi Tribunal's 2008 report on Central North Island claims considered the legitimacy of both the Native Land Court determinations of title and

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26 At 1275.
27 At 1275.
28 Report, above n 1, at 532–533.
29 *Whakarewarewa* Bay of Plenty Times (Vol 16, Issue 2477, 16 December 1889) at 1.
30 Richard Boast *The Native Land Court Volume 2, 1888–1909: A Historical Study, Cases and Commentary* (Brookers, Wellington, 2015) at 490.

the Crown's subsequent land transactions. The Tribunal was satisfied that the Crown's acquisition of these ancestral lands in the late nineteenth century was inconsistent with its Treaty obligations. The individual dispositions secured by the Crown were not the consequence of any collective decision by the customary owners and undermined the hapū's desire to retain ownership and control.[31] The Tribunal's findings provide critical context to the statutory and agreed processes which followed.

(a) Determinations of title

[20] As we have noted, the Native Land Court determined ownership of the lands through its statutory jurisdiction under the Native Land Court Act 1880. The 1880 Act was the successor regime to the Native Land Act 1873, which the Tribunal summarised as:[32]

> … creat[ing] an intermediate form of title, halfway between customary ownership and freehold title held by Crown grant. 'Memorials of ownership' were records of the membership list of landowning hapu at the time the court award was made. But although the land technically remained customary land, those named on the memorial now held individual shares in the land which, contrary to the rules of aboriginal title and the pre-emption clause of the Treaty, became alienable to private buyers and lessees.

Under the 1880 Act, memorials of ownership were replaced by "certificates of title" which served the same purpose of enabling an individual owner to apply to have his or her interests partitioned out.[33]

[21] Two rival accounts were put to the Tribunal about the effect of this process:[34]

> [C]laimants contend that the new tenure system was imposed on Central North Island Māori against their will, that it undermined their existing tribal structures and economies, and led to land alienation. Crown historians maintain that the Native Land Court was a response to — rather than a cause of — changes in Māori society, political structures and economies … [which were] an inevitable product of colonisation and the economic development that came with it.

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31 Report, above n 1, at 560.
32 At 447.
33 Native Land Court Act 1880, s 70.
34 Report, above n 1, at 447.

[22] The Tribunal's inquiry was into the "fundamental question" of whether the Crown acted consistently with the Treaty principles in introducing the new tenure system and the Native Land Court's operations to the Central North Island in the second half of the nineteenth century.[35] The Tribunal found that the Crown did not consult or negotiate consent to introduce new forms of title adjudication, which were designed to "destroy tribal ownership, and to individualise Māori land".[36] It operated by "remov[ing] community land-management rights and disrupt[ing] community decision-making processes at a crucial period when pressures to alienate would come from both the Crown and settlers".[37] Moreover, the Pākehā judges and Māori assessors from outside the region were unfit to determine customary rights:[38]

> [Ascertainment of title] required a knowledge not only of whakapapa, but of which relationships were crucial ones, and of the dynamics that underlay those relationships. It required a knowledge of which divisions of land would work, and which would not. It required an understanding of vicissitudes of the distant and recent past, and how they had impacted on different groups; and of the emergence of newer groups as part of the age-old processes of hapu formation.

[23] In the Tribunal's view the new titles were not appropriate to protect taonga such as the Whakarewarewa geothermal valley. On that issue the Tribunal found:[39]

> Clearly what should have been available to the collective hapu at this point was a community title for the springs — perhaps vested in a trust in which all the hapu were represented. The court knew that the springs were a resource that could not sensibly be divided up among them. From the point of view of the hapu, a collective title would have protected the springs from alienation, and enabled hapu management.

(b) Crown purchases

[24] Having cast considerable doubt on the legitimacy of the Native Land Court's title-determination process, the Tribunal addressed the purchase of Māori land. Throughout the 1890s Crown purchase agents pursued valuable resources in the Rotorua district, such as geothermal springs, through "the standard process of purchasing individual shares in blocks of land that had passed the [Court] and then

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35 At 447.
36 At 457.
37 At 457.
38 At 485.
39 At 533.

seeking partitions for the Crown".[40] The agents would target individuals known to be vulnerable to selling their shares due to economic pressures.[41] While those individuals may well have been acting rationally to meet such pressures, the nature of purchasing and partitioning meant that community control over the sale or retention of defined areas for future needs was severely undermined; the process facilitated the commodification and alienation of land rather than its development.[42]

[25] The Tribunal recorded an express instruction from Patrick Sheridan, head of the Native Land Purchase Department, to Crown agents to pursue individual shares in the Whakarewarewa lands held by the listed owners for Ngāti Whakaue and Ngāti Wahiao; and to "[t]ake any signature offered without waiting for general consent".[43] The Crown agents were well aware that the block containing the springs was collectively owned and indivisible. Nevertheless, they managed to persuade enough individuals to part with shares sufficient to purchase all three Whakarewarewa subdivisions.[44] In 1895 senior purchase officer Richard Gill applied successfully to the Court under the Government Native Land Purchasing Amendment Act 1878 to have land equivalent to these undivided shares defined and partitioned out.[45]

[26] The Tribunal concluded:[46]

> Whakarewarewa is a particularly clear and well-documented example of how purchasing of undivided individual shares over a lengthy period, with use of strategic partitioning, could completely undermine the collective wishes of iwi to maintain control and possession of important taonga. In this instance, while even the [Native Land Court] recognised the practical impossibility of fairly dividing such a taonga into individualised shares in land, the title it conferred was nevertheless able to be used to calculate 'virtual' individual shares and then purchase them, followed by strategic partitions to acquire the treasured resource. This was carried out under Government direction and in the full knowledge of how important this asset was to the local communities claiming it.
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40 At 560.
41 At 569.
42 At 569–570.
43 At 619.
44 At 619.
45 At 620.
46 At 620 and 625.

> [T]he Crown's purchase system was coercive and unfair. It deprived Central North Island Maori of their tino rangatiratanga and their lands without their full, free and informed consent, and without providing a fair equivalent, and it did so in serious breach of the Treaty of Waitangi.

(3) Response from hapū, the Crown and Parliament

[27] In the light of the Tribunal's report,[47] the leadership of Ngāti Wahaio and Ngāti Whakaue approached the Crown on 1 April 2008 with a joint proposal to vest the Whakarewarewa Thermal Springs and Roto-a-Tamaheke Reserve in a trust.[48] This arose because Ngāti Whakaue were not included in the forthcoming Arawa settlement legislation despite the Tribunal's finding that they should be recognised as owners in common with Ngāti Wahiao of the geothermal valley.[49] It was deemed appropriate to progress the proposal outside the settlement framework as it would strengthen the Crown-Māori relationship generally and the process was not providing any redress to Ngāti Whakaue.[50] The process was described in the House as "basically a transfer of assets to their rightful owners" rather than as a Treaty settlement.[51]

(a) Legislative process

[28] The Crown agreed to the joint proposal to transfer the lands to a settlement entity, Te Pūmautanga o Te Arawa Trust. But, significantly, the Minister of Māori Affairs wanted an assurance that this taonga or treasure would be vested in the hands of the appropriate hapū.[52] The Vesting Deed was signed on 8 August 2008 by the Attorney-General, the Minister of Māori Affairs and the Minister of Tourism on behalf of the Crown, and representatives of Ngāti Whakaue, Ngāti Wahiao and Te Pūmautanga o Te Arawa.[53] On 28 August 2008, while considering Te Arawa settlement legislation, the Māori Affairs Committee reported that it had:[54]

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47 A pre-publication version of the report was released in parts in June, July, August and November 2007 before its ultimate publication on 16 June 2008.
48 (22 September 2009) 657 NZPD 6714 and 6721.
49 (22 September 2009) 657 NZPD 6721.
50 (22 September 2009) 657 NZPD 6714.
51 (22 September 2009) 657 NZPD 6717.
52 (22 September 2009) 657 NZPD 6722.
53 (22 September 2009) 657 NZPD 6725.
54 Affiliate Te Arawa Iwi and Hapu Claims Settlement Bill (223-1) (select committee report) at 9.

