IN THE SUPREME COURT OF NEW ZEALAND

SC 54/2010
[2011] NZSC 53

BETWEEN	ALAN PAREKURA TOROHINA HARONGA Appellant
AND	WAITANGI TRIBUNAL First Respondent
AND	THE ATTORNEY-GENERAL Second Respondent
AND	TE WHAKARAU (FORMERLY TE POU A HAOKAI) Third Respondent

Hearing: 11 and 12 October 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: B W F Brown QC and K S Feint for Appellant
D B Collins QC Solicitor-General, V L Hardy and C R W Linkhorn for Second Respondent
T H Bennion for Third Respondent

Judgment: 19 May 2011

JUDGMENT OF THE COURT

A The appeal is allowed and the determination of Judge Clark is quashed.

B The matter is remitted to the Waitangi Tribunal with the direction that it must proceed urgently to hear the claim.

C The second respondent must pay the appellant costs of $25,000 together with reasonable disbursements to be fixed if necessary by the Registrar. Costs in the Court of Appeal and High Court are to be fixed by those Courts.

REASONS

Para No

ELIAS CJ, BLANCHARD, TIPPING AND McGRATH JJ

(Given by Elias CJ and McGrath J)

Table of Contents

Introduction

[1] The appellant, Mr Haronga, sought an urgent hearing of his July 2008 claim to the Waitangi Tribunal for a recommendation that the Crown return to the owners of Mangatu Blocks Incorporated,[1] of which he is Chairman, 8,626 acres forming part of the Mangatu State Forest. The Waitangi Tribunal had already held in its 2004 report in relation to Turanganui a Kiwa, *Turanga Tangata Turanga Whenua,* that the land claimed had been acquired by the Crown in 1961 from Mangatu Incorporation in breach of the principles of the Treaty of Waitangi.[2] Although a claim to restore the land to Mangatu Incorporation under the compulsory jurisdiction of the Tribunal had been part of the claims included in the district-wide hearings in relation to Turanganui a Kiwa,[3] the Tribunal made no specific recommendations for remedy in

---

1 Referred to throughout as Mangatu Incorporation.

2 Waitangi Tribunal *Turanga Tangata Turanga Whenua*: *The Report on the Turanganui a Kiwa claims* (WAI 814, 2004) at [15.5.4].

3 The region of Poverty Bay.

its 2004 report, leaving it to Crown and claimants to negotiate a district-wide settlement of all claims but reserving leave to apply further to the Tribunal if necessary.[4]

[2] In the negotiations, conducted under the umbrella of Turanga Manu Whiriwhiri for all claimants of the district, the interests of Mangatu Incorporation and Te Aitanga a Mahaki, the hapu to which the owners principally belong, were represented by Te Whakarau (formerly known as Te Pou a Haokai), the third respondent. A draft Agreement in Principle for settlement emerged in July 2008. It became clear then that what is proposed will not include return of the land to Mangatu Incorporation. Instead, Te Whakarau will have an option to purchase the whole or part of the Mangatu forest, including the 1961 lands. The owners of Mangatu Incorporation will share in the overall settlement by reason of their membership of Te Aitanga a Mahaki but will not receive the specific redress they have sought for the Treaty breach in relation to the 1961 lands. It is the intention of the government that the final settlement will be given effect in legislation which will remove the jurisdiction of the Tribunal in respect of the claim on behalf of Mangatu Incorporation seeking a binding recommendation for return of the 1961 land to the proprietors of the Incorporation.

[3] Facing this situation, Mr Haronga filed the further claim in July 2008 seeking return of the 1961 lands to Mangatu Incorporation under the compulsory resumption jurisdiction of the Tribunal contained in s 8HB(1)(a) of the Treaty of Waitangi Act 1975. The jurisdiction to make binding orders in respect of licensed Crown forest land was added to the non-binding powers of recommendation of the Waitangi Tribunal in 1989 by amendment which implemented a compromise of litigation between the Crown and the New Zealand Maori Council. Under the compromise, the Crown gained the right to deal with interests in Crown forest land in advance of Waitangi Tribunal clearance of the land from claim. In exchange, Maori claimants obtained the enhanced protection of a right to resumption of the land, should the Waitangi Tribunal recommend that course.

---

4 See the letter of transmittal and [16.5].

[4] Mr Haronga sought an urgent hearing of the claim for resumption of the 1961 lands. The application for an urgent remedies hearing was refused by Judge Clark,[5] a Judge of the Maori Land Court appointed by the Deputy Chairperson of the Waitangi Tribunal as the Presiding Officer to deal with Mr Haronga's claim. Mr Haronga applied unsuccessfully for judicial review of the decision of Judge Clark in the High Court[6] and, on appeal, in the Court of Appeal.[7]

[5] The present appeal is brought from the decision of the Court of Appeal. In it, Mr Haronga challenges the lawfulness of the Tribunal's refusal to grant him an urgent hearing. He maintains that the decision effectively denies his right to have the Tribunal determine under the jurisdiction introduced in 1989 whether the 1961 land should be returned to the ownership of the proprietors of Mangatu Incorporation. He says that the decision of Judge Clark proceeded on the erroneous basis that the jurisdiction to determine whether to recommend resumption of the land was itself discretionary. The Crown and Te Whakarau oppose the appeal. They maintain that the jurisdiction of the Tribunal to order resumption was discretionary and has been exercised against resumption by the recommendation of negotiation in the 2004 report. In addition they contend that the decision to decline an urgent hearing was the exercise of a discretion which is not shown to have been made on a wrong basis.

[6] The appeal raises important questions concerning the extent of the obligation of the Tribunal to conduct inquiries into claims submitted to it and the right of claimants to require completion of such inquiries in circumstances such as those faced by Mangatu Incorporation. The determination of these questions ultimately turns on the interpretation of the provisions of the Treaty of Waitangi Act and in particular the amendments to the statute in 1989.

Background

[7] In 1881 the Native Land Court first granted the Mangatu No 1 block of 100,000 acres to twelve individuals who were to hold the land on trust. In 1893

---

5 Wai 1489, #2.5.10 (21 October 2009).
6 *Haronga v Waitangi Tribunal* HC Wellington CIV-2009-485-2277, 23 December 2009.
7 *Haronga v Waitangi Tribunal* [2010] NZCA 201.

Mangatu Incorporation was established to represent those beneficially entitled to the block.[8] The purpose of setting up the Incorporation to hold the land was to protect it from pressures to sell. Mangatu Incorporation was one of the first protective incorporations set up by Maori. It is of considerable importance to the Incorporation that it has succeeded in retaining most of the block in the years since 1893. Today the Incorporation has 5,000 owners.

[8] In 1961 the Crown purchased 8,626 acres of Mangatu No 1 block for erosion control purposes. The Incorporation was reluctant to sell but did so because it was prevailed upon to believe there was no option other than Crown ownership. The land acquired by the Crown in 1961 is the subject of the present appeal. Today it forms a quarter of the Mangatu State Forest.

[9] In 1992, claims were submitted to the Waitangi Tribunal, under the Treaty of Waitangi Act, contending that the Crown purchase in 1961 had been in breach of the principles of the Treaty of Waitangi. Eric Ruru, a member of the Committee of Management of Mangatu Incorporation, submitted the claim in February 1992 on behalf of himself, the members of Te Aitanga a Mahaki and the proprietors of Mangatu Incorporation (who have beneficial interest in the land held by the Incorporation under Te Ture Whenua Maori Act 1993). This claim, given the number Wai 274, sought the return of the lands acquired in 1961 to the Mangatu proprietors. It claimed "further" that "the whole lands forming the Mangatu State Forest *is otherwise* Crown land available for reparation in settlement of the historical grievances of Te Aitanga a Mahaki ...".[9] As the word "otherwise" and the structure of the claim indicate, Wai 274 sought both return to the Mangatu proprietors of the lands acquired by the Crown in 1961 from the Incorporation and restoration of the rest of the Mangatu State Forest in reparation for other historical Treaty breaches suffered by Te Aitanga a Mahaki.

[10] Subsequently, in March 1992, Mr Ruru submitted a wider claim on behalf of Te Aitanga a Mahaki. This claim was registered as Wai 283. In addition to Mr Ruru's claim, it included claims by Tutekawa Wyllie on behalf of Ngai

---

8 Pursuant to the Mangatu No 1 Empowering Act 1893.

9 Emphasis added.

Tamanuhiri and Peter Gordon on behalf of Rongo Whakaata. It alleged breaches of the Treaty by a number of Crown actions in the nineteenth century: through the Crown's treatment of pre-1840 purchases; by invasion and confiscation; through application of Native Lands and Public Works legislation; and through failure to protect retention and development of traditional land. By these actions in Treaty breach it was said Te Aitanga a Mahaki and the other iwi represented had been wrongfully deprived of their traditional lands. No relief was sought initially in the claim as filed.

[11] The Tribunal, adopting a new district-wide approach to the hearing of claims of historical Treaty breach, included both claims in a wider inquiry into all Turanganui a Kiwa claims. Te Aitanga a Mahaki was one of three related iwi participating in the district-wide inquiry. The proprietors of Mangatu Incorporation had additional interests in the inquiry as members of Te Aitanga a Mahaki and as members of hapu and whanau within what the Tribunal refers to as the "Mahaki cluster" of claimants. The new approach entailed more intensive case management by the Tribunal and greater reliance on formal pleadings and the statement of issues prepared by the Tribunal. It was also a procedure directed at enabling eventual negotiated outcomes with large iwi groups. This was also the Crown preference in dealing with Treaty claims of historic breaches.[10]

[12] During the pre-hearing processes, the claims on behalf of Te Aitanga a Mahaki were combined in a second amended statement of claim filed with the Waitangi Tribunal in May 2001 by Mr Ruru. This statement of claim, on which the hearing by the Tribunal proceeded, was filed in respect of the two separate claims in Wai 274 and Wai 283 and was given both numbers. In it, Mr Ruru recited that Wai 274 was filed by him "for and on behalf of himself and all members of Te Aitanga a Mahaki and on behalf of the proprietors of Mangatu Blocks concerning the area known as the Mangatu Blocks and including the area known in recent times as the Mangatu State Forest". He described Wai 283 as being concerned with "wrongful dispossession of traditional land of Te Aitanga a Mahaki". In the second amended statement of claim, the relief sought was claimed generally by "the

[10] As explained in the evidence in the High Court of Jane Fletcher, Negotiation and Settlement Manager at the Office of Treaty Settlements.

Claimants", without distinction between Wai 274 and 283 and without distinction between Te Aitanga a Mahaki and the Mangatu proprietors in respect of the Wai 274 claims. In respect of the Mangatu State Forest, the claimants sought simply "[t]hat the area known as Mangatu State Forest be returned to the Claimants", without specific reference to the claim by the Incorporation for return of part of the land to it and without specific reference to the distinction, indicated in Wai 274, between return of the 1961 lands to the proprietors and "otherwise" the return of the rest of the Mangatu State Forest as reparation in settlement of the historical grievances of Te Aitanga a Mahaki.

[13] The Waitangi Tribunal heard the district-wide Turanganui a Kiwa claims during 2001 and 2002. It delivered its report on all claims in the report *Turanga Tangata Turanga Whenua* in 2004. The Tribunal found the Crown's conduct in the negotiations over acquisition of the Mangatu Incorporation lands in 1961 to have been in breach of the principles of the Treaty because the proprietors had been misled by the Crown. The Crown did not need to acquire ownership for erosion control purposes and did not disclose that the planted forest would be a commercial asset. The Crown had pressured the Incorporation into selling and had dismissed without consideration its request for a land swap, rather than the sale.

[14] In accordance with the usual practice of the Tribunal, the report found breaches of the Treaty but made no recommendations for redress. Rather, it suggested that the Crown and the claimants enter into negotiations for settlement. In its letter of transmittal of the report to the Minister of Maori Affairs, the Tribunal said:

> We have made no general recommendations in respect of possible settlement. We prefer instead to leave it to the parties to construct settlements which represent their choices rather than ours, although it is always open to claimants or the Crown to seek further assistance from us if that is desired.

[15] Although it made no general recommendations, in response to a request made by the Crown for guidance on the process to be followed in negotiation the Tribunal made a number of remarks designed to assist. It suggested a single district-wide negotiation process, if feasible, to prevent distraction into arguments

about the carve-up and to permit concentration on enlarging "the pie".[11] Within this process, the Mahaki cluster of claimants could obtain a separate settlement of their claims. The Tribunal made no further suggestion as to the form of the settlement relating to the Mangatu forest land beyond indicating that Te Aitanga a Mahaki were "directly affected" by the purchase of the land in 1961 from Mangatu Incorporation.[12] Accordingly, the Tribunal did not address the claim for the exercise of its jurisdiction to require the return of land to identified Maori ownership under the Treaty of Waitangi Act. The Tribunal also indicated that Ngariki Kaiputahi (a hapu within the Mahaki cluster) had suffered breach of the Treaty in relation to the earlier 1881 Native Land Court determination of ownership of the original Mangatu Blocks.[13]

[16] Following the report of the Waitangi Tribunal, the Crown embarked on direct negotiation of the Turanganui a Kiwa claims. Its approach in such negotiations was described in evidence in the High Court by the Negotiation and Settlement Manager at the Office of Treaty Settlements. Since 1999, the Crown has had a policy of negotiating with "large natural groups of tribal interests at an iwi level", rather than with hapu, whanau or individual claimants. This approach is seen as reducing fragmentation, permitting the resolution of overlapping claims, reducing costs, permitting an outcome in which iwi obtain an "effective economic base" from which to attempt to remedy prejudice caused by Treaty breach, and allowing settlement packages which include a "wide range of redress". The Crown first requires demonstration that negotiators have a deed of mandate from the group they represent. Terms of Negotiation are then entered into and, following negotiations, an Agreement in Principle is arrived at, which is made known to the claimant group before preparation of a draft Deed of Settlement. If approved by Cabinet, the draft Deed of Settlement is initialled by the parties and then ratification is sought from the claimant group. A governance entity will also usually be formed to receive the redress, and its role will also be the subject of ratification by the claimant group. When ratification processes are complete (usually following a postal ballot of the claimants), the deed is signed and legislation is introduced into Parliament to give it

---

11 *Turanga Tangata Turanga Whenua* at [16.5].
12 At [16.6.10].
13 At [14.8].

effect. Such settlement legislation "removes the jurisdiction of the Tribunal and the courts to inquire into the historical claims or the subject matter of the settlement".

[17] In August 2005, after mandating procedures had been followed by the claimant groupings, the Crown recognised three mandated groups for the negotiations of the district-wide Turanga claims: Ngai Tamanuhiri Whanui Charitable Trust, Rongowhakaata Claims Committee, and Te Whakarau (representing the "Mahaki cluster"). These three mandated groups then entered into the negotiation of the Turanganui a Kiwa historical Treaty claims through a collective group Turanga Manu Whiriwhiri.

