IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-6385
[2015] NZHC 1907

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision of the Waitangi Tribunal contained within the Ngāti Kahu Remedies Report 2013 concerning Crown Forest and State Enterprise land
BETWEEN	TIMOTI FLAVELL Applicant
AND	WAITANGI TRIBUNAL First Respondent
	THE ATTORNEY-GENERAL Second Respondent

Hearing: 23 and 24 June 2015

Counsel: R D C Hindle, T K T A R Williams and I F F Peters for applicant
M McKillop for first respondent
C Tyson and A Allan for second respondent

Judgment: 12 August 2015

RESERVED JUDGMENT OF DOBSON J

Contents

[1] This proceeding represents another chapter in regrettably protracted endeavours by one Northland iwi to obtain redress from the Crown for grievances arising pre-1865, which were acknowledged a substantial number of years ago to be well-founded.[1] Mr Flavell has brought the proceeding in his capacity as the head claimant for hapū and iwi of Ngāti Kahu, and for Te Rūnanga-ā-Iwi O Ngāti Kahu (Ngāti Kahu), which is the mandated iwi authority representing Ngāti Kahu in its claims against the Crown.

[2] The application for judicial review alleges errors of law by the first respondent (the Tribunal) in a report issued on 1 February 2013 as to remedies in relation to Ngāti Kahu's claims (the Remedies Report).[2] The Tribunal was represented at the hearing of the present claim, but took no substantive part in the proceeding.

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1 In the Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 405 the Tribunal observed that relief must be given sooner rather than later, and that early relief is as necessary as it is appropriate.

2 Waitangi Tribunal *The Ngāti Kahu Remedies Report* (Wai 45, 2013) [Remedies Report].

[3] Ngāti Kahu's application to the Tribunal had been for binding recommendations for the resumption of certain lands claimed within its rohe, and in relation to Crown forest assets, including accumulated rentals. The application also sought non-binding recommendations. The Tribunal declined Ngāti Kahu's application for binding recommendations. Ngāti Kahu's application for judicial review alleged a range of errors of law that were claimed to have rendered the Tribunal's decision invalid. Ngāti Kahu sought a declaration that the Tribunal's decision was invalid, and an order quashing or setting it aside. Orders in the nature of mandamus were also sought to require the Tribunal to hear and determine Ngāti Kahu's applications under ss 8A and 8HB of the Treaty of Waitangi Act 1975 (the Act).

Background

[4] In 1997, the Tribunal produced its Muriwhenua Land Report. Among other things, that report recognised the well-founded claims of five iwi in the far north of the North Island. In addition to Ngāti Kahu, those other iwi were Ngāti Kuri, Ngāi Takoto, Te Rarawa and Te Aupōuri. Each of those iwi has their own rohe, but there are also considerable areas of overlap in which more than one of the iwi assert claims.

[5] The five iwi are jointly identified as Te Hiku o Te Ika a Maui (Te Hiku iwi). After a judicial conference held by the Tribunal in 1998, the Te Hiku iwi put on hold further steps in their claims before the Tribunal and undertook settlement negotiations with the Crown. From Ngāti Kahu's perspective, the negotiations have been "difficult throughout". Ngāti Kahu filed an application with the Tribunal for remedies reflecting the Tribunal's findings in its 1997 Muriwhenua Land Report. In 1998, the Tribunal directed that that application be adjourned to enable the parties to resume negotiations.

[6] Ngāti Kahu and the Crown entered into an Agreement in Principle in 2008 (the 2008 AIP). The Crown also negotiated collectively with the Te Hiku iwi, which led to a collective Agreement in Principle between the Crown and all five iwi in

2010 (Te Hiku 2010 AIP). Neither the 2008 AIP nor the Te Hiku 2010 AIP created any binding commitments.