> … sought advice on the impact of [the Affiliate Te Arawa Iwi and Hapu Claims Settlement Bill] on the ability of Tuhourangi Ngati Wahiao interests to be separately recognised in the pending legislation for the Whakarewarewa Valley. Officials advised us that the Affiliate Te Arawa Bill includes a mechanism for transferring the land to Tuhourangi Ngati Wahiao for on-transfer to a joint trust with Ngati Whakaue, and that this joint trust will be the vehicle for determining the ultimate ownership and management of the land, including the separate interests of Tuhourangi and Ngati Wahiao.

[29] The next day representatives of Ngāti Whakaue and Ngāti Wahiao executed the Trust Deed, the terms of which found expression and effect in the Vesting Act. On 19 June 2009 the Committee reported that:[55]

> … the [Whakarewarewa and Roto-a-Tamaheke Vesting Bill] provides for on-vesting of the Whakarewarewa Thermal Springs Reserve and Roto-a-Tamaheke Reserve from Te Pūmautanga o Te Arawa Trust, established under the Affiliate Te Arawa Iwi and Hapū Claims Settlement Act 2008, to the joint trust. The trust deed establishing the joint trust sets out the Beneficial Entitlement Determination Procedure, and provides for the possible transfer of some or all of those lands following the determination. This mana whenua determination procedure allows the reserve land to be vested separately in the three hapū of Ngāti Wāhiao and the iwi of Tūhourangi in the future.
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> …
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> We consider that the process will give all parties confidence in the Beneficial Entitlement Determination Procedure.

[30] The passage of the Bill through the House enjoyed cross-party support. Its enactment was celebrated as an example of trust and cooperation between iwi and the Crown,[56] with the Minister of Māori Affairs affirming that:[57]

> … at the heart of this bill is a special connection to the land: mana whenua. As we know, mana over whenua can come to people through succession, through the spilling of blood, to cement relationships, even through the spirit of generosity, or as a sincere act of compassion or aroha. Then there are the courts, but we do not want to go there. [The bill] reflects a unique milestone, in that all parties have agreed to initiate a process after the bill becomes law that will allow iwi to determine the allocation of mana whenua interests in the land. The bill itself does not specify how this process should occur. It is a matter for iwi and hapū parties to determine, and the process will be undertaken in accordance with tikanga. A key principle we have respected is that mandate and management issues are always the domain of iwi and hapū to sort out in accordance with their tikanga.

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55 Whakarewarewa and Roto-a-Tamaheke Vesting Bill (290-12) (select committee report) at 2 and 4.

56 (22 September 2009) 657 NZPD 6714–6728; (27 October 2009) 658 NZPD 7564–7579.

57 (27 October 2009) 658 NZPD 7567–7568.

(b) Vesting Act

[31] The preamble to the Vesting Act materially provides:

> (9) The deed establishing the joint trust includes a procedure for determining the beneficial entitlement to the fee simple estate in the Whakarewarewa Valley Land and the Roto-a-Tamaheke Reserve and for the possible transfer of some or all of those lands following the determination. …

[32] The preamble also recites the nature of the agreements reached between Ngāti Whakaue and Ngāti Wahiao (the Trust Deed) and with the Crown and the trustees of Te Pūmautanga o Te Arawa Trust (the Vesting Deed). The Crown agreed to transfer the fee simple estate in the Southern Arikikapakapa Reserve to the Trust; and Te Pūmautanga trustees agreed to transfer to the Trust the fee simple estate in the Whakarewarewa Thermal Springs Reserve and the Roto-a-Tamaheke Reserve. The preamble affirms that all the interested parties:

> (10) … have the right to have their claims to the beneficial ownership of [the lands] independently determined through [the Beneficial Entitlement Determination Procedure].

(c) Trust Deed

[33] The comprehensive Trust Deed provides, among other things, for the creation of the Trust for the principal purposes of (a) completing the Vesting Deed; (b) receiving and holding the Trust's property; (c) continuing the lease of the lands; (d) establishing a replacement Te Puia entity; and, of particular significance to this appeal, (e) compliance with the result of the Beneficial Entitlement Determination Procedure if invoked. Indeed, the Trust Deed is fundamentally geared toward determining the "Final Beneficiary" of Roto-a-Tamaheke Reserve, Whakarewarewa Thermal Springs Reserve and the Southern Arikikapakapa Reserve.

[34] Clause 1.1 of the Trust Deed contains these relevant definitions:

> …
>
> **Beneficial Entitlement Determination Procedure** means the procedure set out in the Second Schedule to this deed to determine the ownership of the Lands as between the Ngati Whakaue Interest and the Tuhourangi Ngati Wahiao Interest, including in what proportions as between them (if any);

…

Final Beneficiary means:

(a) The hapu and the individuals who are determined to be the beneficial owners of the titles to the Lands in whatever proportions (if any) as a consequence of either:

(i) Agreement by the Claimants; or

(ii) The findings of the Beneficial Entitlement Determination Procedure;

and advised in writing to the Initial Trustees; and

(b) Any reference in this deed to an action being taken by or for the benefit of the Final Beneficiary, includes reference to the hapu or individuals who are determined to be the beneficial owner of a specific title when acting in respect of that specific title;

…

Lands mean:

(a) Roto-a-Tamaheke Reserve;

(b) Whakarewarewa Thermal Springs Reserve;

(c) Southern Arikikapakapa Reserve.

Ngati Whakaue Interest means:

(a) The three (3) hapu of Ngati Hurungaterangi, Ngati Taeotu me Ngati Te Kahu o Ngati Whakaue and more particularly those individuals who are descended from one or more of the listed persons by name and by hapu as set out in *the decision of the Native Land Court in respect of Whakarewarewa No 3 Block and dated 24th October 1893 at 28 ROT 124–166*;

(b) Those individuals who are descended from one or more of the 295 listed owners by name and by hapu as set out in *the decision of the Native Land Court in respect of the Pukeroa Oruawhata Block, of which the Arikikapakapa Block forms part, and dated the 27th April 1882* as represented by the trustees of Pukeroa Oruawhata Trust;

…

Tuhourangi Ngati Wahiao Interest means the individuals who comprise Tuhourangi Ngati Wahiao as defined in the Affiliate Te Arawa Iwi/Hapu Deed of Settlement;

…

(Our emphasis of the Native Land Court decisions.)

The Claimant Definition Schedule to the Affiliate Te Arawa Iwi/Hapu Deed of Settlement, dated 11 June 2008, materially provides:

> 1.13 **Tuhourangi Ngati Wahiao:**
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> 1.13.1 means the collective group composed of:
>
> (a) individuals descended from one or more Tuhourangi Ngati Wahiao Ancestors; and
>
> (b) individuals who are members of the subgroups referred to in paragraph 1.13.3(a); and
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> 1.13.2 means every individual referred to in paragraph 1.13.1; and
>
> 1.13.3 includes the following subgroups:
>
> (a) Ngati Apumoana, Ngati Hinemihi, Ngati Hinganoa, Ngati Huarere, Ngati Kahu Upoko, Ngati Puta, Ngati Taoi, Ngati Te Apiti, Ngati Tionga, Ngati Tumatawera, Ngati Tuohonoa and Ngati Uruhina; and
>
> (b) any iwi, hapu, whanau, or group of individuals to the extent that that iwi, hapu, whanau, or group of individuals is composed of individuals referred to in paragraph 1.13.1;
>
> 1.14 **Tuhourangi Ngati Wahiao Ancestor** means an individual who:
>
> 1.14.1 exercised Customary Rights by virtue of being descended from Tuhourangi; and
>
> 1.14.2 exercised the Customary Rights predominantly in relation to Rotomahana Parekarangi 6 or Whakarewarewa 2 at any time after 6 February 1840;

[35] The Second Schedule to the Trust Deed sets out this four-step process for resolving the ultimate question of ownership: (a) *initiation* through service of a determination notice on behalf of specified individuals or hapū; (b) a kanohi ki te kanohi (face-to-face) discussion with a view to reaching a *determination by agreement* as to ownership of the lands; (c) formal *mediation*; and (d) failing agreement, *adjudication* by a panel of three independent members appointed unanimously by the trustees. The Second Schedule also contemplates a fifth and final step: the *implementation* of the panel's determination of beneficial ownership. Pursuant to cl 1.1(b) of the Second Schedule, the determination notice must include

"the area or areas of the Lands over which [individuals and hapū] claim exclusive beneficial ownership" and "the evidential basis for such claims".

