IN THE SUPREME COURT OF NEW ZEALAND

SC 62/2015
[2015] NZSC 128

BETWEEN	RAPATA (ROBERT) LEEF, STEPHANIE TERIA TAIAPA, NADINE HORINA PIRAKE, CAINE RAROA TAIAPA, DARREN WILLIAM LEEF, NEIL HIRAMA AND PANIA ANEISHA BROWN Applicants
AND	COLIN BIDOIS, JENNY ROLLESTON, TAARI NICHOLAS, PATRICK NICHOLAS, CHRISTOPHER (KIRITOHA) TANGITU, RAWIRI KUKA AND SHADRACH ROLLESTON Respondents

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	S P Bryers for the Applicants F M R Cooke QC and M J Sharp for the Respondents
Judgment:	24 August 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay costs of $2,500 to the respondents.

REASONS

Introduction

[1] The proposed appeal concerns the arbitration of a dispute between two hapu of the Bay of Plenty based iwi Ngati Ranginui (Ngati Taka[1] and Pirirakau[2]) over

[1] The applicants are the representatives of Ngati Taka.

which of them had mana whenua over certain tracts of land during the years 1840 to 1865. This issue was important in that 70 per cent of an anticipated Treaty of Waitangi settlement for Ngati Ranginui had been allocated to proportionate distribution based on the share of land lost.[3] The remaining 30 per cent was to be divided between hapu, Ngati Taka being recognised as a separate hapu within Ngati Ranginui for these purposes.

[2] It is largely common ground that the paramount Chief at the time, Te Ua Maungapohatu, had mana whenua over the land at issue. The dispute between Pirirakau and Ngati Taka was whether he was Ngati Taka or Pirirakau, the latter denying Ngati Taka had separate hapu status.

[3] There was to have been a dispute resolution process (the Mana Whenua Agreement) in the Treaty settlement documents, modelled on sch 2 of the Central North Island Forests Land Collective Settlement Act 2008. The last of the three stages in that "tikanga based resolution process" would have been an arbitration by three independent panel members. This process was to occur after formal settlement with the Crown.

[4] Pirirakau and Ngati Taka wished to settle the issue before settlement and it was suggested that they could agree on their own process, which they duly did.[4] Each party nominated an arbitrator, Pirirakau nominating Mr Heta (Ken) Hingston, a retired Maori Land Court Judge.[5] The hearing was over two days, on 23 and 24 January 2014.

[5] Mr Hingston's wife has whakapapa to Pirirakau. This was disclosed prior to the hearing and at the hearing. No objection was taken (unless a comment on the second day of the hearing can be taken as such).[6]

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2 The respondents are the representatives of Pirirakau.

3 Determined by who had mana whenua over the land from 1840 to 1865.

4 There were other cross-claim disputes in addition to that existing between Pirirakau and Ngati Taka.

5 Ngati Taka nominated Mr Kuku Wawatai who was the head of Maori Studies at the Bay of Plenty Polytechnic.

6 The Court of Appeal did not accept that it could: see at [26] and [61] of *Bidois v Leef* [2015] NZCA 176 (Miller, Cooper and Simon France JJ) [*Bidois* (CA)].

[6] Mr Hingston's wife is also a cousin of Mr Rawiri Kuka, who was a witness in the arbitration for Pirirakau. This connection was not known before the hearing but apparently did become known at the hearing.[7] The only objection taken was that Mr Kuka was not a mandated witness as required under the agreed procedure.

[7] The award was promulgated on 23 March 2012 and the Panel found:

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

[8] Because the mana whenua issues had been resolved before settlement, the Mana Whenua Agreement was not included in the final settlement documentation. The Crown and Ngati Ranginui signed a Deed of Settlement on 21 June 2012. The following day, on 22 June 2012, Ngati Taka filed an application for an order that the "arbitration award" be set aside.