[7] The Te Hiku 2010 AIP reflected numerous compromises by each of the Te Hiku iwi, where their separate claims competed for the same assets. Further negotiations between the Crown and Ngāti Kahu broke down and, in July 2011, Ngāti Kahu revived its application for remedies before the Tribunal.

[8] Ngāti Kahu's application sought binding recommendations in respect of all resumable properties within the remedies area it asserted, including those that had already been offered to Ngāti Kahu as part of the settlement with the Crown, and those that were then on offer to other Te Hiku iwi. In addition, the application sought non-binding recommendations that included $205 million in compensation and legal recognition of Ngāti Kahu's dominion over the sea adjacent to its remedies area out to a 200 mile limit.

[9] Each of the other Te Hiku iwi have concluded deeds of settlement with the Crown. A further iwi, Ngāpuhi, and hapū affiliated to Ngāpuhi, also have claims to some properties within Ngāti Kahu's asserted remedies area, but Ngāpuhi interests had not engaged with the Crown or had claims addressed by the Tribunal at that time.[3]

[10] The ratification of the settlement deeds for the other Te Hiku iwi is reflected in the Te Hiku Claims Settlement Bill that was introduced into the House of Representatives in April 2014.[4] The terms of settlement reflected in that Bill involve the transfer of Crown lands and Crown forest assets to each of the four other Te Hiku iwi. The assets to be transferred pursuant to those settlements include assets that are the subject of Ngāti Kahu's claims. The allocation of those assets also involves compromises by each of the four iwi where their claims to such assets competed or overlapped. From the Crown's perspective, it has held back assets that may have contributed to those settlements, in anticipation of allocating such assets to Ngāti Kahu.

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3 Remedies Report at 86, 91.

4 The Bill was read for a second time on 30 June 2015, without any apparent indications that its progress to enactment would be disrupted.

[11] When Ngāti Kahu commenced the present proceeding in May 2014, the relief sought included a declaration that the Crown should exclude from the deeds of settlement with the other Te Hiku iwi the following assets that were included in them:

- 20 per cent interest in the Peninsula blocks south of Hukatere of the Aupōuri Forest;
- 300 hectares or 50 per cent of the Takahui blocks of the Aupōuri Forest;
- Housing New Zealand Corporation land within the Ngāti Kahu core rohe.

[12] Implicitly acknowledging the reality of the stage that had been reached in the legislative process to confirm the settlements with the other Te Hiku iwi, Mr Hindle advised during the hearing that that component of the relief was no longer pursued.

The Tribunal's Remedies Report

[13] The remedies hearing was conducted over five days from 3 to 7 September 2012, preceded by a powhiri on Sunday, 2 September 2012. The Tribunal then heard closing arguments on 18 and 19 September 2012 and delivered its 130 page report (plus appendices) on 1 February 2013. Ngāti Kahu's application was brought on the basis that its negotiators viewed the prospects of successfully negotiating a settlement with the Crown as extremely unlikely, and that the relief sought addressed only the iwi's claims for pre-1865 grievances, leaving post-1865 claims to be pursued separately at a later date.

[14] Three of the other Te Hiku iwi opposed the binding recommendations sought on behalf of Ngāti Kahu, and participated to varying degrees by calling evidence and making submissions. The Crown also opposed the application for binding recommendations.

[15] A recurring theme in the Tribunal's analysis of the application was the circumstances in which Ngāti Kahu withdrew from the Te Hiku combined negotiations with the Crown, and the adverse consequences for the settlements being

progressed by the other Te Hiku iwi if Ngāti Kahu was granted the binding recommendations it sought.