[36] Ngāti Whakaue initiated the arbitral process by serving a determination notice on 28 May 2012. The trustees concluded that face-to-face discussion and mediation — the agreed second and third steps — would be futile. Instead they referred the dispute for adjudication in accordance with cl 15 of the Second Schedule, which materially states as follows:

> 15.4 In hearing the claims the Adjudication Panel will have regard to mana whenua and customary aspects of land tenure pre-Native Land Court in determining the matter of ownership of the Lands. By way of guidance the Adjudication Panel may be assisted by the following
>
> (a) Mana whenua is the mana that Iwi/hapu/individuals traditionally held and exercised over the land, determined according to tikanga including, but not limited to, such factors as: take whenua; demonstration of ahi kaa roa, ahi tahutahu or ahi mataotao:
>
> (b) Evidence of mana whenua may be derived from a range of sources of knowledge including: oral korero, including whakapapa, waiata and tribal history; and written sources, Native Land Court evidence and decisions, research reports, and other records;
>
> …
>
> 15.7 The Adjudication Panel will reach a decision on the ownership of the Lands as soon as is practicable after the conclusion of the adjudication. The Adjudication Panel shall have the power to determine the Final Beneficiary and have the power consequentially to direct the Trustees to:
>
> (a) Allocate the Lands to one or more than one grouping of the Final Beneficiary in joint or multiple ownership as tenants in common in a block, either divided in equal shares or proportionally according to the respective interests so determined;
>
> (b) Subdivide the Lands and allocate the subdivided portions; or
>
> (c) Implement any other solutions proposed in the adjudication, subject to any modifications required by the Adjudication Panel; or
>
> (d) Consider consequential amendments to this deed.
>
> 15.8 A decision with reasons will be given by the Adjudication Panel and the Matter will then be implemented in accordance with Step 5.

> The decision of the Adjudication Panel will be final and binding on all of those who derive from the Claimants.

(d) Mana whenua

[37] It is worth pausing to explain briefly the indicia of mana whenua under the Trust Deed. Clause 15.4(a) notes tikanga factors by reference to which the panel can determine mana whenua: take whenua; and demonstration of ahi kaa roa, ahi tahutahu or ahi mataotao. The term "take" first emerged in relation to aboriginal title in the early nineteenth century, denoting a "root" or foundation to an assertion of interest in a territorial tract which might be embodied in a multiplicity of persons.[58] It has taken on these meanings in contemporary tikanga and law:[59]

> **take**
>
> The base, root or origin of an object or process, or the central authority of a tribe or community. The notion of **take** includes both the subject of an argument or discussion, and the cause or reason for a phenomenon, state of affairs or course of action. In modern times **take** has taken on a further specialised meaning of 'right', especially in relation to land.

[38] Take whenua — take in relation to land — can be expressed through several different connections with the land that are relevant to customary title. Take tūpuna refers to an ancestral right whereas take raupatu stems from having conquered the land and removed the former occupants, both of which are reinforced by take noho tuturu (occupation) and take toa (the power to retain possession).[60]

[39] These take are bound up with the other tikanga factors mentioned in cl 15.4(a). Ahi kaa roa literally means a long-burning fire, referring to one of the phenomena through which the right to title by occupation can be both symbolised and established.[61] Ahi tahutahu, on the other hand, refers to intermittent fires of occupation through which customary title can be maintained. Lastly, ahi mataotao — cooling fires of occupation — is used to describe Māori land where the customary title may face extinguishment because of decreased occupation or abandonment.

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58 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 138.

59 Māmari Stephens and Mary Boyce (eds) *He Papakupu Rea Ture: A Dictionary of Māori Legal Terms* (LexisNexis, Wellington, 2013) at 71 (emphasis in original).

60 HC judgment, above n 7, at [43].

61 Stephens and Boyce, above n 59, at 1.

(4) Determination notices

[40] The substance of Ngāti Whakaue's appeal must be addressed by reference to the formal determination notices filed by the parties and the arguments run by the parties throughout the 13-day hearing. The notices are analogous to pleadings in a statement of claim in an ordinary legal proceeding. They served the critical purpose of framing the issues arising from the competing cases which required the panel's determination.

[41] In a composite way, the interests of Ngāti Whakaue and the Pukeroa Oruawhata Trust were aligned on one side, the latter being a representative body for individual beneficiaries within the multiple Ngāti Whakaue hapū; and the interests of Ngāti Wahiao and the Tuhourangi Valley Authority were aligned on the other, the latter being an iwi entity established to hold the proceeds of Treaty of Waitangi claims.

[42] Ngāti Whakaue's determination notice claimed exclusive beneficial ownership to the lands and asserted:

> The evidential basis for our claims (vis-à-vis the said Lands) includes, inter alia: take raupatu; take toa; the ability and capacity to exercise our authorities without restriction; our exclusive holdings of lands directly adjacent thereto, the ability and capacity to determine access thereto in the case of the visitors; the ability and capacity to exercise occupation, possession and uses thereof; the fact that the Crown acting in bad faith acquired it directly from us; and the wish of our Hapu and our people declared by hui at Te Papaiouru 20 May 2012.

[43] Ngāti Wahiao's more comprehensive determination notice was filed on 26 June 2012, claiming exclusive beneficial ownership of the lands on the following grounds:

(a) Ngāti Wahiao (being the composite of its hapū) have held unbroken customary occupation of the Whakarewarewa block since 1840 and have never been disturbed from continuing possession, with the areas of the Whakarewarewa Thermal Springs Reserve and the Roto-a-Tamaheke Reserve remaining under Ngāti Wahiao's customary control.

(b) In assessing the sharing of customary interests between Ngāti Wahiao and Ngāti Whakaue, a joint (50:50) sharing of the Whakarewarewa block was the minimum necessary recognition required to reflect Ngāti Wahiao's interest in the Whakarewarewa Valley lands.

(c) The Court's adjustment of Ngāti Wahiao's interests on partition in 1889 and on the rehearing in 1893 was unprincipled, incorrect and unlawful. The return of the valley lands to Ngāti Wahiao would reflect both their customary interest in the area and be an appropriate redress for the Court's eight-per-cent award at the 1893 rehearing.

(d) In spite of many challenges over the past 120 years, Ngāti Wahiao have continued to hold and reside on the majority of the Whakarewarewa lands granted to their members, and have since maintained their cultural, social and physical base in their living kainga of Whakarewarewa Village, confirming their cultural connection to the lands and resources. By comparison Ngāti Whakaue sold the majority of the lands granted to them within two years of the Court award, indicating a lack of genuine cultural connection to those lands.

[44] Ngāti Wahiao also claimed that part of the Southern Arikikapakapa Reserve running from the source of the Allum Spring situated on Tihiotonga Mountain to what was formerly the Allum Lake on these grounds:

(a) Ngāti Wahiao have permanently occupied the Whakarewarewa region including adjacent lands on the western side of the Puarenga Stream.

(b) In addition to their history, Ngāti Wahiao and Tuhourangi showed their interests in the area by thoroughly disrupting the attempted survey of the boundary of the Pukeroa Oruawhata Block and disputing the biased Native Land Court findings in favour of claimants who had just negotiated with Judge Fenton to establish Rotorua.

(c) The Court failed to address adequately or acknowledge Ngāti Wahiao's claims and therefore failed to award any interest to Ngāti Wahiao when they were in fact entitled to that part of the Southern Arikikapakapa Reserve claimed.

(d) The return of the Arikikapakapa lands to Ngāti Wahiao would reflect their customary interest in the area and be appropriate redress for the Court's original failure to award any of these lands.

(5) Arguments at the hearing

[45] Ngāti Whakaue's case was clarified, and considerably expanded, by the opening address of its counsel, John Kahukiwa, at the hearings before the arbitral panel. In summary, Ngāti Whakaue's case was advanced on two principal grounds:

(a) In accordance with Nga Tikanga o Te Arawa, at all material times up to and including 1893 it was a matter of historical fact that Ngāti Whakaue held the mana over the territory in which the lands were located and critically exercised its use at their pleasure. Notice was given of the evidence which would be called before the panel in support, principally the sources of that mana and the incidences of its exercise.