High Court judgment

[9] In the High Court Andrews J held that the dispute between the parties did not arise in respect of a defined legal relationship and therefore that the agreement was not an arbitration agreement within the meaning of the Arbitration Act 1996.[8] As a result, the competing mana whenua claims had not been determined and were set aside.[9]

[10] In the alternative, Andrews J also held that the right to an impartial and independent arbitrator is inherent in art 12 of sch 1 of the Arbitration Act.[10] It is in mandatory terms and the waiver provision (art 4) does not apply.[11] A challenge can be made therefore even if no objection was taken at the time.[12] The failure to make a

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7 The applicants now seek to introduce new evidence on this issue, we deal with that application below.
8 *Leef v Bidois* [2013] NZHC 1349 at [71]–[74].
9 At [72]–[73].
10 At [83].
11 At [83].
12 At [83].

challenge can, however, be taken into account in assessing the genuineness and strength of the challenge to the award.[13]

[11] Andrews J held there were grounds to challenge the award because of apparent lack of impartiality and independence.[14] The Judge rejected the argument that there had been waiver of any right to challenge.[15] She also held that there had been breaches of natural justice with regard to how documents had been presented at the arbitration.[16]

[12] Given she did not consider there was an arbitration, Andrews J did not make a ruling on the discretion but did say that there was at least an arguable case that the award should be set aside had it been an arbitration award.[17]

The Court of Appeal judgment

[13] The Court of Appeal held there was an arbitration agreement.[18] The Court held further that there had been waiver with regard to any conflict (and that waiver was possible).[19] On the issue of the documents, the Court held there was no breach of natural justice (although acknowledging the process had not been perfect).[20]

Application and response

[14] The applicants seek leave to challenge the last two aspects of the Court of Appeal's judgment (accepting the finding that it was an arbitration agreement).

[15] The respondents' main submission is that the outcome of the proposed appeal would not change the distribution of settlement proceeds. This is because the challenge to the arbitration was filed in the High Court after the Settlement Trust Deed was signed and the day after the signing of the Deed of Settlement between the

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13 At [83].
14 At [90].
15 At [91].
16 At [126].
17 At [129].
18 *Bidois* (CA), above n 6, at [57].
19 At [64] and [80].
20 At [93].

Crown and Ngati Ranginui. There can thus be no change to the distribution, whatever the result of the appeal.

[16] The respondents agree that the issue of whether the right to an independent and impartial tribunal is non-derogable is a question of general and public importance but say that in this case the discretion not to set the award aside would have to be considered afresh by this Court (given it was not decided below) and the circumstances involved in such a consideration would only be of significance to the parties.

Application to adduce new evidence

[17] The applicants apply to adduce evidence that Mr Hingston's wife is also related to Mr Bidois (who was the main presenter of Pirirakau's case at the arbitration hearing) and say they would certainly have objected if this connection had been known.

[18] The respondents object to the admission of the evidence. In an affidavit Mr Bidois says that he mentioned the connection in the High Court and thus the evidence is not fresh. In any event being part of Pirirakau made it inevitable that Mr Hingston's wife would be related to others.

[19] There was plenty of time, even before the arbitration, to investigate Mr Hingston's wife's connections and it must have been appreciated that she could have connections with senior Pirirakau members. We thus do not consider the evidence to be fresh but, in any event, it would make no difference to our conclusions.

Our assessment

[20] The issue of whether there can be waiver of the right to an independent and impartial tribunal is one of public or general importance. Even if there can be no waiver, however, the fact that no objection was taken at the time must be relevant to the exercise of the discretion whether or not to set aside the award. Also relevant would be the fact that no objection was taken until the award (adverse to Ngati Taka)

was promulgated and the Deed of Settlement with the Crown concluded. This therefore is not a suitable case to decide the question of principle. The issue of the documents is a factual one only of significance to the parties.

Result and costs

[21] The application for leave to appeal is dismissed.

[22] The applicants must pay costs of $2,500 to the respondents.

Solicitors:
Martelli McKegg, Auckland for Applicants
Holland Beckett, Tauranga for Respondents