[18] Te Whakarau was the mandated negotiator for Ngariki Kaiputahi, Te Whanau a Kai, Te Whanau a Wi Pere, Te Whanau a Rangiwhakataetaea and Te Aitanga a Mahaki (the grouping of related hapu and whanau generally referred to by the Tribunal as the "Mahaki cluster"). It was mandated to negotiate settlements for that grouping in respect of the claims in Wai 274 and Wai 283. Mr Haronga, the appellant in the present proceedings, himself moved the mandate of Te Whakarau to negotiate with the Crown.

[19] It appears from the Crown evidence in the High Court that the Mangatu State Forest was identified early in the negotiations as an element in the settlement package for "commercial redress" (in reparation for all breaches found). The interest of the Mangatu proprietors in the specific redress of return of the land sold in 1961 seems to have been subsumed in the negotiations in the more general and wider proposals to use the whole of the forest and accumulated rentals as a component of a single settlement of all the Mahaki cluster claims. With the emergence of a draft Agreement in Principle in July 2008, it became clear that the settlement proposed would not entail recovery by the Incorporation or its proprietors of the land obtained by the Crown in 1961, in what the Tribunal had determined to be breach of the Treaty. Rather, the Mahaki cluster as a whole would have the option of purchasing the Mangatu forest out of the total financial and commercial redress allocated to them under the wider district settlement. If the option is not exercised, the 1961 land could be treated as "land bank" for other Treaty settlements or disposed of by the Crown, adding potentially further sting to the loss.

[20] Because Mr Ruru, the claimant in Wai 274, was a negotiator for Te Whakarau, Mr Haronga, as Chairman of the proprietors of Mangatu Incorporation, filed in July 2008 a new claim with the Tribunal, Wai 1489, covering the same claim in respect of the 1961 lands as Wai 274. The new claim recited the finding of the Waitangi Tribunal that the claim was well-founded and sought return of the land, together with accumulated rentals and compensation under the Crown Forest Assets Act 1989. Mr Haronga sought an urgent hearing. The application for urgency was declined on 28 August 2008 by Judge Coxhead, on the basis that Mangatu Incorporation would suffer no "significant" or "irreversible" prejudice justifying an urgent remedies hearing because the Incorporation could look to resolve its claim by internal negotiations within Turanga Manu Whiriwhiri.[14]

[21] An Agreement in Principle for settlement of claims on a district-wide basis was reached by the Crown with the negotiators on 29 August 2008. This contemplates that, under a Deed of Settlement which will be given effect by legislation, Te Whakarau will have the right to purchase the Mangatu State Forest, including the lands acquired from the Incorporation in 1961. Settlement requires ratification by claimant groups of the initialled Deed and a governance entity (with the Crown ultimately deciding whether there is sufficient buy-in to warrant proceeding with the settlement). The proprietors of Mangatu Incorporation are 5,000 out of an approximate 15,000 entitled to share in the settlement negotiated by Te Whakarau.

[22] The internal negotiations looked to by Judge Coxhead were undertaken, but were unsuccessful. Turanga Manu Whiriwhiri was prepared to allow the land to be made available by the Crown to Mangatu Incorporation (and wrote to the Minister of Treaty of Waitangi Negotiations telling him so), but only on the basis that the settlement package offered by the Crown would be topped up to reflect the removal of the 1961 lands and it seems the value of the accumulated rentals attributed to it.[15] The Crown was not prepared to accept this solution.

---

14 Wai 1489, #2.5.4 (28 August 2008) at [40].

15 Under the Crown Forest Assets Act 1989, s 34(2).

[23] A further application for urgent remedies hearing was accordingly made by Mr Haronga on 17 September 2009. It was referred by the Deputy Chairperson of the Waitangi Tribunal to Judge Clark.

The decision of Judge Clark declining the request for an urgent remedies hearing

[24] Judge Clark considered the application against a Practice Note issued by the Waitangi Tribunal in August 2007[16] and a Memorandum and Directions issued by the Deputy Chairperson in September 2007.[17] The first concerned urgent inquiries and the second concerned remedies hearings.

[25] The Practice Note of August 2007 made it clear that the Tribunal would grant urgency for claims "only in exceptional cases and only after satisfying itself that adequate grounds have been made out" by the claimants.[18] Of "particular importance" is demonstration that the claimants "are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies". Important, too, is the assessment that "there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise" and that the claimants are ready to proceed with an urgent hearing. Urgency is ordered only after hearing from those interested, but can take place on the papers. Where an urgent inquiry is undertaken, truncated processes are provided for and a high degree of cooperation is required.

[26] The August 2007 Practice Note also dealt generally with the approach to be taken in making recommendations. It indicated that where a claim is well-founded, one option is to recommend negotiations with the Crown.[19] That was the course adopted here in the 2004 report, with leave reserved to the parties to apply further. With respect to its powers to make recommendations, the Practice Note acknowledges the distinction in the statute between general recommendations, which are not binding, and its power "[i]n limited instances" to recommend return or

---

16 Waitangi Tribunal "Guide to the Practice and Procedure of the Waitangi Tribunal" (August 2007).
17 Wai 45, #2.273 (6 September 2007).
18 At [2.5].
19 At [2.7].

resumption of certain lands; recommendations which can become binding on the Crown.[20] The Practice Note made no specific provision for the approach to be taken in the different cases. It did, however, deal with the exercise of the Tribunal's power to defer an inquiry under s 7(1A) of the Treaty of Waitangi Act. On request for deferral, the Tribunal would consider all relevant circumstances, including "the attitude of the other parties to the proposal; the expected length of time of any deferral; the state of research commissioned by the Tribunal or the parties; the urgency of the claim; and the extent of notice that has been given to the other parties and the Tribunal (if a hearing date has been set)".[21] The Practice Note suggested that the Tribunal's general power to make recommendations to the Crown extended to recommendations about those with whom settlement negotiations should be conducted.[22] But it contrasted that discretionary jurisdiction with its "duty" to identify those Maori to whom licensed Crown forest lands were to be returned.

[27] By September 2007, the Tribunal was faced with conflicting attitudes from the Crown and some claimant groups about the approach to be taken to remedies hearings, following Tribunal findings of Treaty breach. The Crown took the view that such applications were analogous to applications for urgency and should be subjected to the same "stringent criteria for hearing time". Some claimants apparently argued that remedies hearings should simply proceed "as of right" at the option of the claimants once their claims were determined to be well-founded.

[28] In response, the Deputy Chairperson of the Tribunal put out Directions on a "generic procedural approach" to be taken.[23] The Directions acknowledged that the "original conception" under the legislation appeared to have been a sequential process for hearing, reporting, and making recommendations about each of the claims. That had changed "[i]n recent times" with "the district inquiry model" which, by grouping together claims, had led to wide-ranging inquiries with "correspondingly wide-ranging findings".[24] Specific recommendations had been supplanted in general by invitation to the parties "to use the Tribunal's finding as a

---

20 At [2.8].
21 At [2.9].
22 At [3.2].
23 Wai 45, #2.273 (6 September 2007) at 1.
24 At 2.

basis for negotiating their own arrangements by way of settlement". Although this approach was generally thought to be working, it had become apparent that "sometimes negotiations get to a stage where the intervention of an outside party is required". The Tribunal was the only body able to intervene in this way. The desired outcome was a Treaty settlement. But where an obstacle to settlement arises the Tribunal recognised it has a part to play, although it is necessary for the Tribunal to be "selective" in its decision to hear a remedies application because of the other calls on its resources.[25]

[29] While the Tribunal did not want to be prescriptive about criteria, it indicated a number of factors to be taken into account, broadly comparable to those taken into account in agreeing to urgent hearings. Relevant factors included: demonstration of mandate, the size of the group applying "and whether it is of a dimension and composition that make it suitable to receive the remedies it is seeking, or which the Tribunal may wish to recommend"; whether the applicants' claims relate to any land being sought by way of remedy; whether the applicants have made reasonable attempts but have failed to be accepted as a "group mandated for settlement negotiations" or to reach agreement on settlement with the Crown; consistency with the Crown's approach to other settlements; whether any impediments to settlement appear incapable of resolution by further dialogue or alternative dispute resolution; whether the claimants have contributed to the Crown conduct the subject of complaint; whether the claim relates to other applications also seeking remedies hearings; whether the remedies hearing sought from the Tribunal is likely to "make a positive contribution" towards settlement or the claimants being "admitted to settlement negotiations with the Crown".[26] The Directions emphasised that the ultimate decision is a discretionary one which will turn on its own merits and facts. Importantly for present purposes, the Directions provided "[f]or the avoidance of doubt", that:[27]

> [N]o different or separate set of criteria will be applied to the granting of a remedies hearing where the remedies sought include binding recommendations relating to particular land.

---

25 At 3.
26 At 4.
27 Ibid.

[30] In his reasons, these Directions were relied upon by Judge Clark. He treated the application before him as one "seeking a remedies hearing on an urgent basis".[28] Because an urgent hearing was sought, he also referred to the factors identified in the August 2007 Practice Note, while saying that he was principally influenced by the Directions.[29]

[31] In the end, after traversing the arguments, the Judge considered that the decision to be made was "a very finely balanced and difficult" one.[30] Although attracted by the "simplicity" of the argument that it was "only right and fair" that the land obtained in breach of the Treaty should be returned to Mangatu Incorporation, the "complicating factor" was that, here, the Crown was offering it back to Te Whakarau. In declining the application, three factors were of significance.

[32] First, the Tribunal had "already considered and made recommendations as to settlement" and it had not recommended return of the land to "the current owners of Mangatu".[31] It had, rather, suggested a district-wide settlement, with specific relief being addressed in that process. The Turanganui a Kiwa claimants had followed that advice and were "negotiating accordingly".[32] In such circumstances, it was "unlikely that the Turanga Tribunal faced with this information would now change its settlement suggestions".[33]

[33] The second factor that influenced Judge Clark was the circumstance that "[n]egotiations with the Crown have not broken down". The intervention of the Tribunal was not therefore required as a "circuit breaker".[34] Mangatu Incorporation was not directly involved in the negotiations because it had not sought a mandate to "specifically negotiate the purchase of the Mangatu No 1 Block from the Crown".[35] The proprietors sought to obtain the return of an asset which once belonged to them rather than leaving it to be "subsumed into a wider historical Treaty settlement package". The point remained that "the negotiation process has not stalled nor

---

28 At [19].
29 At [27].
30 At [50].
31 At [52].
32 At [53].
33 At [54].
34 At [55].
35 At [57].

irreparably broken down". In such circumstances, the intervention of the Tribunal was not required "in that sense".

[34] Finally, Judge Clark took the view that the shareholders in Mangatu Incorporation would not ultimately be denied a remedy:[36]

> All of them, by definition will be members of [Te Whakarau]. They will be entitled to share in the benefits of any settlement [Te Whakarau] reach with the Crown, including the purchase of all of the Mangatu Forest, which includes the former Mangatu 1 Block. Whilst it is correct to say that the Incorporation itself will miss out, in that an asset which it formerly owned is not being offered back to it, it is not correct to say that the shareholders in the Incorporation will not have the opportunity to benefit from the purchase of the Mangatu 1 Block.

[35] Te Whakarau had a mandate to negotiate the claims of the Mahaki cluster. Judge Clark considered it would be disruptive of the negotiations if Te Whakarau were forced into an urgent remedies hearing. Such disruption and the impact on resources and time would not prevail, however, "if a meritorious case" required the attention of the Tribunal.[37] The application would "undoubtedly" have succeeded "if the Tribunal was faced with a situation in which the Mangatu Incorporation were the only group interested in the return of the Mangatu No 1 Block. If there wasn't the complication of an offer to [Te Whakarau], their application for an urgent remedies hearing would be very strong.".[38]

> Unfortunately for them there is an offer to [Te Whakarau]. Whilst I am sympathetic to the disappointment that the Mangatu Incorporation is experiencing, when I consider the ultimate position of their shareholders I do not consider the situation to be as serious as to warrant the intervention of the Tribunal. I say that because those shareholders' wider interests are being negotiated by [Te Whakarau]. Those interests include the return of the Mangatu State Forest including the Mangatu 1 Block. All of the shareholders will be entitled to enjoy the benefits of that settlement.

[36] It should be noted that, in these reasons, Judge Clark did not consider whether the circumstance that the land claimed was licensed Crown forest land and subject to the compulsory resumption provisions of the Act was relevant to an assessment of prejudice, should the urgent hearing not be granted. Nor did he deal in his reasons with the submission on behalf of Mr Haronga, earlier recorded in the

---

36 At [58].
37 At [59].
38 At [60]–[61].

decision,[39] that the filing of the remedies claim in Wai 1489 withdrew the mandate to Te Whakarau to negotiate the Mangatu afforestation claim.

High Court judgment

[37] The appellant brought judicial review proceedings in the High Court seeking an order requiring the Tribunal to hear and determine its application for return to Maori ownership of the 1961 land. At the hearing, counsel sought an order for an urgent hearing because, if current negotiations became the subject of a settlement that was given legislative effect, the Incorporation's claims would be nugatory.

[38] Clifford J accepted that not granting urgency to the Wai 1489 claim "may have the practical effect that the application is rendered nugatory".[40] Such potential prejudice was something that the Tribunal, according to its own Practice Note, was required to take into account. But the Judge did not accept that the filing of the new claim resulted in the withdrawal of the mandate given to Te Whakarau to negotiate the Mangatu afforestation claim. He considered that it would be "artificial" to suggest that Te Whakarau had no mandate to negotiate Wai 1489 because that claim could not "truly be regarded as a claim separate from those the settlement of which is currently subject to negotiations".[41] Withdrawal of the mandate to negotiate "would appear to require some voting process similar to that through which the mandate was obtained, as well as formal communication to the Crown and mandated body":[42]

> At the time of the hearing before me, there was no evidence that Mangatu Inc or its proprietors had formally acted to have [Te Whakarau's] mandate withdrawn.