(b) In accordance with law, it was again a matter of historical fact that it was from this exercise of mana through certain known individuals that the Crown, through purported purchase transactions, wrongfully gained ownership of and title to the lands between 1893 and 1901. As a result, the lands should rightly revest in Ngāti Whakaue or their present-day successors.

[46] Ngāti Whakaue's case was that by the end of the nineteenth century they understood Ngāti Wahiao's principal pa kainga were at Motutawa and Tuhourangi's was at Tarawera. Ngāti Wahiao's presence at Whakarewarewa up until 1886 was merely that of itinerant users with Ngāti Whakaue's permission.

[47] Ngāti Whakaue's case raised these specific grounds. First, they relied on Te Ture Whenua Māori Act which materially provides:

> **348 Savings of effect of Land titles Protection Act 1908**
>
> Subject to the provisions of sections 44 to 49, no order of the Maori Land Court, Crown grant, or other instrument of title that, at the commencement of the Native Land Act 1909, was within the protection of the Land Titles Protection Act 1908 shall, on any grounds whatever, be called in question in any court or in any proceedings.

[48] Ngāti Whakaue's case was that s 348 had the effect of making all the Native Land Court decisions determinative of the parties' ownership interests and they could not be called into question by the arbitral panel, referring in support to the list of individuals of the three hapū from whom the Crown acquired shares on which to base its titles. Ngāti Whakaue's case was that, while there were inherent flaws in the Court's processes, there was no evidence to indicate that either party was unfairly treated; and on a restitutionary basis, following logically from the Crown's revesting in acknowledgement of its historical wrongdoing, title must return to those from whom the Crown took it.

[49] Second, Ngāti Whakaue argued that (a) the Native Land Court had access to better evidence than was now available; (b) the best evidence was no longer available because all the material witnesses were dead; (c) the evidence before the Court was a satisfactory foundation for its decisions on ownership; and (d) no new evidence had emerged which was relevant to the identity of the iwi which held mana whenua to the lands.

[50] Third, Ngāti Whakaue argued that the circumstances by which the Crown acquired the lands did not support an inference that Ngāti Whakaue did not hold the relevant mana. They pointed to the Crown's history of acquisition of all the lands it wanted to acquire by less than scrupulous means. The Crown had long since breached its undertaking under the Fenton Agreement relating to the township leasing.[62] Ngāti Whakaue's evidence would prove that (a) the hapū wanted to hold the lands and regulate the administration themselves; (b) a compulsory taking would

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[62] Under the Fenton Agreement the land was to be cut up into sections and leased, rather than sold, with the income to be paid to the Māori owners as determined by the Native Land Court: Boast, above n 16, at 888.

have transpired if the Court's decisions proved insufficient to complete acquisition; (c) Ngāti Whakaue were economically precarious but generous, especially after Tarawera's eruption, and gave land to Tuhourangi at Ngapuna for their care; and (d) by 1880 the Crown's exercise and imposition of its sovereignty had started to take effect.

[51] The Pukeroa Oruawhata Trust argued that through a succession of battles Ngāti Whakaue defeated Ngāti Wahiao and other tribes, who then abandoned Pukeroa Hill and the surrounding area including South Arikikapakapa. Ngāti Whakaue's mana through take toa was established as a result, and confirmed by its exclusive exercise of mana ever since.

[52] In amplification of Ngāti Wahiao's case set out in its determination notice, their counsel Felix Geiringer advanced the primary argument that the Native Land Court's decisions had unfairly deprived them of their lands. In this respect the Court had been more a vehicle for facilitating the alienation of Māori land than a vehicle for delivering justice.

[53] Also, Ngāti Wahiao disagreed that s 348 applied. It would be inconsistent for the terms and spirit of the Vesting Act and the Trust Deed if the panel was prevented from going behind the Court's decisions. This would elevate the decisions from simply being one of a number of sources to being presumptively determinative of mana whenua. Moreover, the Court hearings themselves were tainted by unfairness and did not accurately reflect customary interests in the land at the time. The panel should take into account subsequent events, particularly the speed and volume of the sale of Ngāti Whakaue's interests compared to Ngāti Wahiao.

[54] Our summary highlights the profound differences which underlay the reference of this dispute to arbitration, the importance of the panel's correct identification of the issues arising for its determination, and the necessity for its appropriate engagement with the competing cases advanced before it.

Award

[55] After dealing with a number of preliminary points, the panel narrated each party's claim to the land without, however, identifying the contentious issues which had emerged between them through the pleadings and hearing process.[63] Instead it identified these three issues as arising for its determination: (a) which claimants are eligible to be final beneficiaries; (b) what is the objective of the determination; and (c) what are the criteria for the determination?[64]

[56] In addressing these three issues the panel reached the uncontentious conclusion that the three Ngāti Whakaue hapū, the three Ngāti Wahiao hapū and the beneficiaries of the Trust were eligible to be final beneficiaries but that the Tuhourangi Tribunal Authority was not.[65] The panel regarded its objective as being the determination of which hapū or individuals should be recognised as owners of the three reserves and, if more than one, in what proportions.[66] The criteria for its determination were those set out in cl 15.4 of the Second Schedule to the Trust Deed: to have regard to mana whenua and customary aspects of land tenure prior to the Native Land Court decisions, reserving to itself nevertheless a wide discretion as to what evidence it considered relevant and the weight to be accorded to it.[67]

[57] It is appropriate, because of its importance to Ngāti Whakaue's appeal, that we set out in full the substantive balance of the award which immediately followed the panel's statement of issues and is said to constitute its reasons:

> **Conclusion**
>
> 62. We have carefully reviewed the extensive evidence we have heard in light of clause 15.4 and the helpful submissions of counsel (summarised at [26] to [55] above).
>
> 63. In doing so we have placed considerable weight on the evidence presented to the [Native Land Court] by witnesses whose knowledge of the matters to which they were deposing was much more immediate than could be expected of any witness giving evidence some 130 years later. That evidence does provide strong support for Ngāti Whakaue's claim of occupation.

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63 Award, above n 4, at [26]–[55].
64 At [56].
65 At [57]–[59].
66 At [60].
67 At [61].

64. We have not however accorded similar weight to the decisions of the Court, for a number of reasons. First, we think that there is considerable substance to the submissions we heard as to why the conclusions of the Court should be accorded less weight than would be accorded Court decisions today. Secondly, as we read s 348 of Te Ture Whenua Māori Act 1993 it is not possible for the orders of the Court "to be called into question" in these proceedings "on any grounds whatever". Although the legislative intention may or may not have been to cover situations such as the present, the section is at least arguably applicable and we would not want to transgress it by reassessing the correctness of the decisions. Thirdly, the sales which occurred subsequent to the 1893 decision make it necessary to consider afresh the question of mana whenua.

65. Developing that final point further, we consider that the consequence of the sale of land by a willing seller is that mana whenua moves from the seller to the buyer. As the evidence summarised at para [46] above establishes, a striking feature of the evidence is the speed and volume of sales by those of Ngāti Whakaue who were awarded land compared to the very low level of sales by Ngāti Wahiao. While financial hardship and less than scrupulous dealings by Crown agents may well have contributed to the Ngāti Whakaue sales, that only serves to emphasise the point that Ngāti Wahiao, facing at least as great hardship and the same agents, in almost all cases refused to sell. The differing approaches to selling may also be explained, in part, by Whakarewarewa being the base of the Ngāti Wahiao hapū, whereas that of the Ngāti Whakaue hapū was at Ohinemutu. We therefore regard the evidence of sales and lack of sales as providing strong support for Ngāti Wahiao's claim to mana whenua.

66. In summary, we have concluded that the three Ngāti Wahiao hapū and the three Ngāti Whakaue hapū have both established an ownership interest in Te Roto-a-Tamaheke Reserve and the Whakarewarewa Thermal Springs Reserve. Similarly, the three Ngāti Wahiao hapū and the Pukeroa Oruawhata Trust have both established an ownership interest in the Southern Arikikapakapa Reserve.