[16] The Tribunal acknowledged that Ngāti Kahu had not breached any legal obligations, and had been entitled to pursue its own interests in the way that it had. The Tribunal noted that when Ngāti Kahu proposed its own deed of settlement with the Crown in April and May 2011, the scope of the redress sought was significantly wider than that set out in the 2008 AIP. In addition, the proposed terms were then described as a partial settlement, whereas the 2008 AIP and the Te Hiku 2010 AIP had contemplated full settlements. The extent of the area within which properties were sought by Ngāti Kahu at the remedies hearing was also significantly larger than the area identified in its 2008 AIP.[5]

[17] Given that the binding recommendations sought by Ngāti Kahu would disrupt the settlements that had been negotiated with numerous compromises by the other Te Hiku iwi, spirited opposition to Ngāti Kahu's application was to be expected. One instance drawn to my attention from the closing submissions on behalf of Te Aupōuri was in the following terms:[6]

> The impracticality of combining maximum resumption and subsequent negotiations is made worse by what can only be described as the megalomaniacal "*total relief package*" identified by Ngāti Kahu in closing submissions. The size and scope of what is sought (given that this package is *only in respect of pre-1865 claims in the resumption area*), not only discloses a total overwhelming unreasonableness on the part of the mandated leaders of Ngāti Kahu, and demonstrates a complete lack of any ability to compromise or show moderation, but also evidences a total unreality about what is possible. It is submitted that even on its face there is absolutely no chance of the implementation of this, the preferred Ngāti Kahu package.

[18] In chapter 6 of the Remedies Report, which addressed whether the Tribunal should make binding recommendations, the Tribunal identified with the perspective of the remaining Te Hiku iwi. It described Ngāti Kahu's withdrawal from inter-iwi discussions as representing:[7]

> … an overturning of their collective decisions and a threat to the intricate compromises which were needed if they were to advance their individual

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5 Remedies Report at 6 and 7.
6 The submissions are noted in the record of inquiry: Remedies Report at 178, S38.
7 Remedies Report at 79.

> settlements. By absenting themselves from the Te Hiku forum for more than 15 months, Ngāti Kahu threatened to stall the further progress of all of them.

[19] The Tribunal did not accept Ngāti Kahu's contention that they were being bullied or forced into settlement with the Crown. The Tribunal concluded that Ngāti Kahu's:[8]

> … withdrawal from the collective, and from negotiations with the Crown, put at risk their own prospects of settlement, as is their right; but it endangered also the efforts of the other four iwi to come to the agreement on a fair split among them that had to precede all their individual settlements with the Crown. The repudiation of the principles upon which the collective had been operating … was not consistent with good faith and honourable conduct. These are standards of behaviour that are fundamental to the negotiation of Treaty redress.

[20] The Tribunal treated unresolved customary interest issues in relation to a number of the areas where Ngāti Kahu sought binding recommendations as one of the most significant factors in the Tribunal's consideration.[9] The Tribunal found on the evidence, not just that rights were disputed, but that interests were shared:[10]

> Because of the close intertwining of whakapapa relationships, it is particularly difficult for any one iwi to claim full exclusivity over their rohe.

[21] The Tribunal acknowledged a good deal of evidence in opposition to Ngāti Kahu's claim to exclusive rights in respect of the properties where binding recommendations were sought, and that weighed against Ngāti Kahu in assessing whether their claims were made out on the balance of probabilities.[11]

[22] The Tribunal acknowledged that its capacity to determine competing claims by various iwi had been compromised to an extent by the processes that have been in train, at least since the 1997 Muriwhenua Land Report, and possibly earlier. The Tribunal treated the Te Hiku grouping of iwi interests as involving a process devised to deal with areas of overlapping interests and which appealed to the Tribunal as a pragmatic approach that was "tika and fair in all the circumstances, recognising the interests of all Te Hiku iwi and designed to encourage dialogue and compromise".[12]

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8 Remedies Report at 82.
9 At 82.
10 At 88.
11 At 89.
12 At 90.