[39] In his judgment, Clifford J noted that the Tribunal's general policy was to hold remedies hearings following a Tribunal report only when negotiations between the Crown and claimants had broken down. The prospect of a Tribunal hearing on remedies in that situation could then be a "circuit-breaker". The Judge saw the real issue in the case as being whether the application of the Tribunal's circuit-breaker

---

39 At [33].
40 *Haronga v Waitangi Tribunal* HC Wellington CIV-2009-485-2277, 23 December 2009 at [95].
41 At [83].
42 At [82].

policy to deny the applicant's request for a remedies hearing was lawful in the circumstances.[43]

[40] Clifford J rejected the submission on behalf of Mr Haronga that the Waitangi Tribunal had not considered whether or not to exercise the jurisdiction under s 8HB of the Treaty of Waitangi Act to recommend return of the 1961 land, as claimed. He considered that "the contention that the Tribunal has not, in effect, considered its discretion under s 8HB is unpersuasive".[44] Although the Tribunal had not specifically referred to its powers under s 8HB, "it is not to be expected that the experienced Tribunal was unaware of its jurisdiction in that respect".[45] The Tribunal's comments on remedies generally ("albeit expressed generally and on a 'first principles' basis") indicated that it had "in its discretion declined to make any recommendations – binding or otherwise":[46]

> In my view, the fact that the Tribunal had power under s 8HB to make a binding recommendation does not in itself change the nature of the Tribunal's function. Applications to be heard are made under s 6. Here, the Tribunal heard the claim as part of its wider inquiry. The Tribunal then has a discretion to make a recommendation – either under s 6(3) or under s 8HB. It chose not to do so. If a Tribunal decides to make a recommendation under s 8HB, that recommendation (when made final) is binding in terms of the Crown Forest Assets Act. In essence, the Crown's discretion whether to comply with the recommendation is removed. That, in my judgment, does not alter substantively the Tribunal's role. There is nothing in the 1989 amendments to the [Treaty of Waitangi Act] indicating that the Tribunal's power to issue (what become) binding recommendations in relation to Crown forest land sits outside or is to take precedence over the general claims process. The only difference relates to the current status of the land (comprising Crown forest land, rather than other public land) – there is no difference in terms of the underlying claims and/or right to redress.

[41] The Judge took the view that "settlement negotiations and Tribunal hearings are inherently inter-related" and the fact that a recommendation is sought under s 8HB does not change the relationship.[47] In those circumstances, the existence and current status of settlement negotiations were relevant when the Tribunal was asked to consider granting a remedies hearing. The Tribunal was therefore generally entitled to adopt a policy that it would not intervene unless the settlement process –

---

43 At [96], [104].
44 At [106].
45 At [107].
46 At [108]–[110].
47 At [111]–[112].

"which it has indicated the Crown and claimants should pursue"[48] – has broken down. Such policy, as explained in the Directions of September 2007, permits the Tribunal to deploy its resources fairly and efficiently and overcomes its concerns that the recommendation of specific relief may "unwittingly lead to uncertainty and inconsistency". The decision for Judge Clark, in context, was "whether to revisit its earlier decision ... not to make recommendations but to enable the parties to come to their own agreement":[49]

> In other words, the decision was whether to intervene in ongoing – and not stalled – settlement negotiations to make a recommendation as to remedy in relation to one claim within the district wide inquiry.

[42] In that light, the Judge thought there was no error of law in the determination. While the practical effect might be that, through settlement and legislation, the Tribunal's jurisdiction to hear Wai 1489 was removed, he treated the Tribunal as having effectively already decided not to make the recommendation sought but to provide an opportunity for negotiation. There was no breach of natural justice, no deference to Crown policies of settlement, and the Tribunal had taken all relevant considerations into account.

[43] The Judge added, "[f]or completeness" that had the mandate of Te Whakarau been "formally and effectively withdrawn" in relation to the Mangatu afforestation claim, the position would have been different.[50] In that case, the Tribunal would have "erred in law" if it were to rely on the ongoing negotiations between the Crown and Te Whakarau to deny an urgent hearing.[51] The "otherwise ongoing negotiations" would be irrelevant in circumstances where the claimant had withdrawn its mandate. In that different context, Clifford J thought that there might well be "likely significant and irreversible prejudice such that an urgent hearing is warranted".[52]

---

48 At [113].
49 At [115].
50 At [119].
51 At [120].
52 At [121].

Court of Appeal judgment

[44] The Court of Appeal dismissed the appellant's appeal. The Court agreed with Clifford J that the introduction of the Tribunal's power to make recommendations that became binding did not substantively change its role. The Tribunal was a Commission of Inquiry with power to make recommendations. The power to make recommendations under s 6(3) was still the central remedies provision of the 1975 Act:[53]

> Under it, the Tribunal has a general discretion as to what, if any, remedial recommendations it makes, even though under s 6(2) it (generally) has an obligation to investigate claims made under s 6(1).

[45] "Further", under the special resumption provisions, recommendations became binding "only if the Crown and the claimants are unable to agree a means of implementing the Tribunal's interim recommendations". That constituted "statutory recognition of the important role of settlement negotiations".[54] The Court of Appeal took the view that it was "unreal" to suggest that the Tribunal's role changed "as it moves from considering aspects of a claim that might result in non-binding recommendations to considering aspects that might result in a binding recommendation":[55]

> As part of its general remedies discretion, the Tribunal has the power to make binding recommendations in various contexts, including in relation to Crown forest land. Clearly that power is not one to be exercised lightly, but neither is the Tribunal's power to make any other form of recommendation.

[46] The Court accepted that the Tribunal would not be entitled to adopt a policy that it would never consider whether to conduct a remedies hearing for a resumption order. The Directions applied by Judge Clark did not require that result but rather stressed the particular merits of the case. The same was true for urgency. The Judge had turned his mind to the merits of the application. Importantly, he had noted that the proprietors of the Incorporation would share in the benefits of settlement, including the opportunity to purchase the Mangatu State Forest. Te Whakarau had been given a mandate to negotiate a comprehensive settlement, including in relation

---

53 *Haronga v Waitangi Tribunal* [2010] NZCA 201 at [42].
54 Ibid.
55 At [43].

to the 1961 lands. Others had an interest and would be adversely affected if the block were returned to the Incorporation. This balancing of interests was open to the Judge in assessing the merits of the application. Contrary to the appellant's submissions, Judge Clark was entitled to consider the state of settlement negotiations. An inflexible "circuit breaker only" approach might be objectionable. But Judge Clark had not taken an inflexible or formalistic approach. He looked to the substance of the matter and exercised a discretion. Furthermore, the Judge was entitled to take the view that the Tribunal had turned its mind to settlement in the 2004 Report and was unlikely to change its recommendations:[56]

> Where the Tribunal considers the question of remedies and concludes that it is preferable that the parties attempt to negotiate a settlement, subject to leave reserved, it is exercising its discretion in relation to remedies in the same sense as it does when it grants remedies itself in the first instance.

[47] Finally, the claim on behalf of Mangatu Incorporation for resumption of the 1961 land "does not confer priority on them or their claim":[57]

> If they were likely to be excluded from any effective remedy in relation to the 1961 land, that would be an important factor for the Tribunal to consider in determining whether to grant an urgent remedies hearing. But they will not be excluded, and may yet be able to achieve the return of the land, depending on decisions still to be made by the claimant groups.

Statutory provisions

[48] The appeal ultimately turns on provisions in the Treaty of Waitangi Act 1975, including amendments to that Act enacted in 1989, and in the Crown Forest Assets Act 1989.

[49] The functions of the Waitangi Tribunal are described in s 5 of the Treaty of Waitangi Act. In respect of the appellant's claim, the following are of significance:

> **5 Functions of Tribunal**
>
> (1) The functions of the Tribunal shall be—

---

56 At [48].
57 At [49].

> (a) to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6:
>
> ...
>
> (ab) to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 of the Crown Forest Assets Act 1989:
>
> ...

Section 6 of the Treaty of Waitangi Act confers jurisdiction on the Waitangi Tribunal to consider claims. In particular:

> **6 Jurisdiction of Tribunal to consider claims**
>
> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> ...
>
> (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that ... the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> (2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
>
> (a) the claim is submitted contrary to section 6AA(1); or
>
> (b) section 7 applies.
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.
>
> (4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

[50] The Tribunal's obligation to "inquire into every claim submitted to it" under s 6(2) is subject to s 7. Section 7(1) permits the Tribunal, in its discretion, to refuse to inquire into or further into a claim if its subject-matter is trivial, if the claim is

frivolous or vexatious or not made in good faith, or if there is an adequate alternative remedy available. Section 7(1A) provides the Tribunal with a general power to "defer" its inquiry "for such period or periods as it thinks fit", "for sufficient reason". Section 7(2) requires the Tribunal, in any case where it exercises its powers under s 7(1) (or s 7(1A)) to inform the claimant of the decision and "state its reasons therefor".

[51] Section 8HB(1) of the 1975 Act, inserted in 1989,[58] provides a specific power in respect of recommendations for return to Maori ownership of licensed Crown forest land:

> **8HB Recommendations of Tribunal in respect of Crown forest land**
>
> (1) Subject to section 8HC, where a claim submitted to the Tribunal under section 6 relates to licensed land the Tribunal may,—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and
>
> (ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ... act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Maori ownership of the whole or part of that land,—
>
> include in its recommendation under section 6(3) a recommendation that the land or that part of that land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land is to be returned); or
>
> ...

[52] A recommendation for return of Crown forest land under s 8HB(1)(a) of the 1975 Act is initially an interim recommendation until it is confirmed by the Tribunal following elapse of a 90 day period under s 8HC:

> **8HC Interim recommendations in respect of Crown forest land**
>
> (1) Where the recommendations made by the Tribunal include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), all of those recommendations shall be in the first instance interim recommendations.

---

58 Crown Forest Assets Act 1989, s 40.

(2) The Tribunal shall cause copies of its interim findings and interim recommendations to be served on the parties to the inquiry.

(3) Subject to subsection (5), the Tribunal shall not, without the written consent of the parties, confirm any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), until at least 90 days after the date of the making of the interim recommendations.

(4) Where any party to the inquiry is served with a copy of any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), that party—

(a) may, within 90 days after the date of the making of the interim recommendations, offer to enter into negotiations with the other party for the settlement of the claim; and

(b) shall, within 90 days after the date of the making of the interim recommendations, inform the Tribunal—

(i) whether the party accepts or has implemented the interim recommendations; and

(ii) if the party has made an offer under paragraph (a), the result of that offer.

(5) If, before the confirmation of any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), the claimant and the Minister of Maori Affairs settle the claim, the Tribunal shall, as the case may require, cancel or modify the interim recommendations and may make, if necessary, a final recommendation under section 8HB(1)(a) or section 8HB(1)(b).

(6) If subsection (5) does not apply in relation to any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), upon the expiration of the 90th day after the date of the making of the interim recommendations, the interim recommendations shall become final recommendations.

[53] Finally, s 36 of the Crown Forest Assets Act 1989 requires return of Crown forest land to Maori ownership in accordance with final recommendations of the Tribunal to that effect:

36 Return of Crown forest land to Maori ownership and payment of compensation

(1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—

> (a) Return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) Pay compensation in accordance with the First Schedule to this Act.
>
> (2) Except as otherwise provided in this Act or any relevant Crown forestry licence, the return of any land to Maori ownership shall not affect any Crown forestry licence or the rights of the licensee or any other person under the licence.
>
> (3) Any money required to be paid as compensation pursuant to this section may be paid without further appropriation than this section.

[54] Schedule 1 to the 1989 Act provides for calculation of compensation payable reflecting, in particular, the fact that land is being returned subject to encumbrances.

[55] The long titles to the respective statutes assist in their interpretation and relevant passages are set out later in these reasons.

The statutory history

[56] The 1975 Act established the Waitangi Tribunal.[59] Section 6(3) confers a power on the Tribunal, if it has found a claim well-founded, to recommend to the Crown that action be taken to compensate for or remove the prejudice. This general power to recommend remedies has not been the subject of legislative amendment since 1975. Section 8HB(1) of the 1975 Act is an additional remedial power of the Tribunal where a claim relates to licensed Crown forest land.[60]

[57] The present appeal turns on the meaning and application of these provisions enacted in the 1975 and 1989 legislation and the rights they give, explicitly or implicitly, to claimants. In order to interpret the statutory language it is necessary to consider the statutory history of these provisions.

[58] The Waitangi Tribunal was established to inquire into and make recommendations on claims by Maori that they have been prejudicially affected by

---

[59] Treaty of Waitangi Act 1975, s 4(1).

[60] As defined in s 2 of the Crown Forest Assets Act 1989.

conduct of the Crown that is inconsistent with the principles of the Treaty of Waitangi. To this end the long title to the 1975 Act provides that it is:

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

[59] Initially the functions of the Tribunal were confined to inquiry into and making recommendations on claims which would be considered by the government. The power to make recommendations on claims that could become binding was introduced in the 1975 Act by the 1988 Act[61] and reiterated in the 1989 Act.[62] Enactment of this legislation followed compromise of litigation between the New Zealand Maori Council and the government that was the subject of judgments of the Court of Appeal in 1987[63] and 1989.[64]

[60] This litigation arose from the development during the 1980s of the government's policy of corporatising government commercial activities. On 30 September 1986 the Government introduced to the House of Representatives the State-Owned Enterprises Bill,[65] to give effect to its corporatisation policy. Claims were submitted to the Waitangi Tribunal by five northern Maori tribes concerning the perceived prejudicial effect on their land claims of the transfer of Crown land to new State corporations as provided for in the Bill. The claimants' concern was that the Bill would put the return of land to Maori ownership in accordance with Tribunal obligations beyond the power of the Crown. The Tribunal inquired into the claim. In an interim report it suggested that the Bill itself might be contrary to the principles of the Treaty, unless it were amended to restrict alienation by the State enterprises and provide for the Crown's continuing responsibility for return of land to Maori.[66]

[61] In response to these concerns, the Bill was amended to include what became ss 9 and 27 of the State-Owned Enterprises Act 1986. Section 9 provided that

---

61 Treaty of Waitangi (State Enterprises) Act 1988, s 4.

62 Crown Forest Assets Act 1989, s 40.

63 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (the "Lands" case).

64 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) (the "Forests" case).

65 (30 September 1986) 474 NZPD 4722.

66 Wai 22 "Interim Report to the Minister of Maori Affairs on State-Owned Enterprises Bill" (8 December 1986) at 4.

nothing in the Act permitted the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. Section 27 made provision for land which had been the subject of a claim submitted to the Tribunal before the date of the Governor-General's assent to the 1986 Act.[67] However, at that date a number of claims which were in the course of preparation had not been lodged.

[62] The New Zealand Maori Council then brought proceedings seeking judicial review of the proposed exercise of the power under the 1986 Act to transfer land to State-owned enterprises. These were removed into the Court of Appeal.[68] In its judgment the Court of Appeal held that s 27 did not sufficiently address the risk that Crown land the subject of claims made after 18 December 1986 might be transferred in circumstances which prejudiced availability of remedies to those seeking redress. The Court decided that it would be inconsistent with Treaty principles for the Crown to implement a series of land transfers without giving consideration to the possibility of claims to the land and a reasonable opportunity for those possibilities to be investigated. This brought the restraints on the exercise of the Crown's powers under s 9 of the Act into play. The Crown had a Treaty obligation to act with the utmost good faith which obliged it to ensure powers under the 1986 Act were not exercised inconsistently with Treaty principles. The onus was on the Crown to make an informed decision that known or foreseeable Maori claims did not require retention of particular land before it was transferred.

[63] The Court of Appeal also gave directions regarding preparation of a scheme of safeguards which provided reasonable assurance that land or water would not be transferred in such a way as to prejudice Maori claims.[69] The judgment left it to the New Zealand Maori Council and government to work out the details.