67. We think that those interests should be recognised as undivided shares. In other words, each interest should share in all the reserve rather than different parts of a reserve being allocated to different interests. The question of whether the shares should be equal is a difficult one. If we had been asked to apportion all the Whakarewarewa Valley lands we would have inclined to the view that the Ngāti Wahiao interest should be somewhat greater than the Ngāti Whakaue interest. We are mindful however that Ngāti Wahiao continue to own most of the Whakarewarewa No 2 block which was awarded to them in 1893 whereas, following the Crown purchases, the Court in 1896 awarded to the Crown some 747 of the 871 acres in the Whakarewarewa No 1 block and 157 of the 215 acres in the Whakarewarewa No 2 block. We think therefore that justice will be done if ownership of the lands in the three reserves is apportioned equally between Ngāti Wahiao and Ngāti Whakaue.

[58] After repeating its determination, the panel noted as follows:

> 69. Having made this decision, we think that the parties should be given the opportunity to confer in an attempt to agree on how the decision should be given practical effect, including what is to be the continuing role (if any) of the Joint Trust. We envisage that the involvement of Sir Wira Gardiner as facilitator or mediator could well assist in progressing those discussions. Against the possibility that agreement on one or more issues cannot be reached, we reserve the right to all parties to apply to us at any time for any further decisions or directions which may be required.

[59] It is not contested that the panel and its award were governed by the Arbitration Act. We must determine whether the award as a whole, but these passages in particular, satisfied the panel's obligation deriving from art 31(2) of sch 1 to the Arbitration Act and cl 15.8 of the Second Schedule to the Trust Deed to state the reasons on which the award is based. Moore J subjected this issue to a thorough analysis, concluding "by a fine margin" that the panel properly discharged its legal duty.[68] The question is whether that equivocal conclusion can be justified having regard to the Judge's own earlier acknowledgment of the paucity of the panel's reasons.[69]

Obligation to give reasons

(1) Statutory requirement

[60] Article 31(2) of sch 1 to the Arbitration Act marked an important legislative development by requiring that an arbitral award "shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given". Neither its predecessor, the Arbitration Act 1908, nor the common law imposed an obligation to deliver a reasoned award. Its introduction in 1996 along with a range of other new measures incorporated the provisions of the UNCITRAL Model Law on International Commercial Arbitration,[70] recognised the increasing significance of arbitration as a means of formal dispute resolution and aligned more closely the arbitral and judicial functions and our statutory code with international practice.

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68 HC judgment, above n 7, at [112]–[137].

69 At [120].

70 *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law* GA Res 40/72 (1985).

Compliance with the obligation is now mandatory unless the parties specifically agree otherwise. The Law Commission earlier reported "strong support for such a change" to New Zealand's arbitral jurisdiction.[71]

(2) Purpose of duty

[61] The purpose of the arbitral obligation to give reasons merits restatement. Within the arbitral framework for determining competing rights and obligations, the reasons explain how the adjudicator progressed from a particular state of affairs to a particular result. The reasons are the articulation of the logical process employed by a person whose particular skills, expertise or qualification the parties have chosen to decide their dispute. The reasons expose to the parties the disciplined thought pattern of the specialist adjudicator, thereby dispelling any suggestion of arbitrariness. A requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.[72]

[62] In *Flannery v Halifax Estate Agencies Ltd* the English Court of Appeal observed that the duty to give reasons is a function of due process, and therefore of justice.[73] Fairness requires that the parties, especially the disappointed party, should be left in no doubt why they have won or lost or their expectations have otherwise been frustrated. Without reasons the disappointed party will not know whether the panel has misdirected itself, and thus whether he or she may have an available right of appeal. These observations were made in the context of determining whether a Judge at first instance was required to give reasons for a conclusion essential to his decision — in that case for preferring one expert witness to another. The principle holds equally true, however, for the arbitral process. As we are about to explain, the nature and extent of the reasons required to fulfil this function varies according to the context. But the underlying purpose for which reasons are necessary remains common to both processes.

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71 Law Commission *Arbitration* (NZLC R20, 1991) at [388].
72 *Flannery v Halifax Estate Agencies Ltd*, above n 8, at 381.
73 At 381–382.

(3) Nature of duty

[63] The leading authorities stand for a common theme: the nature and extent of the duty to give reasons for an award necessarily imports a degree of flexibility according to the circumstances, including the subject matter being arbitrated, its significance to the parties and the interests at stake.[74] The subject matter may range from a mundane dispute between parties to a standard-form building contract to a multinational contest over resource rights. The standard required is necessarily dictated by the context. The reasons must reflect the importance of the arbitral reference and the panel's conclusion. There is no qualitative measure of adequacy. The reasons are not required to meet a minimum criterion or extent — or to satisfy the curial standard[75] — except that they must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points. They must engage with the parties' competing cases and the evidence sufficiently to justify the result.[76] They must be the reasons on which the award is based; if they do not satisfy these requirements, they are not reasons.

(4) Requirements for this award

[64] Mr Hodder QC for Ngāti Wahiao acknowledges the relative brevity of the panel's reasoning but submits that it was nevertheless appropriate and sufficient. He submits that a number of contextual factors weigh against an obligation to give detailed reasons in this arbitration, including that the panel was multi-member and jointly established to include expertise in the law in general and especially tikanga; the findings required did not involve a commercial dispute but rather competing historic claims of the respective hapū to the lands; the hearing had traversed a very wide range and large volume of evidence and submissions; the findings were necessarily based on both the existence and application of mana whenua principles; and the parties would be co-existing neighbours and co-owners for the foreseeable

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74 *Casata Ltd v General Distributors Ltd*, above n 8, at [91]; *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 (CA) at [57]; *Westport Insurance Corp v Gordian Runoff Ltd*, above n 8, at [53]; *Flannery v Halifax Estate Agencies Ltd*, above n 8, at 381–382.

75 *Westport Insurance Corp v Gordian Runoff Ltd*, above n 8, at [53] and [169].

76 *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 (CA) at 132–133.

future with a sense in refraining from pronouncing on specific historical issues which might well cause offense.

[65] In support of this submission Mr Hodder relies on brief obiter observations in *Casata v General Distributors Ltd*,[77] the only previous occasion on which this Court has considered the obligation to give reasons. The Court noted that elaborate reasons were not required for each and every component of an award; and that an expert arbitral panel was entitled to express a conclusory preference for one side's experts over another. However, the statements in *Casata* were made in the context of an unsuccessful challenge to an arbitrator's determination on a rent review. The specific complaint was of a failure by the tribunal to provide a coherent and reasoned rebuttal to one particular aspect of the expert valuation evidence — economic evidence tendered to provide independent verification of the proper ground-rental rate on which valuers had expressed competing opinions. This case is very different. This panel was also of an expert nature but the evidence it heard and its context was of an incomparably more complex nature than technical evidence about rental levels. Moreover, *Casata* reaffirmed the principle that "it is necessary that the arbitrator deal with the issues raised … and make all necessary findings of fact".[78]

[66] In support of his submission that the award was inadequately reasoned, Mr Goddard QC for Ngāti Whakaue cited a decision of the Permanent Court of Arbitration on appeal from a determination of the Abyei Borders Commission, a panel of experts constituted to delimit the boundaries to an oil-rich enclave between North Sudan and South Sudan.[79] While the Court was addressing the threshold question of whether the panel was required to state reasons, its decision highlights the critical link between the significance of the issues, the processes adopted by the parties, and the nature and extent of the reasons required to respond to those issues.

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77 *Casata Ltd v General Distributors Ltd*, above n 8, at [88]–[92].

78 At [90] quoting *Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd* (1991) 22 NSWLR 653 (SC) at 657.

79 *Abyei Arbitration (Government of Sudan v Sudan People's Liberation Movement/Army) (Final Award)* (2009) XXX RIAA 145 (PCA).

[67] In outlining the extent of the duty to state reasons, the Court emphasised that the Commission "was created as part of an extraordinarily complex political process, which is not comparable to ordinary commercial or investment arbitrations".[80] Against the backdrop of "years of uncertainty" and the "untold hardship" of civil war, the Commission was to "definitively determine" the boundaries;[81] and, whatever its conclusions:

> 522. … Stakeholders were entitled to know on what grounds the … decision was made. Indeed, such knowledge could be critical to the legitimacy and acceptability of the decision.