The Tribunal concluded that it was not able to make precise findings on mana whenua over specific properties where the relationships were so entwined.[13]

[23] The Tribunal treated its role in the Treaty redress process as important in restoring the Māori group in whose favour recommendations are made, addressing the honour of the Crown and restoring the relationship between the Treaty partners. It saw its power to make binding recommendations as coming within that function and not standing outside of it.[14] That purpose made the Tribunal wary of remedying a Treaty grievance for one group, which would have the effect of creating a fresh grievance for another. That was seen as important here, where making binding recommendations would prejudice all the work of the remaining Te Hiku iwi and the Crown in reaching settlements which the Tribunal implicitly approved of.

[24] The Tribunal's conclusion on whether it would make binding recommendations was expressed as follows:[15]

> Taking into account all the circumstances of the present case, it is our decision that binding recommendations for the well-founded claims of Ngāti Kahu are not warranted. One reason is that we are satisfied that, in the context of a settlement framework that has changed markedly over the past decade, fair redress for those claims can be secured by other means. … Our further reasons relate to:
>
> - the doubtful benefit to Ngāti Kahu, when weighed against the disadvantages that would surely flow, of section 27B[16] memorialised properties being resumed in their favour ;
> - the absence of a restorative justification for the resumption of roads; and
> - the complexity of mana whenua interests in the resumable properties that are available for use in Treaty settlements, which militate against their resumption, exclusively, to Ngāti Kahu.

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13 Remedies Report at 90.
14 At 97, 98.
15 At 100.
16 "Section 27B" is a reference to that section in the State-Owned Enterprises Act 1986, which was added from 1988 as part of the provisions amending the Treaty of Waitangi Act 1975 to provide for the Tribunal to make binding recommendations. Section 27A required District Land Registrars to enter a memorial on the title of any land transferred by the Crown to a State Enterprise (with limited exceptions) that the land was subject to s 27B. That section provided for the Crown to resume ownership of any such land, and to then return it to Māori ownership once the Tribunal had made a binding recommendation for that to occur, and there had been no subsequent agreement to vary that recommendation.

[25] The Tribunal commented:[17]

> Ngāti Kahu brought little evidence of their specific relationships with most of the section 27B lands, and no real proposal as to how the properties would assist in their tribal recovery. Yet resumption of those lands would, we consider, deliver the final blow to the prospects of repairing relations with their whanaunga and would cause a serious deterioration in their already troubled Treaty relationship with the Crown. A likely consequence would be that lands of undoubted cultural and economic significance to Ngāti Kahu would no longer be available to them. In addition, it seems probable that resumption would alienate many members of the local community who would be unlikely to be persuaded of the grounds or the justice of such a measure when redress for the well-founded claims of Ngāti Kahu can be provided by other means.

[26] The Tribunal did make a sequence of non-binding recommendations that included a revision of the adequacy of the Crown's offer to Ngāti Kahu as it stood at the time of the hearing. The effect of the recommendations expanded the scope of redress considered appropriate. Subsequently, the Crown has amended the offer made to Ngāti Kahu so that, from the Crown's perspective, it more or less accords with the scope of remedies recommended for Ngāti Kahu by the Tribunal.

The Tribunal's power to make binding recommendations

[27] The Tribunal's power to make binding recommendations in relation to land or any interest in land has existed since amendments were made to the Act in 1988 and 1989. The provisions addressing respectively land in the name of a State enterprise and Crown forest land are in ss 8A and 8HB of the Act, and the first of those provisions is relevantly in the following terms:

> **8A Recommendations in respect of land transferred to or vested in State enterprise**
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> …
>
> (2) Subject to section 8B, where a claim submitted to the Tribunal under section 6 relates in whole or in part to land or an interest in land to which this section applies, the Tribunal may—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and

[17] Remedies Report at 101.

(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, should include the return to Maori ownership of the whole or part of that land or of that interest in land,—

include in its recommendation under section 6(3), a recommendation that that land or that part of that land or that interest in 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 or that interest in land is to be returned); or

(b) if it finds—

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

(ii) that a recommendation for return to Maori ownership is not required, in respect of that land or any part of that land or that interest in land, by paragraph (a)(ii),—

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land or that interest in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 212 of the Education Act 1989; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land or that interest in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 212 of the Education Act 1989.