[64] Following this judgment the Crown and the Maori Council entered into negotiations and reached agreement that the Crown would be able to transfer land to State enterprises which would be subject to return to Maori ownership (commonly referred to as resumption). If the Waitangi Tribunal were to so recommend, return

---

67 The Act received that assent on 18 December 1986.

68 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC) at 650 per Heron J.

69 At 666.

would be compulsory. The Treaty of Waitangi (State Enterprises) Act 1988 was enacted to give effect to that agreement. Its long title reads:

> An Act—
>
> (a) To give effect to an agreement entered into between the New Zealand Maori Council and Graham Stanley Latimer and the Crown in settlement of an application for judicial review made by the New Zealand Maori Council and Graham Stanley Latimer; and
>
> (b) To make to the Treaty of Waitangi Act 1975, the State-Owned Enterprises Act 1986, and the Legal Aid Act 1969 the amendments proposed in that agreement; and
>
> (c) To protect existing and likely future claims before the Waitangi Tribunal relating to land presently in Crown ownership; and
>
> (d) To give better effect to the objects of the State-Owned Enterprises Act 1986, and to ensure compliance with section 9 of that Act.

[65] A purpose of the 1988 Act was accordingly to protect both existing and likely future claims submitted to the Tribunal. Parliament introduced provisions in the 1975 and 1986 Acts enabling the Tribunal, having found a claim to be well-founded, to recommend that land transferred to or vested in State enterprises under the 1986 Act be returned to Maori ownership.[70] When such a recommendation was confirmed the land was to "be resumed by the Crown" and returned to Maori ownership.[71]

[66] Parliament accordingly contemplated that the transfer of assets to State enterprises could take place forthwith, existing and future claims to the land involved being protected under the statutory scheme. Implicitly, Parliament, like the Court, was concerned to protect such claims on an individual basis.

[67] On 9 December 1987, the Court of Appeal issued a Minute recording that agreement had been reached by the Crown and Maori parties to the litigation, discharging certain of its earlier directions and declarations, and adding:[72]

---

70 Sections 8A and 8B of the Treaty of Waitangi Act 1975, introduced by s 4 of the Treaty of Waitangi (State Enterprises) Act 1988.

71 Sections 27B and 27C of the State-Owned Enterprises Act 1986 were inserted by s 10 of the Treaty of Waitangi (State Enterprises) Act 1988.

72 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 719 per Cooke P.

> Purely as a precaution, in case anything unforeseen should arise, leave to apply is reserved.

[68] On 28 July 1988, the Minister of Finance announced in Parliament the Government's intention to sell the State's commercial forests.[73] The Minister later advised Maori interests that the proposal was for the Crown to sell forestry assets without relinquishing ownership of the land.

[69] On 3 February 1989 the Maori Council applied to the Court of Appeal, under leave reserved, for a declaration that the Government's forestry sale proposal was inconsistent with the Court's judgment of 29 June 1987 and the Agreement the subject of the Court's Minute. The Court delivered judgment on 20 March 1989 on a preliminary issue raised by the Crown as to whether the Maori Council application fell within the leave to apply reserved by the Court.[74] The Court held that the application was properly brought. In the Court's opinion, the question of whether forestry assets, such as trees growing on the land, could be disposed of through the New Zealand Forestry Corporation, a State enterprise, without breach of the principles of the Treaty, went to the heart of issues addressed in the 1987 judgment.[75]

[70] Further negotiations were undertaken by the Crown and the Maori Council and Federation of Maori Authorities Incorporated. These resulted in an agreement being entered into on 20 July 1989. This agreement provided for the Crown to be able to sell the existing forest crop and other forest assets, providing purchasers with a licence to use the forest land for forestry purposes over the term of the licence. The purchaser was to pay an initial capital sum and a market-based rental for use of the land.

[71] The agreement also provided for a trust to be created, the Crown Forestry Rental Trust, which would administer a fund into which the annual rental receipts would be paid.

[72] The agreement of 20 July 1989 provides relevant context in interpreting legislation that followed in 1989. It included the following provisions:

---

73 (28 July 1988) 490 NZPD 5548.
74 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).
75 At 152.

6. The Crown and Maori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.

...

8. If the Waitangi Tribunal recommends the return of land to Maori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land ...

...

15. The attached annex lists the main principles of the two parties within under which this Agreement has been negotiated.

16. The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.

[73] The annex referred to in paragraph 15 included as a Maori principle:

> [To] minimise the alienation of property which rightly belongs to Maori;

And as a Crown principle:

> [To] honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty.

[74] The Crown Forest Assets Act 1989 gave effect to this agreement. Its long title relevantly provides it is:

> An Act to provide for—
>
> (a) The management of the Crown's forest assets:
>
> (b) The transfer of those assets while at the same time protecting the claims of Maori under the Treaty of Waitangi Act 1975:
>
> (c) In the case of successful claims by Maori under that Act, the transfer of Crown forest land to Maori ownership and for payment by the Crown to Maori of compensation:
>
> (d) Other incidental matters.

[75] Part 3 of the 1989 Act is headed "Return of Crown forest land to Maori ownership and compensation". Section 35 places restrictions on the sale of Crown forest land and any rights or interests in any Crown forestry licence. Crown forest

land subject to a Crown forestry licence cannot be disposed of "except in accordance with section 8" (which requires Ministerial approval). Crown forestry licences cannot be disposed of "unless the Waitangi Tribunal has made, in relation to the licensed land, a recommendation under section 8HB(1)(b) or section 8HB(1)(c) or section 8HE of the Treaty of Waitangi Act".[76] The first two routes described deal with the Waitangi Tribunal's options "where a claim [is] submitted to the Tribunal under section 6".[77] The third is a "[s]pecial power" (not in issue in the present case) to recommend that land be cleared from liability to be returned to Maori ownership on application by the Crown or any licensee of Crown forest land. The Crown Forestry Rental Trust was established by deed dated 30 April 1990.

[76] The statutory history clarifies Parliament's purpose in enacting the 1988 and 1989 legislation. That purpose was to make changes to the process under the 1975 Act for addressing claims of breach of Treaty principles. The changes, which applied to claims in respect of licensed Crown forest land, gave greater protection to those who established their claims were well-founded. Rather than being dependent on a favourable response from the government to a recommendation of the Tribunal, claimants could seek recommendations from the Tribunal for a remedy which would become binding on the Crown if no other resolution of the claim was agreed. The purpose accordingly was to protect claimants by supplementing their right to have the Tribunal inquire into their claim[78] with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown. If the Tribunal so decided, that relief could extend to returning Crown forest land to identified Maori claimants. This was in return for permitting the Crown to transfer government-owned assets, including forest crop and other forest assets, to private interests. The government was thereby able to fully implement its corporatisation policy.

[77] It is in this context that the lawfulness of the Tribunal's refusal to accord the appellant a hearing for remedy of his claim must be determined.

---

76 Crown Forest Assets Act 1989, s 35(2).
77 Treaty of Waitangi Act 1975, s 8HB(1).
78 Section 6(2).

The Tribunal was obliged to decide whether or not to make an order under s 8HB

[78] Contrary to the view taken in the High Court and Court of Appeal, we consider that the Tribunal, having decided the claim on behalf of Mangatu Incorporation was well-founded, was obliged to determine the claim in Wai 1489 for an order under s 8HB(1)(a) of the Treaty of Waitangi Act. The Tribunal had a choice as to whether or not to grant the remedy sought and, if so, on what terms. But it had to make a choice. It was jurisdiction it could not decline. This conclusion turns on the terms and scheme of the legislation.

[79] As the long title of the Treaty of Waitangi Act suggests, the Tribunal was established to assist the Crown in discharge of its Treaty obligations through making "recommendations on claims relating to the practical application of the Treaty". Its functions, described in s 5 and as relevant to the present appeal, are "to inquire into and make recommendations upon ... any claim submitted to the Tribunal under section 6" and "to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 of the Crown Forest Assets Act 1989" (which provides for calculation of the compensation payable under s 36(1)(b) to Maori to whom ownership of the land is transferred in accordance with the recommendation of the Tribunal). The claim in Wai 1489 was that the prejudice suffered by the proprietors of Mangatu Incorporation in the 1961 sale should be removed by a recommendation for return of the land (made under s 6(3) and s 8HB(1)(a) of the Treaty of Waitangi Act but binding on the Crown pursuant to s 36(1) of the Crown Forest Assets Act) and compensation (both by way of the general power to make "other" recommendations reserved under s 8HB(3) and under the specific statutory regime for compensation for forestry licences under s 36(1)(b) and Sch 1 of the Crown Forest Assets Act).

[80] It is the principal function of the Waitangi Tribunal to inquire into and make recommendations on claims submitted to it under s 6 of the Treaty of Waitangi Act.[79] With limited exceptions, the Tribunal is obliged to inquire into every claim.[80] This

---

79 Section 5(1)(a).
80 Section 6(2).

involves determining whether the claim of Crown action inconsistent with the Treaty of Waitangi is well-founded, and if so, whether the Tribunal should recommend to the Crown that action be taken to compensate for or remove the prejudice.[81] While the Tribunal is not obliged to recommend a remedy for all claims it has decided are well-founded, it is required to determine whether it should do so. Its recommendations may either be in general terms or indicate specific actions which, in the opinion of the Tribunal, the Crown should take.[82] Each of these steps is part of the inquiry which it is the Tribunal's duty to undertake. The obligation to inquire into each claim is not discharged by a determination that the claim of Treaty breach is well-founded.

[81] Section 7(1) confers on the Tribunal limited powers to decide, in its discretion, not to inquire into, or further inquire into a claim. They apply to claims concerning trivial matters or where they are frivolous or vexatious or not made in good faith. The powers also cover claims where there is an adequate alternative remedy. Given the very substantial protection accorded to claims in respect of Crown forest land, there can be no alternative remedy that is adequate. None of the factors identified in s 7(1) applies in the present case and there is no other provision excusing the Tribunal from its duty to inquire into the claims.

[82] Further power to refuse to inquire is provided by s 7(1A):

> **7 Power of Tribunal to defer claim**
>
> ...
>
> (1A) The Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under section 6.

[83] While this provision does not excuse the Tribunal from its duty to inquire, it does permit it to defer commencing an inquiry (and to adjourn it after it has commenced) for a period or periods. This can only be done "for sufficient reason". When the power is exercised, the Tribunal must inform the claimant of its decision

---

81 Section 6(3).
82 Section 6(4).

and state its reasons for its decision.[83] The power always looks to commencement or recommencement of the inquiry once sufficient reasons for the deferral cease to exist.

[84] It follows from this statutory scheme that the power under s 7(1A) cannot be used, consistently with its purpose, in order to defeat a claim, in the sense of precluding it from being the subject of an inquiry or precluding completion of that inquiry. In that respect, an inquiry into a claim is not complete until the Tribunal has determined whether the claim is well-founded and, if so, whether it should recommend a remedy. Where the Tribunal has decided a claim is well-founded and the remedy sought is return of Crown forest land, the inquiry must address whether the land is to be returned to Maori ownership, any terms and conditions of return, and, if applicable, to which Maori or group of Maori the land is to be returned.[84]

[85] The Tribunal also has powers under the Second Schedule to the Act to regulate its own procedure in such manner as it thinks fit.[85] The Chairperson of the Tribunal may issue Practice Notes as to its practice and procedure.[86] The Chairperson or other presiding officer also has powers to do any acts preliminary or incidental to a Tribunal hearing.[87] These powers, however, are administrative in nature only. The Act is specific as to whether they may be exercised by the Tribunal or the Chairperson or presiding officer.

[86] The Tribunal, of course, has limited resources to meet the many demands on it for hearings of claims. It may lawfully use its powers under s 7(1A) to prioritise hearings of claims, subject to consideration of urgency in the particular case. In the present case it was also within the Tribunal's powers for it to adjourn the inquiry after making findings on the merits of the claims, in order to encourage the parties to endeavour to reach their own settlement. While the prospect of a settlement between the various claimants and the Crown remained open, there may well have continued to be sufficient reasons for the adjournment to continue.

---

83 Section 7(2).
84 Section 8HB(1).
85 Schedule 2, cl 5(9).
86 Schedule 2, cl 5(10).
87 Schedule 2, cl 8(2)(c).

[87] But the exercise of the s 7(1A) power for scheduling reasons or to permit negotiated settlement does not end the inquiry. It does not remove the Tribunal's obligation to complete an inquiry by adjudicating on whether it should make remedial recommendations for claims that it has decided are well-founded. If settlements do not eventuate or if irremediable prejudice to the claimants will result from deferral for scheduling purposes, the Tribunal must reconvene its adjourned inquiry to adjudicate on whether recommendations should be made.

[88] The obligation to consider any recommendations it thought fit to make after a finding of prejudice resulting from Treaty breach here fell to be fulfilled by the Tribunal in the context of Crown forest assets and the special provisions under the heading "Recommendations in relation to Crown forest land". Under them, the Tribunal has the effective responsibility of ordering resumption, where it considers that course appropriate, because the Crown must comply with its recommendations in relation to such land, after a 90 day pause to enable other resolution by agreement. As Baragwanath J remarked in *Attorney-General v Mair*, the result of the 1989 amendments in relation to Crown forest land was to confer upon a claimant with a sound case for the exercise of the judgment of the Tribunal an outcome which, "while expressed as recommendatory, [is] ultimately adjudicatory".[88] That view is consistent with the legislative history, referred to above. As the long title to the Crown Forest Assets Act makes clear, the legislative package enacted in 1989 envisaged that "successful claims" under the Treaty of Waitangi Act would result in "the transfer of Crown forest land to Maori ownership and for payment by the Crown to Maori of compensation." The agreement of 20 July 1989, which preceded the legislation and which is referred to at [70]–[73] above, identified a principle of significance to Maori as being to "minimise the alienation of property which rightly belongs to Maori". The jurisdiction to order resumption in respect of licensed Crown forest land, conferred on the Tribunal by the 1989 Act, was part of the negotiated solution reached between the Crown and Maori in their agreement, under which both parties gained something of value. It must be understood in that context.

[89] Particular care not to preclude completion of the inquiry is necessary in such cases. They are not the same as those in which the recommendations of the

---

[88] *Attorney-General v Mair* [2009] NZCA 625 at [102].

Waitangi Tribunal may or may not be accepted by the Crown, and in respect of which some deference to the political process in which claims are negotiated makes good sense, particularly when the Tribunal has to husband its resources. In the case of Crown forest land, the "recommendatory" obligation of the Tribunal is an adjudicatory obligation, even if the relief available to it is a matter for judgment.