[68] The Court noted it would be unusual for the Commission to invite the parties to make submissions and then reach a decision which did not address them;[82] and that the requirement to state reasons also functions as an "informal control mechanism" which helps to "dispel any hint of arbitrariness and ensure the presence of fairness".[83] The Court held that:

> 534. … The degree of reasoning provided … for each of [the Commission's] conclusions had to be commensurate with the importance of those conclusions, as the articulation of reasons is the principal way by which reviewing bodies … may ascertain reasonableness. … [M]uch of the evidence in this case is marked, in varying degrees, by some imprecision and is often circumstantial, and to that extent, the subjective assessment necessary when evaluating such evidence can be taken into account. This does not dilute the necessity of articulating reasons in itself, however.

[69] The Court's statements apply equally to this arbitration. Mr Hodder is correct, nevertheless, that brevity is often acceptable in an arbitral panel's assessment of evidence and factual findings, reflecting the principles of arbitral finality and party autonomy underpinning the Arbitration Act. Indeed, this panel was bound by cl 15.7 of the Trust Deed to reach its decision "as soon as is practicable". However, Mr Hodder acknowledges this critical qualification: brevity is acceptable provided that the circumstances justify it and there is reasonable clarity about the core basis for the conclusion.[84] As *Casata* confirms, the reasons must not be so economical

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80 At [520].
81 At [522].
82 At [523].
83 At [524].
84 *Stefan v General Medical Council* [1999] 1 WLR 1293 (PC) at 1304.

that they deprive a party of having a question of law considered by the High Court if necessary.[85]

[70] It is clear that the arbitration was of great significance to all parties. It would be the culmination of a long and complex process. We are satisfied that this dispute falls at the upper end of the spectrum of subject-matter importance referred for arbitration. As Mr Goddard observed, the panel was formed to eliminate by its final determination grievances of great historical and spiritual significance to the parties. In our judgment these grievances could only be laid finally to rest by an adequately reasoned award.

[71] Contrary to Mr Hodder's submission, none of these contextual factors which he identified favour, let alone justify, anything short of an adequately reasoned award — one which engaged directly with the substance of the parties' competing cases and explained the panel's finding that each was entitled at the relevant dates to an undivided half share in all the land with sufficient detail and logic to enable the parties to understand its rationale. While the parties deliberately chose the arbitral approach in preference to litigation through the courts, their appointment of a retired Supreme Court Judge to chair the panel is significant. His appointment must have reflected an expectation that the panel's reasons would be expressed with the depth and substance necessary to mark the solemnity of the task and stamp the award with the mana of a judicial equivalent. His inclusion alongside experts in tikanga reflects the trust vested in the panel to carry out independently, fairly and comprehensively the same inquiry into beneficial ownership of the lands which ought to have been undertaken by the Native Land Court prior to the Crown's acquisition.

[72] The parties' clear intent was that a panel of experts when constituted would undertake a comprehensive inquiry to determine as best it was able the issues raised by the determination notices. The apparently shared expectation was that the panel's decision would explain logically the reasons for its determination by reference to their competing cases, the relevant evidence on which it relied and its factual findings on each particular block of land with its own distinctive history. The panel

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[85] *Casata Ltd v General Distributors Ltd*, above n 8, at [89].

would be expected to assess discretely the claims to each. This common expectation was reinforced by the Trust Deed's provisions which:

(a) specifically link the definitions of the Ngāti Whakaue and Ngāti Wahiao interests to the two Native Land Court decisions summarised above,[86] relating respectively to Arikikapakapa and Whakarewarewa blocks in April 1882 and October 1893;

(b) separately define the three blocks by reference to the specific allotments comprising each of them;

(c) require, under cl 1.1(b) of the Second Schedule, the determination notices to specify the particular area or areas within the blocks for which a party claims exclusive beneficial ownership, with a supporting evidential basis; and

(d) require the panel when determining ownership to have regard to mana whenua and customary aspects of land tenure in place before the Native Land Court decisions.

[73] As Moore J observed, the central issue of ownership could only be determined by considering a voluminous body of historical evidence presented by both parties, which he fully summarised: 30 witnesses gave viva voce evidence and the transcript ran to 1,200 pages.[87] Experts were engaged by both sides. There were also site visits. And counsel for all parties made extensive submissions.[88]

[74] Moore J observed also that the subject matter and the nature of the evidence did not easily lend itself to an approach analogous to the judicial process of analysing the evidence and making reasoned findings.[89] However, we disagree with his view that this approach would have been both unsound and undesirable for several reasons;[90] and with his view that a more "impressionistic" approach was

86 See [34] and [13]–[18] of this judgment.
87 HC judgment, above n 7, at [121].
88 At [112]–[118].
89 At [123].
90 At [124].

appropriate to reflect "the imprecise and changeable aspects of tikanga".[91] Drawing analogies with the judicial process can be diversionary. Whether the requirement was analogous or not, we are satisfied that the panel was obliged to analyse the evidence and make reasoned findings.

[75] We emphasise three points. First, we repeat that the panel's overriding obligation was to perform its duties in accordance with the Trust Deed and the Arbitration Act. The subject matter of the dispute was essentially factual, and could only be determined by making reasoned findings on the evidence. The reasons did not need to be as extensive as may be expected of a formal judgment. But they had to be sufficiently full for the parties to understand the pathway taken by the panel to explain the result.

[76] Second, we accept that the panel faced obvious evidential difficulties, not least because of the intervening passage of time and the absence of contemporaneous documents from a society which recorded its history orally. The result would depend heavily upon the interpretation of contemporaneous documents produced by third parties, including transcripts of evidence given before the Native Land Court, the decisions themselves, and government records — all of which were open to question in terms of their reliability and freedom from bias. However, none of the factors could justify an impressionistic approach given the parties' choice of the discipline inherent to the arbitral process created by the Trust Deed as the best machinery for resolving this dispute. Any suggestion of impressionism is answered by the parties' stipulation for provision of determination notices and a reasoned award.

[77] Third, we add that the panel's historical disadvantage (due to the absence of direct access to contemporaneous evidence) was offset by an important compensating benefit. Detailed research produced by a new wave of institutions and scholars was now available on the critical indicia of mana whenua set out in the Trust Deed. The Native Land Court's decisions had fallen well short of the legal rigour and tikanga expertise currently expected of professionals determining mana whenua in these lands of high importance. We infer that the parties and the Crown held doubts about whether the general courts of New Zealand have reached the

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[91] At [130].

desired level of proficiency in tikanga to ensure the proper resolution of competing claims based on factors such as take whenua and ahi kaa roa.[92] Ngāti Wahiao and Ngāti Whakaue acted cooperatively in enlisting Parliament's support to create a private legal framework so as to simulate anew their day in court and have an impartial panel definitively determine their respective mana whenua.

Adequacy of the panel's reasons

[78] In a sense this was a single-issue dispute: which party or parties had mana whenua over which lands in 1882 and 1893? But, as we have outlined,[93] within this issue were separate inquiries to be undertaken by reference to different land and dates. The determination notices set the legal and factual framework. And the competing cases raised a series of important issues relating to each particular block which, if addressed logically, would have provided a focused path to resolution.

[79] Identification of a list of issues serves as an organised framework for the arbitral reasoning process. While it is not mandatory, arbitrators frequently request the parties to submit a list of issues for that purpose. In our judgment the panel's identification of three largely uncontentious and formalistic issues — instead of those emerging from the parties' cases — was an inadequate platform for its reasoning process. Eligibility for classification as a Final Beneficiary and the criteria for determination were defined in the Trust Deed and were not materially in dispute. The real issues were much more profound, and specific to each block of land.

[80] Nor was the panel's lengthy recital of the parties' cases and of some of the evidence a substitute for identifying the true issues. Mr Hodder defends that part of the award, describing it as a central part of the reasoning process. He says it is wrong to treat the six paragraphs (in reality five) under the heading "Conclusion" as constituting the sum of the panel's reasons. His argument may have had merit if the lengthy narrative had included findings on disputed points. But, while the narrative provides informative background, it does not assist in understanding the panel's reasoning.

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92 See for example the speech of the Minister of Māori Affairs at [30] of this judgment.
93 See [40]–[54] of this judgment.

[81] We shall now review the specific reasons given by the panel for its decision. We emphasise this is not in the nature of a qualitative analysis of a particular reason or reasons in the way an appellate court would determine an appeal against a judgment. It is rather an assessment of whether a reason, either on its own or together with others, might provide an adequate or sufficient explanation for the result.