[28] Section 8HB(1) is in essentially the same terms in respect of Crown forest land.

[29] Any Tribunal recommendation in relation to Crown forest land under s 8HB triggers an additional obligation to pay compensation in terms of s 36 of the Crown Forest Assets Act 1989, which is in the following terms:

> **36 Return of Crown forest land to Maori ownership and payment of compensation**
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> (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—
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> (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 Schedule 1.
>
> (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.

[30] The process provided for is variously described as "binding recommendations" or "resumption recommendations" or "resumption orders". They are so described because their effect is to require the Crown to resume ownership of land that has been transferred subject to memorials recognising the prospect of interests for Māori claimants. The procedure involves the Tribunal giving notice of a binding recommendation, which is followed by a 90 day period in which the Crown and the claimant may reach agreement on the extent of land to be transferred, and the mechanics of how the transfer is to happen. A transfer will only occur pursuant to the Tribunal's recommendation if the parties do not agree to terms within that 90 day period. Therefore the Tribunal is inclined to see its power as somewhat less than orders to transfer the lands in question.

[31] Since its inception, the Tribunal's jurisdiction has been provided for in s 6 of the Act, subs (3) of which provides:

> **6 Jurisdiction of Tribunal to consider claims**
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> …
>
> (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.

[32] In the 2009 Court of Appeal decision in *Attorney-General v Mair*, Baragwanath J observed that the amendments introducing the sections that provide for binding recommendations conferred on a claimant with a sound case for the exercise of judgement of the Tribunal an outcome which:[18]

> … while expressed as recommendatory, [are] ultimately adjudicatory.

[33] In May 2011, the Supreme Court delivered a judgment on the nature of the Tribunal's jurisdiction to conduct inquiries into claims submitted to it for the making of binding recommendations, in the case of *Haronga v Waitangi Tribunal*.[19] That proceeding involved a claim by the proprietors of Mangatu Blocks Incorporation (the proprietors) for return to them of an area of land south of Gisborne that had been acquired by the Crown in 1961 allegedly in breach of Treaty obligations. The Tribunal had dealt at a district-wide level with more extensive claims brought on behalf of a hapū, Te Aitangi a Māhaki. It decided that the proprietors' claim was well-founded. The proprietors were a subset of that hapū and both had been represented by one party in the proceedings before the Tribunal, which produced recommendations for a single settlement at hapū level. The terms of settlement would involve return to the hapū of a larger area including the block that was the subject of the proprietors' separate claim.

[34] The government was moving towards legislation that would settle the wider hapū claim and thereby remove the jurisdiction of the Tribunal to deal any further with the proprietors' discrete claim. On behalf of the proprietors, Mr Haronga sought an urgent remedies hearing from the Tribunal to press for a discrete remedy in relation to the proprietors' land. The Tribunal refused the request for an urgent remedies hearing. Judicial review proceedings, first in the High Court and on appeal in the Court of Appeal, were unsuccessful in challenging the Tribunal's decision not to hold a hearing. Mr Haronga's second appeal to the Supreme Court was successful.

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

19 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53.

[35] Baragwanath J's characterisation in *Mair* was approved by the majority of the Supreme Court in *Haronga*.[20] As the majority in *Haronga* observed:

> [76] … The [1988 and 1989] 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 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 Māori claimants. This was in return for permitting the Crown to transfer government-owned assets, including forest crop and other forest assets, to private interests. …

[36] The Supreme Court further found:

> [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.

[37] In the present case, the Tribunal acknowledged that it had an obligation to consider whether to make binding recommendations. It treated its jurisdiction to make such orders as part of recommendations made pursuant to s 6(3) of the Act to compensate for, or remove, prejudice caused by Treaty breaches. The Tribunal continued:[21]

> It is important to record that the mere fact that the Ngāti Kahu claims are well-founded does not automatically mean that resumption recommendations will follow. The words of sections 6(3), 8A, and 8HB make it clear that the Tribunal has a discretion to decide whether or not to recommend resumption. While the Tribunal is under an obligation to consider whether it should make such adjudicatory recommendations, it is not obliged to make them.