[90] The circumstance that the claim sought a recommendation under s 8HB(1)(a) for return of the land was highly relevant in considering an application for urgency against the background that this jurisdiction of the Tribunal was likely to be overtaken if urgent hearing was denied. Judge Clark addressed the request for an urgent hearing under the generic Directions given by the Deputy Chairperson of the Tribunal for decisions on allocating remedies hearings.[89] We do not read the September 2007 Directions (indicating that "no different or separate set of criteria will be applied to the granting of a remedies hearing where the remedies sought include binding recommendations relating to particular land") as suggesting that the circumstance that the claim seeks binding recommendations is not a highly important contextual consideration. The non-exhaustive criteria identified do not suggest irrelevance. But if any such implication should be taken from the statement, made "[f]or the avoidance of doubt", it is necessary to say that, in the statutory scheme, likely avoidance of the special remedy provided must be an important, perhaps the decisive, factor in considering whether to hold a remedies hearing.

[91] The Tribunal is not obliged to recommend resumption. That is clear both from the wording of s 6(3) and s 8HB. Section 8HB applies to all claims relating to licensed land, as the 1961 lands are. The Tribunal has three options only in relation to claims for licensed Crown forest land. It may recommend that the land be not liable to return to Maori ownership if it finds the claim not to be well-founded.[90] If it finds the claim to be well-founded, it must consider whether remedial action "to compensate for or remove the prejudice" it has found "should include the return to Maori ownership of the whole or part of the land".[91] If so, it may include such a

---

89 It is not clear which powers were being exercised by the Deputy Chairperson in issuing the directions, or whether they should have been issued by the Tribunal itself rather than a presiding officer, but no issue has been made of that in this case.

90 Treaty of Waitangi Act 1975, s 8HB(1)(c).

91 Section 8HB(1)(a)(ii).

recommendation in its recommendation under s 6(3) (so that the resumption takes effect after the 90 day pause if not overtaken). If a recommendation for return is "not required ... by paragraph (a)(ii) of this subsection", it may recommend that the land "not be liable to return to Maori ownership".[92] (This discretion is necessary because the land may be subject to other claims which makes its clearance from liability premature).

[92] The scheme therefore is that, following a finding that a claim is well-founded, s 8HB(1)(a) is the controlling provision. The Tribunal must consider whether its return "should" be recommended as part of a recommendation under s 6(3) "to compensate for or remove the prejudice caused [by the act found to be in Treaty breach]".

[93] Here, the prejudice arose out of the alienation of the land from the proprietors of Mangatu Incorporation in 1961. It was necessary for the Tribunal, in discharging its obligation to inquire into the claim, to consider whether to recommend return of the land. The decision of Judge Clark, declining the request for an urgent remedies hearing, shows no appreciation of the need to make a determination under s 8HB(1) (perhaps because he took the view, which for reasons given below we consider to be in error, that the Tribunal had already decided against a recommendation to return the land in its 2004 report). The result is that the Tribunal's obligation to inquire into the claim has not been fulfilled. And consideration of the application for the urgent remedies hearing failed to take into account the critical circumstance that this was a claim for return of land under s 8HB(1)(a). Without that context, the assessment of prejudice (required by the Practice Note) was not properly undertaken and the determination not to grant an urgent hearing was inevitably flawed.

The Tribunal had not exercised its jurisdiction to inquire into the claim by its report of 2004

[94] Judge Clark took the view that the Tribunal, in its 2004 report, had fulfilled its obligations to consider the claim and make recommendations. He considered it

---

92 Section 8HB(1)(b).

had decided against recommending return of the land to "the current owners of Mangatu",[93] preferring instead to recommend that specific relief for Te Aitanga a Mahaki (whose members it treated as having been affected by the breach in relation to sale in 1961) should be sought in the district-wide negotiated settlement. As a result, he thought that, at the hearing sought, the applicant would have to persuade the Tribunal to change its recommendation, a step it was unlikely to take given that it was being followed in the negotiations.[94] This view was one of the three planks of his decision to decline the application. The High Court and Court of Appeal also agreed that the Tribunal had made a decision as to remedies in its 2004 report.[95]

[95] We are unable to read the 2004 report as discharging the Tribunal's obligation to inquire into the claim to the 1961 lands on behalf of Mangatu Incorporation. The terms of the report look to the anticipated negotiation towards a settlement but reserve leave to the parties to apply further should that be necessary. There is no formal determination that the Tribunal's recommendation, in terms of the legislation, is for negotiations and that it has decided that no other recommendations (including those available to it under s 8HB(1)) are appropriate. The letter of transmittal, quoted above in [14], makes it clear the Tribunal had made no recommendations but had offered guidance for the purpose of negotiations. There is no reference in the report to the claims for relief under s 8HB(1)(a) and no determination whether or not removal of the prejudice claimed (the loss of the very land subject to the resumption liability of the Crown) should be addressed by recommending resumption. Nor is there any consideration of other matters required to be addressed under s 8HB(1)(a), should resumption be recommended, such as the identification of those to whom the land should be "returned" or any terms and conditions that might be appropriate. Against a finding of prejudice in the acquisition of the 1961 lands (a specific claim of prejudice which on the claim could only have been suffered by the owners at the date of acquisition), absence of recommendations on these matters provided no platform for negotiation of the specific claim. It was not surprising that it was lost in the district-wide settlement negotiation. Rejection of urgency in Wai 1489 meant that Mr Haronga has not been

---

93 At [52].
94 At [54].
95 At [106]–[110] per Clifford J and at [48] per Arnold J.

heard on the issue of resumption under the statutory system designed to protect land from wrongful alienation and in respect of a finding that the loss of the 1961 lands which he seeks to recover for the owners was wrongful. Given the statutory obligation, discussed above, to inquire into every claim and consider making recommendations where they are well-founded, the general findings and indications given in the report cannot fairly be read as fulfilling the responsibilities of the Tribunal under s 6(2) and s 8HB(1). It follows that Judge Clark in declining an urgent remedies hearing and the Courts below in refusing relief on judicial review were in error in a principal ground relied on.

The merits of Mr Haronga's application for urgent hearing were not affected by the ongoing negotiations between Te Whakarau and the Crown

[96] The fact that negotiations between Te Whakarau and the Crown were continuing was a significant factor in the decision of Judge Clark not to grant an urgent remedies hearing. He treated the fact that negotiations had not broken down as indicating that the intervention of the Tribunal was not required.[96] In the High Court, Clifford J took the view that the "otherwise ongoing negotiations" would have been irrelevant if Mr Haronga and the proprietors of Mangatu Incorporation had "formally and effectively" withdrawn the mandate given to Te Whakarau.[97] In such circumstance, if the Tribunal had taken them into account, it would have fallen into error of law. Since, however, Clifford J considered that the mandate had not been withdrawn, he too took the view that Judge Clark was entitled to take the ongoing negotiations between Te Whakarau and the Crown into account in declining the urgent hearing. While the Court of Appeal considered that an inflexible application of the "circuit-breaker" policy could be objectionable, it thought that the circumstance was a relevant consideration which Judge Clark was entitled to take into account in the exercise of his discretion whether to grant urgency.[98]

[97] In our view, Clifford J was right to see the relevance of the ongoing negotiations with Te Whakarau as dependent on whether Mr Haronga and the proprietors of Mangatu Incorporation were bound by mandate for the negotiations.

---

96 At [57].
97 At [119]–[120].
98 At [47].

Since we consider that they were not, the foundation for his conclusion is, however, undermined.

[98] We consider that there was no legal compulsion for Mr Haronga and the proprietors of Mangatu Incorporation to remain within the settlement process. They were not estopped from bringing a distinct claim, as they did. Indeed, we think they could simply have sought an urgent resumed hearing under the leave reserved in Wai 274, since that claim specifically sought restoration to the proprietors of Mangatu Incorporation of the land alienated in 1961. Nor was it necessary, as Clifford J thought,[99] for there to be any particular form of withdrawal from the earlier mandate given. The filing of the claim in Wai 1489 (when it became clear that the earlier claim in Wai 274 by Mr Ruru for return of the 1961 lands to Mangatu Incorporation was not being pursued by Te Whakarau) was inconsistent with the negotiations and any mandate relied on by Te Whakarau in respect of Mr Haronga and the proprietors of Mangatu Incorporation. They were entitled to have the claim heard and determined under s 6(2) of the Treaty of Waitangi Act (set out at [49] above). Although in form a separate claim, it was in reality pursuing the original claim in Wai 274 for resumption of the land sold in 1961.[100] There was no longer any occasion to defer the s 6(2) responsibility for determination of the claim for resumption to Mangatu Incorporation once exclusion of the claim from the settlement removed any "sufficient reason" to defer the inquiry under s 7(1A). In considering a request for urgent hearing, the negotiations between Te Whakarau and the Crown had become irrelevant and Judge Clark's reliance on them was, as Clifford J rightly saw, in error of law.

[99] Similar reasoning applies to the factor upon which Judge Clark placed most stress – the fact that the proprietors of Mangatu Incorporation will not be excluded from the benefits of any settlement resulting from the negotiations, including through the prospect of purchase of the whole of the Mangatu State Forest. Their claim is for specific relief which entails removal of the very prejudice complained of through return of the 8,626 acres alienated from Mangatu Incorporation in 1961. It

---

99 At [82].

100 Mr Haronga might indeed have applied for continuation of the hearing in Wai 274 in his own right (as a member of the group represented by Mr Ruru).

was no answer to say in response to an application for an urgent determination on the merits that Mr Haronga and the proprietors of Mangatu Incorporation will be entitled to share in the benefits of any commercial redress offered for breach of those other claims. But any such remedy does not remove their right to the Tribunal's investigation and adjudication as to remedy in respect of the specific prejudice and breach suffered by them in their capacity as owners in 1961.

The urgent hearing should have been granted

[100] Had the matter been viewed on its merits, an urgent hearing could not have been withheld because of the likelihood the proprietors of Mangatu Incorporation would lose the right to adjudication of their claim. The Court of Appeal did not consider the merits of the application because of the view it took that the considerations which persuaded Judge Clark were open to him, a view with which we have expressed disagreement. Judge Clark himself considered that the matter was evenly poised and that the application would "undoubtedly" have succeeded if Mangatu Incorporation was the only claimant with an interest in the 1961 land.[101] He was persuaded not to grant the application only because of the offer, including the forest, to Te Whakarau and in which Mr Haronga and the proprietors of Mangatu Incorporation would share. As indicated, we consider these reasons were misconceived and did not obviate the need to consider the application on its own merits. Similarly, Clifford J in the High Court took the view that, had it not been for the continuing mandate of Te Whakarau, there might well have been such significant and irreversible prejudice that an urgent hearing was warranted.[102] Such conclusion seems inevitable, for reasons which may be summarised in what follows.

[101] This is a claim for restoration of the very land the loss of which has caused the prejudice found to have been suffered in breach of the principles of the Treaty. Restoration of land (should the Tribunal recommend it) will remove that prejudice. If the opportunity to obtain restoration is lost, the claimant will suffer "significant and irreversible prejudice" through the proposed settlement. Such prejudice, both self-evidently and as recognised by the Practice Note, is a principal factor bearing on

---

101 At [60].
102 At [119]–[121].

whether urgent hearing should be granted. The settlement negotiated will not deal with the specific claim for restoration of the land under the adjudicatory jurisdiction of the Tribunal.

[102] In such circumstances, the "circuit-breaker" role the Tribunal recognises is in reality engaged, because it is clear the appellant and Mangatu Incorporation are excluded from negotiations about return of the 1961 lands. The Tribunal is the only body able to intervene. That is itself a reason for the Tribunal to undertake an urgent remedies hearing, as the September 2007 Directions acknowledge.

[103] The Tribunal's district-wide policy of hearing is comparatively new. The Turanganui a Kiwa claims were the first dealt with under the district-wide approach. As the September 2007 Directions acknowledged, the new approach had led to more wide-ranging findings and a preference for leaving the parties to negotiate their own settlement. There were implications for specific claims for particular relief which may not have been easy for claimants to appreciate, particularly in the first district-wide hearing. It is significant that the specific claim (return to Mangatu Incorporation) was put forward at the outset in Wai 274. Although that claim was consolidated in an amended pleading common to Wai 274 and 283 and as part of the case management of the district-wide claim, the relief sought (return to the "claimants") remained apt to cover the specific relief for Mangatu Incorporation in relation to the 1961 lands. This is not a case of a claimant coming forward belatedly with something unforeseen. As soon as it became clear from the negotiations that the land was not being returned to Mangatu Incorporation, Mr Haronga filed a further specific claim and sought urgency.

[104] A significant number of people are affected as proprietors of Mangatu Incorporation. That is a factor identified by the Deputy Chairperson in the Directions of September 2007 as relevant to the decision to grant a remedies hearing. There is no doubt that the Incorporation is "of a dimension and composition that make it suitable to receive the remedies it is seeking".[103] The connection of Mangatu Incorporation and its proprietors with the particular land is undisputed and the Incorporation's protection of the land since 1893 is a matter of pride. The loss of

---

[103] At 4.

nearly 9,000 acres from the Block in 1961 was the Treaty breach which qualifies them to seek redress through its return. It was a circumstance which should properly have weighed in favour of urgency that the opportunity to recover the lost land was slipping away.

[105] The September 2007 Directions provide that the criteria for granting a remedies hearing are no different in relation to the Tribunal's compulsory powers than in relation to claims in which it has powers of recommendation only. We doubt whether such a sweeping proposition can be justified given the terms and legislative history of the 1989 amendments. It may be that the Tribunal had in mind cases where there is no risk that failing to grant urgency will lead to defeat of the claim before it can be considered. In such cases it may be appropriate to give the claimants and the Crown opportunity to come to their own negotiated outcome, rather than an outcome achieved through adjudication. But where matters reach a stage, as here, where settlement will defeat the claimants' rights to have resumption determined by the Tribunal, the fact that the compulsory jurisdiction is invoked cannot be irrelevant. The legislative history of the 1989 amendments make it clear that this jurisdiction was enacted as significant redress and as part of a bargain in which the Crown also gained something of value to it. It would not be in the spirit of the legislation or its policy of providing greater security to Maori claimants in obtaining return of land to treat the loss of the opportunity as irrelevant. It was itself a right of real value. The decision not to grant urgency was flawed by the failure to weigh this powerful factor. Properly taken into account, it is close to being determinative in itself.

[106] The Crown stressed that there are overlapping claims in relation to the Mangatu forest. The Tribunal itself noted in its report that "Te Aitanga a Mahaki were directly affected" by the 1961 acquisition from Mangatu Incorporation, without however explaining the comment further.[104] And the Tribunal also found that members of Ngariki Kaiputahi were prejudiced, in Treaty breach, by the vesting orders made in the Native Land Court in 1881 in respect of Mangatu No 1 Block, perhaps indicating that they have an interest in the forest for the purposes of redress which may conflict with the claim on behalf of Mangatu Incorporation.

[104] At [16.6.10].