[82] We begin, however, by noting that the panel appeared to justify avoiding a reasoned analysis of the indicia of mana whenua set out in cl 15.4:[94]

> The Trust Deed tells us however, "by way of guidance", that "we may be assisted" by the definition of mana whenua and the sources of evidence of mana whenua specified in paras (a) and (b) respectively …

It tells against the adequacy of the panel's reasons that nowhere in the balance of the award did the panel address expressly the various instances of take or ahi to which it was directed by the parties through the terms of the Trust Deed, the determination notices, their submissions and evidence throughout the hearing.

(1) Paragraph 63

[83] The first step in the panel's reasoning process was its recital that it had placed considerable weight on the evidence presented to the Native Land Court by witnesses whose knowledge of the subject matter was much more immediate than could be expected of a witness giving evidence some 130 years later. This factor was said to favour Ngāti Whakaue. However, it is a self-evident truth that, all other things being equal, contemporaneous evidence is generally more reliable than reconstruction. This statement does not tell us what evidence of particular witnesses was being relied upon in relation to each block of land. Moreover, the statement fails to address the questions raised by the Waitangi Tribunal about the integrity of the Court's processes such as its evidence-gathering.

[84] Nor does the statement explain why the panel completely disregarded the evidence of many other witnesses. We refer, for example, to the evidence given for Ngāti Wahiao by David Alexander, an environmental consultant and researcher who

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[94] Award, above n 4, at [61]. Compare [37]–[39] of this judgment.

has expertise in historical Māori land matters. His brief ran to almost 300 pages. Similarly, the award does not explain why the panel gave no express weight to the evidence of Drs Marian Mare and Aloma Palmer which supported Ngāti Wahiao's claim to mana whenua in all the lands including Whakarewarewa.

[85] Mr Hodder himself emphasised the comprehensive nature of Mr Alexander's report on mana whenua traditions in various time spans leading up to 1893. Two brief examples demonstrate the relevance of the contemporaneous evidence recorded throughout the report:

(a) Mr Alexander recited correspondence between the Chief Surveyor and Henry Mitchell, who in November 1881 was instructed to proceed with a survey of the region which placed Whakarewarewa outside the Tuhourangi area and within the claim area of Ngāti Whakaue. Mr Mitchell noted, however, that the boundary line was merely a "preliminary survey" because "some of the boundaries of this claim are disputed". Mr Alexander believed the boundary line put Ngāti Wahiao at a disadvantage from the start, and that the Native Land Court misread the nature of the boundary throughout its decisions to the benefit of Ngāti Whakaue.

(b) Mr Alexander emphasised Ngāti Wahiao's kaitiakitanga and control of the geothermal resource at Whakarewarewa as a tourist attraction. Ngāti Wahiao occupied the valley on a year-round basis from at least 1878 and "established a monopoly over tourism activities there, including access, guiding, and inviting visitors to view the day-to-day life of their kainga". Mr Alexander believes Ngāti Wahiao's invitation to the survivors of the 1886 Tarawera eruption shows they believed they had mana whenua in Whakarewarewa to give them the right to allow others to settle there. Moreover, an 1890 issue of the Bay of Plenty Times demonstrates that Pākehā were agitating for the Crown to take control of the geysers from the "native extortioners who at present own them", whom the paper described as "desperately lazy". This article offers a glimpse of the colonial expectations placed on the

> Native Land Court and evidences Ngāti Wahiao's control of the Whakarewarewa area.

[86] Without expressing a view on the reliability of Mr Alexander's report or the weight it might have been given, we are satisfied the panel was bound to address the evidence in apparent support of Ngāti Wahiao's claim and the doubts raised as to the soundness of the Native Land Court process. At the very least Mr Alexander's report highlights the broad body of contemporaneous evidence beyond the Native Land Court's minute book.

[87] Mr Hodder is correct that the Trust Deed gave the panel a discretion about the admissibility of and weight to be given to certain evidence. The panel was "master of the facts", to adopt Mr Hodder's description, and exclusively entitled to decide "the admissibility, relevance, materiality, and weight of any evidence".[95] But an evidentiary discretion does not absolve the panel from stating why it preferred certain evidence, and what that evidence was, and why it simply disregarded a large body of expert evidence, other than stating the obvious.

(2) Paragraph 64

[88] The second step in the panel's reasoning process was its explanation that it had not accorded particular weight to the Native Land Court decisions for three reasons: (a) the Court's decisions from the late nineteenth century would be accorded less weight than Māori Land Court decisions today; (b) s 348 of Te Ture Whenua Māori Act arguably barred the panel from reassessing the correctness of the Court's decision; and (c) the post-1893 sales require a fresh approach to the question of mana whenua.

[89] This brief statement appears to be a response to Ngāti Whakaue's primary case that the panel was bound to treat the Native Land Court decisions as final and conclusive evidence of beneficial ownership of the lands. Ngāti Whakaue sought to maintain the substantive benefit of the Court's decisions while arguing that their immediately consequential conduct in disposing of their lands to the Crown should

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95 Arbitration Act, sch 1, art 19(2).

be disregarded. This proposition found legal expression in arguments that the Court's judgments gave rise to an issue estoppel, barring the panel from making findings inconsistent with the earlier decisions; and that to depart from the Court's determinations would constitute a breach of s 348 in failing to treat those decisions as final and binding evidence of ownership.

[90] This same argument was at the forefront of Ngāti Whakaue's appeal to the High Court and before us. Mr Goddard submitted that res judicata applied because the decisions were of a court of record. In the result the decisions cannot be reopened in proceedings in the general courts or in an arbitral forum, and the adjudicative procedure provided by the Vesting Act cannot form the basis of an implied repeal of s 348.

[91] We can address this argument shortly. We agree with Moore J and Mr Hodder that the Native Land Court decisions did not give rise to an issue estoppel. In summary:

(a) Legal title to the lands was not an issue in the arbitration — the issue was which party was beneficially entitled to the lands before the Court orders were made.

(b) The panel's function was to determine beneficial ownership having regard to mana whenua and customary aspects of land tenure prior to the decisions — "an earlier decision of the Court as to legal title cannot prevent a later Court from considering beneficial ownership in accordance with tikanga in relation to the same land".[96]

(c) The Vesting Act was neutral but could not be interpreted as a statement of legislative intention that the competing claims would be determined by the decisions independently of the Trust Deed.

[92] We agree with Mr Hodder also that the integrity of the Native Land Court's processes and decisions were in serious question before the panel. It was for this

[96] HC judgment, above n 7, at [77].

very reason that the Crown agreed to return the lands to Māori. The agreement to refer this dispute to arbitration would be pointless if the legal position were otherwise. The Native Land Court's problems are well traversed in contemporary scholarship and Waitangi Tribunal reports. Moore J accepted the Waitangi Tribunal's thesis that the Court's process of ascertaining title was a vehicle to commodify the lands through assimilation "into English law concepts of ownership rather than recognising the notion of collective tenure by an iwi, hapū or whanau as a matter of tikanga or customary law" under which "permanent alienation of land is not possible".[97] The Crown's pursuit of its policy of purchasing individual interests and then seeking partition of the lands was "less than scrupulous".[98]

[93] We do not construe s 348 as affecting this analysis. Section 348 and its predecessors were designed as savings provisions.[99] It addresses security of title rather than beneficial ownership; the preamble to the Land Titles Protection Act 1908 materially records that "considerable alarm ha[d] been caused among the European landholders at … attacks upon their titles, and it [was] expedient that reasonable protection should be afforded to the holders of such titles". The purpose of the provision is to protect legal titles to land from delayed challenges in litigation,[100] safeguarding the Court's transformation of communal lands into something in which individuals could obtain indefeasible and transferrable rights. It is of no moment in the present case.

[94] It is regrettable that the panel did not directly address Ngāti Whakaue's argument. The three express grounds on which the panel decided against giving particular weight to the Native Land Court's decisions are unconvincing and internally inconsistent. However, we can only construe the panel's award of equal undivided ownership shares in all the lands as a rejection of Ngāti Whakaue's argument.

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97 At [21].
98 At [23].
99 See [63]–[67] for Moore J's full discussion of the legislative context.
100 At [68].

(3) Paragraph 65

[95] In its third step the panel expressed its view that the evidence of sales of land awarded to Ngāti Whakaue and the lack of sales of land awarded to Ngāti Wahiao provided "strong support" for Ngāti Wahiao's claim to mana whenua. We accept that this finding was open to the panel. But critically it made no analysis of the particular land or lands affected by the volume or absence of the relevant sales.

[96] Mr Goddard made much of the panel's statement in the first sentence that "the consequence of the sale of land by a willing seller is that mana whenua moved from the seller to buyer", arguing that the statement is a significant error of tikanga and thus of the common law.[101] The Crown could not possibly come within any identified class of potential holders of mana whenua. Nor could it hold and exercise traditional or customary rights.

[97] We agree with Mr Hodder that the panel's statement, while regrettably ambiguous, cannot be construed as an affirmative assertion that mana whenua passed to the Crown. As Moore J observed, the sentence is unfortunately phrased but, when read in context, the words were used by the panel to set the backdrop to Ngāti Wahiao's affirmative claim to mana whenua.[102] The panel's finding was that Ngāti Whakaue's sales, irrespective of the identity of the buyer, were evidence that the iwi's mana whenua in the lands was less than Ngāti Wahiao's, who refused to sell when faced with the same pressures.

[98] Mr Goddard's argument does, however, highlight the problems created by the paucity of the panel's reasoning process. Its brief statement about the transfer of mana whenua has led to the confusion about whether the panel was addressing mana whenua before or after the Crown's wrongful acquisition of the lands. If it was the former, the panel was required to explain how the sales weighed in the scales against a claimant when the whole context was one of wrongful acquisition through those sales.

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101 See generally *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [183]–[186] per Tipping J; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95] per Elias CJ (dissenting).

102 HC judgment, above n 7, at [158].

(4) Paragraph 66

[99] The fourth apparent step in the panel's reasoning process did not provide reasons at all but was conclusory, as is reflected in the panel's own description of it as a "summary". It expresses the panel's conclusion that both Ngāti Wahiao and Ngāti Whakaue have established ownership interests in the Roto-a-Tamaheke Reserve and the Whakarewarewa Thermal Springs Reserve; and Ngāti Wahiao and Pukeroa have established an ownership interest in the Southern Arikikapakapa Reserve.

[100] The statement is indeed summary in nature, and does not explain how or why those ownership interests were established. This was the very issue which the panel was mandated to determine. Moreover, its conclusion does not follow logically from the panel's findings that the contemporaneous evidence presented to the Native Land Court provided "strong support for … Ngāti Whakaue's claim of occupation"; and the evidence of sales by one party and the lack of sales by another provided "strong support for … Ngāti Wahiao's claim to mana whenua". The panel failed to take the next and decisive step of weighing or evaluating those positions of relative evidential strength. The existence of strong support or otherwise for a claim does not of itself translate into proof of an exclusive ownership interest in a particular piece of land.

(5) Paragraph 67

[101] This paragraph is also conclusory, not reasoned. It expresses the panel's view that the competing interests should be recognised as undivided shares in all the lands, rather than different parts of a reserve being allocated to different interests. The panel then observed that "the question of whether the shares should be equal is a difficult one". That may be true, but again it did not absolve the panel from discharging its fundamental duty to determine ownership by reference to mana whenua prior to the relevant Native Land Court decisions in 1882 and 1893. It concluded with the observation that "justice will be done" if ownership was apportioned equally between the parties.

[102] This statement is essentially a finding but without any reasons. It proceeds from the premise that each party had established an equal beneficial share in each

block. It does not identify the evidence on which the panel relied to find this equality by reference to each particular block. It belies the underlying premise of the parties' agreement to adopt the Beneficial Entitlement Determination Procedure to determine competing claims to exclusive possession to find that each of the rival complainants had an equal undivided share in each block. This same competition dominated the parties' cases before the panel. There was never a suggestion of a middle ground of equality in all the lands.[103]

[103] Mr Hodder defended this conclusion of undivided equal ownership in all the land as the panel's exercise of an evaluative judgment. However, a judgment must be reached on an adequate factual foundation, which was absent here. There was no apparent evaluation other than an observation that the question was difficult. We agree with Mr Goddard that the inference is inescapable that the panel, having concluded the issue was difficult and complex, simply elected to adopt a convenient compromise, one that was not the result of any reasoned or logical process. The determination was, to adopt an authoritative description, "an irrational splitting of the difference",[104] and cannot be sustained on any grounds.

Conclusion

[104] Together these five paragraphs constitute the only section of the panel's award which might arguably be said to provide reasons for its decision. It is perhaps telling that the panel headed the section as its conclusion. Indeed, the reasons are essentially conclusory in nature and to the extent that they purport to explain the result they are so inadequate and inconsistent that they fall short of discharging the panel's mandate to give a reasoned award. The reasons are not commensurate with the importance of the subject matter and the panel's conclusion.

[105] What was required, we repeat, was the panel's formulation of issues by reference to the parties' determination notices, discrete analyses of the competing claims to mana whenua to each block of land at each relevant time, and a logical and

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[103] As noted at [43(b)] of this judgment, Ngāti Wahiao asserted that joint sharing of the Whakarewarewa block was the minimum necessary recognition to reflect its interests in the lands, but its primary claim remained a claim to exclusive beneficial ownership of all the lands.

[104] Lord Justice Bingham "Differences Between a Judgment and a Reasoned Award" (1997) 16 The Arbitrator 8 at 8.

coherent explanation for a determination on which party was entitled to beneficial ownership of a particular block of land by reference to the dates of the two seminal Native Land Court decisions.

[106] The result of the panel's award is to preserve the interim arrangement of shared ownership, with the suggestion that the parties seek mediation or arbitration if they cannot "agree on how the decision should be given practical effect".[105] There is a degree of irony in this result, which was not desired by any of the parties, when it requires them to revert for finality to the agreed steps in the Benefit Entitlement Determination Procedure which preceded the fourth step of adjudication.[106] The panel had no mandate to direct a stopgap arrangement; it accepted an obligation to determine mana whenua in the relevant lands and identify the Final Beneficiary for each block.

[107] In our judgment Moore J erred in finding that the panel discharged its mandate to give reasons for its award as required by cl 15.8 of the Second Schedule to the Trust Deed and art 31(2) of sch 1 to the Arbitration Act.

[108] We are satisfied that Moore J's error in deciding this first and primary question in Ngāti Wahiao's favour was directly material to his decision. Mr Hodder did not suggest otherwise. It follows that the appeal must be allowed and the award set aside for the panel's error of law in: (a) failing to make reasoned findings as to who were the beneficial owners of the lands before 1893; (b) failing to determine the parties' claims to the lands having regard to those findings; and (c) allocating beneficial ownership according to broad conceptions of fairness. It is unnecessary for us to determine the other questions, nor to determine Ngāti Whakaue's separate application to set aside the award for breach of natural justice pursuant to art 34 of sch 1 to the Arbitration Act on which leave was not required.

[109] We make two concluding observations. First, we appreciate that the result of our judgment is that the parties' expenditure of considerable costs and resources over a prolonged period has not brought about the finality that underpinned their

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105 Award, above n 4, at [68].
106 See [35]–[36] of this judgment.

agreement to refer their dispute for adjudication by a suitably qualified panel. We regret that result. But it is the inescapable consequence of the panel's performance. Second, our decision is based solely upon the legal ground of the panel's failure to discharge its agreed mandate by giving a reasoned award and does not in any sense reflect a view on the merits of the competing claims. It is by now trite to observe that the underlying contest is complex and its determination will require careful reasoning in the light of a vast body of evidence.

[110] We record also that it is unnecessary for us to grant any further relief consequential upon allowing Ngāti Whakaue's appeal and setting aside the award. Assuming the parties do not reach an independent resolution of their contest, the trustees will be required to constitute a new panel to determine beneficial ownership in accordance with the requirements of the Trust Deed and the Arbitration Act.

Result

[111] The appeal is allowed.

[112] The interim award issued by the arbitral panel on 7 June 2013 and adopted as the final award on 14 November 2014 is set aside.

[113] The respondent is ordered to pay the appellants costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

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Appendix — Roto-a-Tamaheke Reserve, Whakarewarewa Thermal Springs Reserve and Southern Arikikapakapa Reserve