Section 8HB(1)(a) (set out above at [51]) specifically confers upon the Tribunal the "duty" (as the Practice Note of August 2007 rightly recognises it to be) of identifying "the Maori or group of Maori" to whom the land "is to be returned". The language of s 8HB(1)(a) ("shall identify") highlights that it is the obligation of the Tribunal to decide between competing claims once it has determined that the claim is "well-founded" and that the action to be taken to compensate for or remove the prejudice "should include the return to Maori ownership" of the land or part of it. The first condition is already made out by the finding in 2004 of the Tribunal in relation to the acquisition of 8,626 acres from Mangatu Incorporation in 1961. The second condition can only be fulfilled by the Waitangi Tribunal completing its inquiry, as the appellant seeks. But the obligation on the Tribunal to identify the Maori or group of Maori to whom land must return means that the possibility of overlapping interests cannot properly be used, as it was by Judge Clark and the Courts below, as a reason against the granting of an urgent remedies hearing for the proprietors of Mangatu Incorporation.

[107] If the Tribunal is of the view that the land should be returned, it has power under s 8HB to arrive at the outcome it thinks right. It may return part only of the land or specify the Maori or group of Maori to whom the 1961 lands or the balance of the Mangatu forest should be returned. Although compensation under Sch 1 goes with the land, the Tribunal may recommend return with or without additional compensation[105] and in any event may order terms or conditions. (It may be for example that some adjustment to any additional compensation or the imposition of terms or conditions is considered if the Tribunal finds that the price paid to Mangatu Incorporation in 1961 was fair.) The Tribunal has ample power to impose terms and conditions and to adjust interests if that seems necessary. An urgent hearing would not give the appellant "priority", as the Court of Appeal feared. And other affected parties, such as those claiming to be affected by the 1881 Native Land Court determination, can be heard on the resumption claim.[106]

---

105 Under s 8HB(3) of the Treaty of Waitangi Act 1975.

106 Section 8HD(1)(d) of the Treaty of Waitangi Act 1975 safeguards the right of any Maori or group of Maori with an interest in the inquiry apart from any interest in common with the public to appear and be heard in the course of any inquiry into a claim for licensed Crown forest land.

[108] Although hearing the claim may cause some delay to the settlement, or part of it, the Tribunal Practice Note of August 2007 indicates that urgent hearings will be expedited. And the issues for determination are confined to whether the land should be resumed, and if so, by whom and on what terms and conditions. Moreover, it is not inconceivable that, if the proprietors of Mangatu Incorporation have the opportunity to be heard by the Tribunal, that itself may act as the "circuit-breaker" envisaged by the Tribunal, allowing the opportunity for further discussion between the parties. In the circumstances, however, the prospect of additional delay cannot be determinative.

[109] If the appellant is to be heard, as is his right under the legislation, it is necessary to give urgency to his claim, which will otherwise be overtaken. Judge Clark was of the view that the case for urgency was "finely balanced".[107] If it had not been for the offer to Te Whakarau, he thought the application was a very strong one. The offer does not meet the case, for the reasons given. The reasons to the contrary that prevailed in the Courts below are not on point. The factors identified make this an overwhelming case for urgent hearing.

[110] In requiring the Tribunal to proceed with urgency to hear Mr Haronga's claim, we do not seek to offer any view on the merits of the relief sought on behalf of Mangatu Incorporation. We reiterate that it is for the Tribunal to exercise its statutory obligation to inquire into the claim for resumption of the 1961 land. Whether recommendations are made which include return of land and to whom is for the Tribunal to decide.

[111] We would allow the appeal and quash the determination of Judge Clark. The matter is remitted to the Waitangi Tribunal with the direction that it must proceed urgently to hear the claim.

WILLIAM YOUNG J

---

[107] At [50].

Why I am dissenting – an overview

[112] The result in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*[108] notwithstanding, it is not customary for the courts to exercise (directly or indirectly) the statutory power of decision which is being reviewed. So if the usual judicial review approach were adopted on this appeal, the Waitangi Tribunal would simply be required to reconsider whether to grant urgency. The majority have, instead, required the Tribunal to accord urgency; this because they consider that Judge Clark[109] had no choice but to direct an urgent hearing of Mr Haronga's application. I disagree and this is the primary reason why I am dissenting.

[113] In the balance of these reasons, I will explain why I prefer a more limited approach to relief to that proposed by the majority. I will do so primarily by reference to (a) the history of the dispute; (b) whether the statutory scheme left Judge Clark with no choice but to direct urgency; and (c) whether there was legitimate scope on the facts for refusing urgency.

[114] I disagree with the majority on the primary reason they give for concluding that Judge Clark was wrong (namely their conclusion that on the basis of the statutory scheme he had no choice but to order urgency). I also consider that it was properly open to him to refuse urgency. My reasons for this latter conclusion are not precisely the same as Judge Clark gave (although there is a reasonable degree of overlap). A close analysis of whether such differences as there may be between his approach and mine disclose reviewable error would be a distraction from the more important questions in the case. Given this is a dissenting judgment, I propose to afford myself the luxury of not engaging in that kind of analysis. This means that I am addressing the case on the assumption that judicial review should be granted and am confining myself to remedy.

---

108 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).

109 In deciding the application for an urgent remedies hearing: Wai 1489, #2.5.10 (21 October 2009).

The history of the dispute

[115] The relevant procedural history of the claims made to the Tribunal is reviewed in [9]–[12] of the reasons of the majority. It is, however, I think worth noting the way in which the claimants relevantly particularised, in the last statement of claim (referred to in [12] and filed in May 2001), the recommendations which they sought:

> (a) Pursuant to ss.8A – 8H(j)[110] of the Treaty of Waitangi Act 1975 with the return to the Claimants of all relevant Crown land, land held by any State Owned Enterprise, land held by any institution under the Education Act 1989 and land vested under the New Zealand Railway Corporation Restructuring Act 1990 or any interest in any such land and together with improvements thereon;
>
> (b) That all land owned by the Crown within the claim area and any improvements thereon including reserve and conservation land be returned to the Claimants;
>
> (c) That the area known as Mangatu State Forest be returned to the Claimants;
>
> ...

This final statement of claim thus sought the return of the Mangatu State Forest to the claimants generally and did not identify, as one of the earlier statements of claim had, a specific claim on behalf of Mangatu Incorporation for the return of the 8,626 acres acquired by the Crown in 1961 ("the 1961 land"). So if the general recommendation sought in (a) was intended to invoke s 8HB in relation to a claim by Mangatu Incorporation for the return of the 1961 land,[111] this was not clearly signalled.[112]

---

110 This is presumably a reference to s 8HJ of that Act.

111 The recommendation sought in (a) does not refer to "Crown forest land" or "licensed land" as those terms are defined and used in the Treaty of Waitangi Act 1975, ss 8HA–8HI.

112 If such a recommendation was being sought, the then current Waitangi Tribunal Practice Note "Guide to the Practice and Procedure of the Waitangi Tribunal" (October 2000) set out at [3.6] the Tribunal's expectation that claimants should state whether or not the relief sought includes the recovery of any land, or interest in land, in relation to which the Tribunal may make a binding recommendation under ss 8A to 8HJ of the Treaty of Waitangi Act 1975. The [3.6] expectation has been carried through to subsequent iterations of this Practice Note.

[116] In its report, *Turanga Tangata Turanga Whenua*,[113] the Tribunal found that there had been breaches of the principles of the Treaty in relation to, inter alia:

(a) The 1881 Mangatu title determination.[114] This determination provided the foundation for what became Mangatu Incorporation's title and, on the finding of the Tribunal, prejudiced the interests of Ngariki Kaiputahi.

(b) The 1961 acquisition by the Crown of the 8,626 acres from Mangatu Incorporation.[115] In this respect, the Tribunal set out the Crown contention that the price paid to the Incorporation was fair, on the basis that the price paid was higher than contemporary valuations, but did not make an express finding on the point.[116] Its finding that the relevant claim was well-founded was based on its conclusion that the conduct of the Crown in respect of the negotiations was in breach of Treaty principles.

[117] In its letter of transmittal, the Tribunal commented that it had "made no general recommendations in respect of possible settlements" and went on to say:

> We prefer ... to leave it to the parties to construct settlements which represent their choices rather than ours, although it is always open to claimants or the Crown to seek further assistance from us if that is desired. We have given some thought to relativities between claimant groups and our views on that matter can be found in chapter 16. They are intended to do no more than provide an independent guide in the hope that this will assist the parties to focus on the real issues in the negotiation such as overall quantum for the district.

I have doubt as to precisely what was meant by this letter, and in particular by the phrase "general recommendations" although, for reasons I will come to later, I do not think that anything turns on this.

---

113 Waitangi Tribunal *Turanga Tangata Turanga Whenua*: *The Report on the Turanganui a Kiwa claims* (WAI 814, 2004).

114 See [14.8].

115 See [15.5.4].

116 See [15.3.8]. It was accepted by the appellant, in discussing the Tribunal's findings with the Minister for Treaty of Waitangi Negotiations, that the owners were paid a reasonable price for the land.

[118] In chapter 16 of the *Turanga Tangata Turanga Whenua* report (titled "Hei Whakamahutanga: The Healing"), the Tribunal observed:[117]

> … it would still be our preference, and no doubt the Crown's, for the claimant iwi and hapu to negotiate the settlement of the Turanga claims in a single district-wide negotiation process if that is at all feasible. The advantages of this approach to the Crown and claimants are obvious and significant. For the Crown there is the advantage of a single set of negotiations without the usual problems of boundary disputes (at least for the iwi and hapu represented within the district). There can be significant gains in both time and cost for the Crown. For the claimants, there is the additional leverage on the crucial question of quantum, which a single district-wide claimant table can bring to the negotiation. A negotiating panel on which all settling groups are represented also has the advantage of transparency between claimant groups. This can reduce the potential for claimants to be distracted by internal competition over the size and nature of their respective settlement packages. Disputes over dividing the pie can be resolved more easily by using collective efforts to enlarge it first. In addition, there are significant advantages to claimants in being able to pool skills and expertise. In every district, there will be only a few individuals with experience in negotiation in the highest levels of government and with the networks to call on where necessary. It produces far better results for all if those few can be engaged for the common good, rather than to advantage one group over the others.
>
> That is not to say that a single negotiation would produce a single settlement package. On the contrary, we would fully expect a single negotiation to result in the creation of several settlement packages in accordance with the wishes of the claimants. It is the single negotiation that produces the advantages, not necessarily the single settlement.
>
> Whether this approach is feasible we cannot say, but it ought to be carefully considered for the benefits that it can bring to all sides. At the very least, the claimants should give consideration to a single negotiation of quantum for the whole district, even if each claimant group would prefer to negotiate its own particular settlement package.
>
> We turn now to the particular claimant groups and our view of the levels at which they should settle however the negotiations are ultimately structured. The hapu and iwi claims are advanced by:
>
> - Te Aitanga a Mahaki and its close affiliates Te Whanau a Kai and Ngariki Kaiputahi;
> - Rongowhakaata; and
> - Ngai Tamanuhiri.
>
> It is our view that the Mahaki cluster (our phrase for want of a better one) should negotiate a single settlement, though we do not discount the possibility that the result would include separate packages for each of Te Whanau a Kai and Ngariki Kaiputahi. In the end, although Te Whanau a

[117] At [16.5].

> Kai and Ngariki Kaiputahi have a number of distinctive claims, they are both so closely bound up in the Mahaki complex that the claims they share with their whanaunga outweigh, in our view, those which are distinct. That includes, we hasten to add, Ngariki Kaiputahi's separate Mangatu claim.
>
> ...
>
> **16.7.2 Relativities**
>
> In an effort to encourage the claimants to focus on the overall value of a Turanga settlement rather than engage in divisive internal competition over comparative settlement values, we cautiously suggest the following division in the overall settlement sum for Turanga:
>
> - Te Aitanga a Mahaki: 46 per cent. Of that proportion, 3 per cent should go to Ngariki and 7 per cent to Te Whanau a Kai, should it be agreed that those kin groups will administer separate settlements. That would leave 36 per cent to Te Aitanga a Mahaki itself. We consider that Te Whanau a Wi Pere should be compensated as a part of Te Aitanga a Mahaki and/or Te Whanau a Kai depending on the issue, since Wi Pere had strong claim to both lineages.
>
> ...
>
> **16.8 Hei Kapinga Korero**
>
> We finally wish the claimants and the Crown well in navigating their way through the difficult process of negotiating the settlement of these long-standing grievances. They have been left unanswered for far too long and the people of Turanga and Poverty Bay need to put these matters behind them so that they can begin to move forward. We are well aware of how difficult it has been for all sides to get even this far, yet in many ways the job has only just begun. It is time now to galvanise claimant communities for the push toward settlement. With luck it will be as a single body with many distinctive voices but much in common. It is time also for the Crown to galvanise its negotiating teams and its political will, to demonstrate to claimants that momentum need not be lost amongst the day-to-day issues of executive government as it so easily can be. We express the fervent hope that the benefits to accrue to claimant communities as a result of the settlement of the Turanga claims will outweigh the strains of the process.
>
> Leave is reserved to all claimant and crown parties to apply for further direction if necessary.

[119] As noted in the reasons of the majority at [18], Mr Haronga initially supported the mandate of Te Whakarau to negotiate with the Crown on behalf of the Mahaki cluster. The circumstances in which, and the reasons why, Mr Haronga came to file a separate claim on behalf of Mangatu Incorporation are discussed at [19]–[20] of the majority's reasons.

[120] Mr Haronga and the Committee of Management of Mangatu Incorporation have, very properly, kept the owners informed of progress with the claim and have received support at annual general meetings of the Incorporation. Of the approximately 5,000 owners, the Committee of Management has the postal addresses of some 3,000. Of those 3,000 owners, 121 attended the 2010 annual general meeting. Only 8 of these 121 owners voted in a way which was inconsistent with Mr Haronga's pursuit of the claim. Mr Haronga's position is that the actions he has taken on behalf of Mangatu Incorporation and the owners, as approved by the Incorporation, have terminated the mandate of Te Whakarau to represent it and the owners. There appear to have been no other steps taken to terminate the mandate of Te Whakarau and to establish a separate mandate in favour of Mr Haronga. His position seems to be that this is unnecessary given the legal status of Mangatu Incorporation, the decisions taken by its Committee of Management and the support these decisions have received at annual general meetings.

[121] The approach taken by Mr Haronga on behalf of Mangatu Incorporation and its owners is not congruent with the way in which the Crown would prefer to conduct settlement negotiations (namely on a district-wide basis) and what seems to be a similar policy preference on the part of the Tribunal. In dealing with Mr Haronga, the Crown has treated the issue over the 1961 land as "internal" to Te Whakarau. The consequential lack of engagement with Mr Haronga has understandably caused him much frustration, frustration with which I have considerable sympathy.

[122] On the other hand, I rather gather from the evidential material that the approach of Mr Haronga (and the Incorporation) to the mandating issue may have resulted in some frustration on the part of the Crown negotiating team and Te Whakarau. They plainly do not see votes at the annual general meetings of Mangatu Incorporation as amounting to a mandate in favour of Mr Haronga or a withdrawal of the mandate previously granted to Te Whakarau. Because the concept of mandate for these purposes is political rather than legal, I do not see myself as particularly well-placed to comment on the merits of the opposing positions.

[123] We do not know many details about the current settlement process, and in particular whether the Mangatu Incorporation owners, acting otherwise than through the Incorporation, may have signified approval of the proposed settlement and what the prospects are of those owners ratifying the proposed settlement by postal ballot, if the process ever gets that far.

Did the statutory scheme leave Judge Clark with no choice but to direct urgency?

Overview

[124] The approach taken by the majority is very much based on the view that, given the statutory scheme, Judge Clark had no choice but to direct urgency. As will be obvious, I do not accept that this is so. To explain why, I must myself review the statutory scheme.

The primarily relevant provisions

[125] The generally relevant statutory provisions of the Treaty of Waitangi Act 1975 are set out in the judgment of the majority but, despite the partial repetition, I think it helpful to set out those which I see as primarily relevant:

> **5 Functions of Tribunal**
>
> (1) The functions of the Tribunal shall be—
>
> (a) *to inquire into and make recommendations upon, in accordance with this Act, any claim* submitted to the Tribunal under section 6:
>
> ...
>
> (ab) to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 of the Crown Forest Assets Act 1989:[118]
>
> ...

[118] To anticipate a point that is later made, this is *not* a reference to binding recommendations made under the Treaty of Waitangi Act 1975, s 8HB(1)(a).

6 Jurisdiction of Tribunal to consider claims

(1) *Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—*

[by any of a number of specified types of State action]

and that the [specified type of State action] *was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section*.

(2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—

...

(b) section 7 applies.

(3) *If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.*

(4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

(4A) Subject to sections 8A to 8I, the Tribunal shall not recommend under subsection (3),—

(a) the return to Maori ownership of any private land; or

(b) the acquisition by the Crown of any private land.

...

7 Power of Tribunal to defer claim

(1) The Tribunal may in its discretion decide not to inquire into, or, as the case may require, not to inquire further into, any claim made under section 6 if in the opinion of the Tribunal—

(a) the subject-matter of the claim is trivial; or

(b) the claim is frivolous or vexatious or is not made in good faith; or

(c) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise.

(1A) The Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under section 6.

...

8HB Recommendations of Tribunal in respect of Crown forest land

(1) Subject to section 8HC, where a claim submitted to the Tribunal under section 6 relates to licensed land the Tribunal may,—

(a) if it finds—

(i) that the claim is well-founded; and

(ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Maori ownership of the whole or part of that land,—

include in its recommendation under section 6(3) a recommendation that the land or that part of that land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land is to be returned);

...

8HC Interim recommendations in respect of Crown forest land

(1) Where the recommendations made by the Tribunal include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), all of those recommendations shall be in the first instance interim recommendations.

(2) The Tribunal shall cause copies of its interim findings and interim recommendations to be served on the parties to the inquiry.

(3) Subject to subsection (5), the Tribunal shall not, without the written consent of the parties, confirm any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), until at least 90 days after the date of the making of the interim recommendations.

(4) Where any party to the inquiry is served with a copy of any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), that party—

(a) may, within 90 days after the date of the making of the interim recommendations, offer to enter into negotiations with the other party for the settlement of the claim; and

(b) shall, within 90 days after the date of the making of the interim recommendations, inform the Tribunal—

(i) whether the party accepts or has implemented the interim recommendations; and

(ii) if the party has made an offer under paragraph (a), the result of that offer.

(5) If, before the confirmation of any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), the claimant and the Minister of Maori Affairs settle the claim, the Tribunal shall, as the case may require, cancel or modify the interim recommendations and may make, if necessary, a final recommendation under section 8HB(1)(a) or section 8HB(1)(b).

(6) If subsection (5) of this section does not apply in relation to any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), upon the expiration of the 90th day after the date of the making of the interim recommendations, the interim recommendations shall become final recommendations. (Emphasis added)

[126] Also of relevance is the Crown Forest Assets Act 1989, the long title of which records that it is an Act:

... to provide for—

(a) The management of the Crown's forest assets:

(b) The transfer of those assets while at the same time protecting the claims of Maori under the Treaty of Waitangi Act 1975:

(c) *In the case of successful claims by Maori under that Act, the transfer of Crown forest land to Maori ownership* and for payment by the Crown to Maori of compensation: (Emphasis added)

The purpose identified in (c) of the long title was made good[119] through the enactment of first, ss 8HB and 8HC (which are reproduced above, and were introduced into the Treaty of Waitangi Act via Part 4 of the Crown Forest Assets Act), and secondly, s 36(1) which provides:

---

[119] In saying this I am conscious that the long title refers to "Crown forest land" whereas, as I will discuss, the compulsory recommendation process applies only to such land which is subject to a Crown forestry licence.

> **36 Return of Crown forest land to Maori ownership and payment of compensation**
>
> (1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—
>
> (a) Return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) Pay compensation in accordance with the First Schedule to this Act.

Schedule 1 provides for compensation to be assessed by reference to (a) the prejudice associated with the returned land being encumbered by a forestry licence and (b) the value of the trees (which can be calculated in a number of ways).

[127] It is important to recognise that the Crown Forest Assets Act was not enacted to facilitate the sale of Crown forest land generally. Rather it primarily provided for what in rather simplistic terms[120] can be seen as sale by the Crown of the trees. This involved, inter alia, the creation of Crown forestry licences. Treaty of Waitangi issues were addressed only in relation to land which was subject to such licences[121] with the result that the ability of the Crown to deal with other Crown forest land does not appear to have been materially constrained by the Act.[122]

The Treaty of Waitangi Act, ss 6(1)–(3)

[128] The structure of ss 6(1)–(3) is as follows:

(a) The relevant claim is as to inconsistency rather than for particular relief. This is apparent from the words of s 6(1).

---

120 "Crown forestry assets" are defined in s 2 of the Act so as to include assets which go beyond the trees, for instance plant used for forestry purposes.

121 See s 35(2) of the Crown Forest Assets Act and s 8HB(1) of the Treaty of Waitangi Act.

122 I confess to some difficulty understanding why ss 8 and 35(1) and (2) are drafted as they are. Section 8 is couched in permissive terms but the dealings it authorises are very limited. Section 35(1) has the consequence that licensed land can only be sold in accordance with s 8 (which I assume is a restriction intended to protect Treaty claimants). But s 8 also applies to non-licensed Crown forestry land and in this respect seems to be unnecessary as permitting what could in any event be done. And the s 35(1) restriction is not, at least explicitly, lifted if a recommendation of the kind referred to in s 35(2) is made. My doubts about all of this, however, do not affect the substance of what is expressed in the text.

(b) The obligation of the Tribunal under s 6(2) is to inquire into that claim, that is, to inquire into whether there has been a relevant inconsistency.

(c) Where the Tribunal finds such a claim to be well-founded, it may "if it thinks fit having regard to all the circumstances of the case" (as the legislature puts it in s 6(3)), make recommendations.

[129] A Waitangi Tribunal claimant may well specify the recommendations which will be sought and in this way can be regarded as claiming relief (in the form of the proposed recommendations). And where a compulsory recommendation is likely to be sought, the Tribunal expects that to be signalled in the statement of claim.[123] But on my interpretation of s 6(1), the statutorily envisaged claim is confined to the asserted breach of Treaty principles. I think that this follows from the direction in s 6(1) to the effect that it is "that claim" which may be submitted to the Tribunal. The s 6(2) obligation imposed on the Tribunal to inquire into claims submitted under s 6(1) thus applies to the claim of inconsistency.

[130] In contradistinction the majority judgment proceeds on the basis that the s 6(2) obligation to inquire extends to the recommendatory function under s 6(3). As is apparent, I disagree. In doing so, I note that:

(a) Throughout ss 5 and 6, the legislature has used the terminology of both inquiry and recommendation. Given this, I think it is difficult to construe the statutory obligation to inquire imposed by s 6(2) as encompassing the statutory function of making recommendations (or indeed considering whether to do so).

(b) My narrow approach to s 6(2) is supported by the sequence envisaged by ss 6(1)–(3): the making of a claim as to alleged inconsistency, a duty on the Tribunal to inquire into that claim, and then, if the claim is well-founded, a discretionary power to make recommendations.

---

123 See footnote 112, above.

(c) Applying s 6(2) to the Tribunal's recommendatory function would create something of a tension between the mandatory terms of s 6(2) and the very discretionary nature of s 6(3) emphasised by the use of both the word "may" and the qualifier that such discretion is only to be exercised if the Tribunal "thinks fit having regard to all the circumstances of the case".

[131] So, on the general structure of ss 6(1)–(3), I see the s 6(2) obligation as discharged once there has been a full inquiry into the s 6(1) claim. This, of course, is not to say that the Tribunal is not required to approach in a principled way whether to make a recommendation. It is just that it is not required to do so under the compulsion of s 6(2) from which s 7 is the only escape route.[124] And my reading of the August 2007 Practice Note concerning the Tribunal's practice and procedure[125] and the September 2007 memorandum and directions given by Judge Wainwright concerning remedies applications[126] suggests to me that the Waitangi Tribunal is of the same view.

What if s 8HB is potentially applicable?

[132] I rather suspect that if it were not for ss 8A–8I, there would have been little challenge to my general – and not very prescriptive – analysis of the interplay between ss 6(1)–(3); this given that consensual settlements are the primary mechanism for resolving Treaty claims, the pivotal but necessarily flexible role which the Tribunal plays in that process and the deeming of the Tribunal to be a Commission of Inquiry and not a court.[127] On the other hand, I accept that the compulsory recommendation procedures provided for by ss 8A–8I (discussed in full in the reasons of the majority) and the associated implementing legislation (such as s 36 of the Crown Forest Assets Act and ss 27B–27C of the State-Owned Enterprises Act 1986) might arguably require a different and more formal approach.

---

124 Section 6AA(1) has no relevance to this case.

125 Waitangi Tribunal "Guide to the Practice and Procedure of the Waitangi Tribunal" (August 2007).

126 Wai 45, #2.273 (6 September 2007).

127 Treaty of Waitangi Act 1975, Schedule 2, cl 8(1).

[133] The reasons of the majority proceed on the basis that a claimant seeking return of land is making a "claim" for the land for the purposes of both s 6(2) of the Treaty of Waitangi Act and item (c) of the long title of the Crown Forest Assets Act and is, in that way, evoking an adjudicatory jurisdiction. The underlying reasoning is best captured in the actual language used in the reasons of the majority:

> [78] Contrary to the view taken in the High Court and Court of Appeal, we consider that the Tribunal, having decided the claim on behalf of Mangatu Incorporation was well-founded, was obliged to determine the claim in Wai 1489 for an order under s 8HB(1)(a) of the Treaty of Waitangi Act. The Tribunal had a choice as to whether or not to grant the remedy sought and, if so, on what terms. But it had to make a choice. It was jurisdiction it could not decline. This conclusion turns on the terms and scheme of the legislation.
>
> ...
>
> [86] The Tribunal, of course, has limited resources to meet the many demands on it for hearings of claims. It may lawfully use its powers under s 7(1A) to prioritise hearings of claims, subject to consideration of urgency in the particular case. In the present case it was also within the Tribunal's powers for it to adjourn the inquiry after making findings on the merits of the claims, in order to encourage the parties to endeavour to reach their own settlement. While the prospect of a settlement between the various claimants and the Crown remained open, there may well have continued to be sufficient reasons for the adjournment to continue.
>
> [87] But the exercise of the s 7(1A) power for scheduling reasons or to permit negotiated settlement does not end the inquiry. It does not remove the Tribunal's obligation to complete an inquiry by adjudicating on whether it should make remedial recommendations for claims that it has decided are well-founded. If settlements do not eventuate or if irremediable prejudice to the claimants will result from deferral for scheduling purposes, the Tribunal must reconvene its adjourned inquiry to adjudicate on whether recommendations should be made.
>
> ...
>
> [89] Particular care not to preclude completion of the inquiry is necessary in such cases. They are not the same as those in which the recommendations of the Waitangi Tribunal may or may not be accepted by the Crown, and in respect of which some deference to the political process in which claims are negotiated makes good sense, particularly when the Tribunal has to husband its resources. In the case of Crown forest assets, the "recommendatory" obligation of the Tribunal is an adjudicatory obligation, even if the relief available to it is a matter for judgment.
>
> ...
>
> [92] The scheme therefore is that, following a finding that a claim is well-founded, s 8HB(1)(a) is the controlling provision. The Tribunal must consider whether its return "should" be recommended as part of a

> recommendation under s 6(3) "to compensate for or remove the prejudice caused [by the act found to be in Treaty breach]".

[134] As is already obvious, I do not accept that s 6(2) applies to the recommendatory function of the Tribunal (reserving for the moment whether the position may be different where a compulsory recommendatory function is in issue). I am also uncomfortable with the absolutist language of [87]. Is a claimant who may suffer irremediable prejudice entitled to a remedies hearing even if the prejudice, despite its irremediable nature, is comparatively slight compared to the adverse implications of delay from the point of view of other parties? What if the associated delays might cause irremediable prejudice to other parties? While the risk of irremediable prejudice provides a cogent basis for seeking an urgent fixture before the ordinary courts, it is not always a trumping consideration.[128] So why should it be so absolutely controlling in the Waitangi Tribunal?

[135] The conclusion that s 8HB(1)(a) is the governing provision once the Tribunal concludes that a claim is well-founded is a critical element in the reasoning of the majority. This conclusion does not sit altogether comfortably with s 6(3) which provides that in such circumstances the Tribunal:

> … *may, if it thinks fit having regard to all the circumstances of the case*, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future. (Emphasis added)

Giving effect to s 6(3) as well as s 8HB(1)(a) requires the words I have emphasised to operate. On this basis, the Tribunal, having held that a claim is well-founded, has a discretion to make recommendations which it is to exercise only "if it thinks fit having regard to all the circumstances of the case". Once it has decided to make recommendations – and only then – is it required to address under s 8HB(1) whether its recommendations should include the return of land to Maori. So at least on a literal approach to s 6(3), there is some ellipsis in the process envisaged by the majority in [92].

---

[128] I can illustrate this with a perhaps dated example based on personal injuries practice. Because a live plaintiff was much better situated as to available damages than his or her estate would be, a plaintiff faced the risk of irremediable prejudice if he or she died before trial. In my experience this did not give a dying plaintiff an absolute right to an expedited hearing.

[136] The reasons of the majority conclude that, in relation to Mr Haronga's application for the return of the land, the Tribunal's functions are adjudicatory. A body exercising an adjudicatory function can be expected to act like a court. Litigants before the courts are conventionally entitled to a determination on the claims they bring. On the approach of the majority, Mr Haronga is similarly entitled. As I have tried to make clear, I think that on any view the language of [87] is inappropriately absolute. As well, and more importantly, I do not accept that:

(a) there is a close analogy between a proposed resort to the compulsory recommendation function and a claim which is submitted to a court for adjudication;

(b) Parliament intended to treat claimants before the Tribunal as if they were plaintiffs before the courts; or

(c) Parliament intended the Tribunal to act as if it were a court.

[137] There are many legislative indications which point away from an adjudicatory analysis of the Tribunal's functions. These are all associated (directly or indirectly) with the way in which the s 8HB process is located within the discretionary jurisdiction to make recommendations conferred by s 6(3). But, notwithstanding this, they warrant separate mention:

(a) The starting point for the process is the making of a s 6(1) claim. This claim focuses on the breach, that is whether State action has been inconsistent with the principles of the Treaty of Waitangi. Although a claimant may give notice of the recommendations which are likely to be sought – and the Tribunal expects this where a claimant intends to invoke ss 8A–8HJ – there is no need for a claimant to do so (which is why it is not a problem for Mr Haronga that the last statement of claim to the Tribunal did not seek discretely a compulsory recommendation for the return of the 1961 land to Mangatu Incorporation).

(b) Although there is necessarily something of a lis between claimants and the Crown in relation to a s 6(1) claim given the requirement in s 6(3) for the Tribunal to make a finding as to whether the claim is well-founded, the function of the Tribunal under s 6(2) is not to hear the claim, but rather to inquire into it. I see this as envisaging the sort of inquisitorial process which is consistent with the Tribunal's deemed status as a Commission of Inquiry rather than adjudication in the traditional sense.

(c) Once a claim is held to be well-founded, the consequences are provided for by s 6(3) in very discretionary terms which depend primarily on the assessment of the Tribunal. The Tribunal does not have to make recommendations and if it does so, it is not restricted to recommendations which have been proposed by the claimants. This is in marked contradistinction to the usual practice of the courts.

(d) Even where s 8HB(1) is in play, the relevant function of the Tribunal is that provided for in the very general terms of s 5(1)(a). As to this, it is important to note that s 5(1)(ab) is not addressed to recommendations under s 8HB(1).

(e) Once the s 8HB(1) process gets under way, the legislature provides for the Tribunal to be the initiating party. As I have already commented, the compulsory recommendation process is not dependent upon a claimant having sought such a recommendation. The section contemplates that the Tribunal will identify the Maori or group of Maori to whom land ought to be returned (rather than a process of self-identification by claimants) and those that are identified need not have been claimants.

(f) If the Tribunal was intended to follow an orthodox adjudicatory process, there would be no need for the interim and final recommendation provisions of ss 8HB–8HC. To my way of thinking these provisions are only necessary (essentially to preserve natural

justice entitlements) because the Tribunal can be expected to act inquisitorially.

(g) The requirement for Crown compliance with a s 8HB(1)(a) recommendation is provided for not in the Treaty of Waitangi Act but rather in the Crown Forest Assets Act, s 36. If the legislature had intended the Tribunal to act as, or like, a court, I would have expected this to have been made clear in the Tribunal's own Act. The course actually adopted by the legislature of providing for the compulsory recommendation jurisdiction as a subset of the more general s 6(3) recommendatory function and then stipulating in a separate Act for compulsory effect indicates, at least to me, an intention that the Tribunal should adopt its usual inquisitorial processes.

(h) There is no right of appeal.

[138] The only substantial countervailing indication of legislative intent is provided by the long title to the Crown Forest Assets Act, (c) of which can be read as envisaging successful claims for the return of land, which in turn might be thought to contemplate an adversarial process and an adjudicatory function. The long title, however, is also able to be read as an accurate, albeit elliptical, summary of the intended process as I have analysed it. Although Mr Brown QC for the appellant maintained that the compulsory recommendation procedure had been "shoe-horned" into s 6(3), the fact remains that this is where the legislature chose to place it. Indeed, for reasons I am about to come to, I think that the legislature's decision in this regard was entirely logical. And against the very particular and consistent pattern of the associated and operative legislative provisions to which I have referred, I prefer the latter of the two interpretations just mentioned.

[139] Against that background, I come now to the Crown Forests Agreement which preceded the enactment of the Crown Forest Assets Act and to the litigation history referred to in the reasons of the majority.

[140] I accept it is possible to see some of the language used in the Agreement (and most particularly in the listed "Maori Principles" and "Crown Principles") as providing some perhaps indirect support for Mr Haronga's case. But if I can be permitted a small pun, focus on this sort of detail misses the wood for the trees.

[141] Prior to 1989, any attempt by claimants to secure return of what is now described as Crown forest land could only have been made under s 6(3). The 1989 legislation set out to avoid the possibility of prejudice to claimants associated with the sale of forestry assets, primarily the trees. That is why the relevant provisions of the Crown Forest Assets Act (including its amendments to the Treaty of Waitangi Act) apply only where land has been made subject to Crown forestry licences and why the legislature provided a mechanism (via s 36(1)(b) and Sch 1 of the Crown Forest Assets Act) by which claimants who were later to obtain a recommendation for the return of land could avoid prejudice associated with the forestry licence encumbrances and the sale of the trees.

[142] Associated with this mechanism was the requirement to comply with any recommendations for the return of licensed land which I agree advances to some extent the position of claimants (at least if the assumption is made that the Crown might not have complied voluntarily with a non-compulsory recommendation). But what I cannot discern in the legislation or its background is an intention to make the position of Maori claimants materially better in relation to obtaining a recommendation in relation to *land* that is licensed than it would have been if *the trees* had remained in Crown ownership. Improving the position of Maori claimants in this way would go beyond what was necessary to remove potential prejudice associated with the sale of the trees. When looked at in this light, the background to the legislation supports my view that the compulsory recommendation process is properly regarded as just a sub-set of s 6(3) and the decision by legislature to place it there is entirely logical.

[143] The upshot is that I see the binding recommendation process under s 8HB as a sui generis add-on to the Tribunal's inquisitorial and recommendatory functions and required to be exercised within the statutory framework provided by ss 6(1)–(3). The compulsory s 8HB recommendatory function, as a sub-set of the general

non-binding recommendatory function, is not subject to s 6(2). Section 7 is therefore not of controlling relevance. Once a claim is held to be well-founded, the Tribunal does not go direct to s 8HB(1)(a); it only does so if it has first decided that it ought to make recommendations. The process is not properly seen as adversarial and the Tribunal's function is not adjudicatory in the sense suggested by the majority.

Section 7

[144] It follows from what I have just said that I do not see s 7 as being of controlling significance. But I think it right nonetheless to address the section. In part this is because in my view the judgment of the majority, by requiring that the Tribunal accord urgency to Mr Haronga's claim, is pre-emptively, and I think wrongly, precluding the Tribunal from resort to s 7. As well, the narrow approach taken by the majority to s 7 reinforces the result they reach. In discussing s 7, I will assume, contrary to my own view, that s 7 is applicable to remedies hearings; this to enable correlation of my views with those of the majority.

[145] Section 7(1) provides for what is close to a dismissal of a claim and is not particularly relevant in the present context, save that I draw attention to s 7(1)(c). The reality is that the proposed settlement can only take effect if endorsed by Parliament by statute. Such endorsement will come only if Parliament is satisfied that the settlement has an appropriate level of support from claimant groups. The concepts of mandate and ratification which are at the heart of the parliamentary consideration are political and not legal in nature. There is no requirement for those who are mandated to have obtained authority to negotiate from every single member of the relevant claimant group. Nor need ratification by claimants necessarily be unanimous in the sense of being assented to by every single member of the relevant claimant group. Any other approach would give every member of a claimant group (and of course there could be many thousands) a right of veto. Accordingly, when and if Parliament is invited to endorse the settlement, it would be open to Mr Haronga and Mangatu Incorporation and the owners to present their opposition to Parliament and to challenge the mandate of the negotiators and the ratification process. That opportunity is arguably within what is contemplated by s 7(1)(c) as an

"adequate remedy … other than the right to petition the House of Representatives".[129]

[146] What I have just said provides a preface to my approach to s 7(1A). This is because I cannot see Parliament approving a settlement over substantial opposition from the owners represented by the Committee of Management of Mangatu Incorporation. And essentially for this reason, I think it would be open to the Tribunal to defer addressing Mr Haronga's claim under s 7(1A) for a period defined not by the calendar but rather in terms of the termination of the settlement process currently underway. Because the concepts of mandate and ratification are political and not legal, the Tribunal might perhaps consider that assessment of the relevant mandates and ratification processes and results can appropriately be left to the legislature. As well, for all we know, the ratification process may eventually produce evidence of substantial support for the settlement amongst owners of Mangatu Incorporation. In considerations of this sort, allied perhaps to the factors discussed in the next section of these reasons, the Tribunal might conceivably find "sufficient reason" for not hearing Mr Haronga's claim pending the outcome of the settlement and legislative process.

Was there legitimate scope on the facts for refusing urgency?

The significance of the Turanga Tangata Turanga Whenua *report and subsequent progress towards settlement*

[147] Given the terms of the letter of transmittal[130] it is at least uncertain whether what was said by the Tribunal in chapter 16 of the report should be regarded as "recommendations" for the purposes of s 6(3). I do not, however, see this as mattering either way.

---

129 I do not see the ability to make submissions on a specific Bill as necessarily being a "right to petition the House of Representatives" for the purposes of s 7(1)(c) – a right which I think is addressed to approaching the House in a specific manner for purposes which may be unrelated to business which is otherwise before the House. This analysis is consistent with the organisation of the Standing Orders of the House of Representatives 2008, in which petitions to the House are provided for in Chapter 7 which is headed "Non-Legislative Procedures". Reference can also be made to David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at chapter 37.

130 See above at [117].

[148] The Tribunal did not address directly whether it should make a binding recommendation for the return of the 1961 land to Mangatu Incorporation. The most likely (and obvious) reason for this is the fact that in the last statement of claim, the remedies identified did not specifically include resumption of the land by Mangatu Incorporation. In this context, I do not think that the Tribunal could be sensibly regarded as having concluded that it should not exercise its s 8HB(1)(a) jurisdiction in relation to the 1961 land. As well, I do not see the Tribunal's jurisdiction to make recommendations under s 8HB(1) as exhausted. It is, however, clear that a compulsory recommendation for return of the 1961 land was not in the minds of the Tribunal members when they came to envisage how a final settlement might be achieved. As earlier discussed, the Tribunal identified some considerations (for instance as to relativities) which might be reflected in such a final settlement and, importantly, gave advice as to the way in which negotiations might proceed. My impression, based on what the Tribunal said, is that it envisaged a scheme which is not entirely consistent with what is now proposed by Mr Haronga.

[149] It is clear that very substantial progress (for a while acquiesced in by Mr Haronga) has been made towards settlement in a way which, as far as I can tell, is broadly congruent with the advice/recommendations of the Tribunal.

The substantive merits of Mr Haronga's application in the context of the current settlement process

[150] That it was Mangatu Incorporation which was wrongly deprived of the 1961 land gives Mr Haronga's claim apparent cogency. The more cogent the claim, the greater might be thought the justification for urgency. For this reason, I think it right to set out some factors which may be seen to detract from that apparent cogency.

(a) On the finding of the Tribunal, the 1881 Mangatu title determination, which provided the foundation for what became Mangatu Incorporation's title, prejudiced the interests of Ngariki Kaiputahi. There is thus potentially an upstream claim by Ngariki Kaiputahi in relation to the land.

(b) It seems reasonably clear that the owners were paid a reasonable price for the 1961 land. This may be relevant in a context in which the total settlement pie is obviously limited and there are other claimants.

(c) As Mr Bennion for Te Whakarau pointed out, the composition of Mangatu Incorporation is not the same now as it was in 1961. So, looking through Mangatu Incorporation to the owners and their underlying beneficial interests, it is not necessarily correct to treat the claim for resumption as being made on behalf of the entity which was dispossessed of the land.

(d) Mr Bennion also noted that more generally, and in respects other than those identified in (a) and (c), the way in which the Native Land legislation and the Native Land Court operated means that the current shareholdings in Mangatu Incorporation do not necessarily accurately reflect customary ownership interests.

(e) The claim for return of the 1961 land arguably cuts across what was proposed in chapter 16 of the Tribunal's *Turanga Tangata Turanga Whenua* report. And it undoubtedly cuts across the proposed settlement which has been negotiated by those whom the Tribunal may regard as properly mandated and which will then be the subject of a ratification process. On this aspect of the case I have the impression that Mr Haronga's approach to mandate might be regarded as unorthodox by those engaged in the Treaty settlement process.

The merits of the application for urgency

[151] That Mr Haronga's claim will be lost assuming legislative endorsement of the proposed settlement provides a very strong basis for seeking urgency. But again there are, or at least may be, some countervailing considerations:

(a) Presumably Parliament will not legislatively endorse the scheme without substantial support from the Mangatu Incorporation owners.

(b) As explained by Mr Bennion, granting an urgent hearing for Mr Haronga's claim will not be a cost-free process. There will be consequences for Te Whakarau in terms of the costs of the process and there will almost certainly be delays in securing legislative endorsement for, and thus implementing, the proposed settlement.

(c) There may be different ways of analysing the procedural history I have referred to, in particular: the significance of the form of relief sought in the final statement of claim; the mandating of Te Whakarau; the time and commitment which has been put into the settlement process; what might, arguably, be seen as the late withdrawal by Mr Haronga from that settlement process; and deviations from the usual practice as to mandating.

(d) If the view is taken that the application for resumption is unlikely to be successful, this too may be material as to whether urgency is appropriate.

An overall appreciation

[152] I do not wish to be taken to suggest that the factors mentioned, whether individually or collectively, mean that Mr Haronga's claim for the return of the land should not succeed. Nor am I saying that it would be wrong to hear it urgently. Indeed, given the delays and costs of the review and appeal process – and of course with the benefit of hindsight – I think it would have been better to have heard the application, rather than to argue about whether it should be heard. As well, I can see how unsatisfactory the situation must seem to Mr Haronga. The Crown can logically maintain that the issue whether the 1961 land should be returned to Mangatu Incorporation is internal to Te Whakarau only on the basis of its preference for district-wide settlements. Although Mr Haronga wishes to challenge this preference (at least in relation to his claim), he cannot do so unless granted an urgent hearing. So it is understandable that he is frustrated with what has happened. But as I have tried to show, there are other interests which may be material to what should happen. My position is simply that the question whether Mr Haronga's claim should be heard

urgently is better determined by the Tribunal rather than us. So my conclusion is that assuming Judge Clark had a discretion to exercise – as I believe he did – it was open to him to refuse urgency.

Solicitors:
Gibson Sheat, Wellington for Appellant
Crown Law Office, Wellington for First and Second Respondents
Bennion Law, Wellington for Third Respondent