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20 At [88].

21 Remedies Report at 16.

Alleged errors of law

(1) The Tribunal treated the power to make binding recommendations as applying only in exceptional circumstances

[38] Mr Hindle cited numerous passages in the Remedies Report that suggested the power to make binding recommendations should be used as a last resort, or only in exceptional circumstances. He argued that such an approach imposed a threshold on Ngāti Kahu for which there was no justification on the terms of the statute or the policy applicable to its application.

[39] A first reference at the very outset of the Remedies Report was in the following terms:[22]

> The power is exceptional because a Tribunal recommendation that land be resumed will become binding on the Crown after 90 days, unless the Crown and the successful applicant negotiate a different arrangement.

[40] When considering whether to make binding recommendations in the context of the Supreme Court's reasoning in *Haronga*, the Tribunal observed:[23]

> We consider it is implicit in the notion that the Tribunal's resumptive power provides additional protection to claimants, that the power should be used only when there is no other means of securing the redress that the claimants should receive.

[41] I note that the passage I have just quoted is followed immediately by the following:[24]

> Even if that were not so, the various uncertainties and difficulties that would result from our exercise of the resumptive power … have led us to consider whether there is an alternative way, that does not involve binding recommendations, for Ngāti Kahu to obtain the redress to which they are entitled …

[42] The Tribunal recorded the Crown's position at the hearing before it that binding recommendations must always be used as a last resort and that where there were sufficient Crown owned properties available for use in a Treaty settlement,

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22 Remedies Report at 2.
23 At 103.
24 At 103.

there is no need to order resumption. The Crown position was that there were sufficient properties in Ngāti Kahu's case.[25]

[43] The Tribunal did not explicitly accept that binding recommendations could only be made as a last resort. Rather, under a separate heading, "Binding recommendations require extra care", the Tribunal stated:[26]

> We have to use particular care when it comes to making binding recommendations because there are greater consequences for the Crown and for other affected parties. Common sense dictates that "the more serious the issue the greater should be the care used in assessing it".

[44] The quotation at the end of this extract is taken from the Tribunal's 1998 Turangi Township Remedies Report.[27] The Tribunal repeated this theme when observing that it was:[28]

> … necessary for the Tribunal to exercise greater care if powers of binding recommendation are to be utilised because the consequences are greater, in this instance, not only for the Crown but also for the other parties whose proposed settlements … are affected.

[45] Although the observation quoted in [43] is appropriate as a matter of first principle for any adjudicator, the Tribunal's approach to an application for binding recommendations should also reflect the evolving jurisprudence on the settlement of Treaty claims.[29] In light of the Supreme Court's characterisation of the Tribunal's powers to make binding recommendations in *Haronga*, when the Tribunal is considering an application for binding recommendations, its power to make them is to be treated as a component of its wider powers. Its use of those powers must be consistent with the provisions in s 6(3) of the Act which guides the making of all recommendations.

[46] I accordingly accept that the Tribunal erred in law by implicitly imposing an additional onus on Ngāti Kahu to make out its case for binding recommendations.

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25 Remedies Report at 64, 65.
26 At 76.
27 Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998).
28 Remedies Report at 89.
29 For example, the Supreme Court's most recent observation that progress with the Crown attitude to claims should provide reassurance to Māori that claims are not being ignored: *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [148].

Once the Tribunal finds any claim to be well-founded, it has a discretion to assess, in the circumstances of each case as they arise before it, what recommendations, if any, the Tribunal should make to the Crown. That discretion requires it to assess the appropriateness of all forms of recommendation and the statute does not require any specific justification for making binding recommendations. The Tribunal's task is to evaluate what forms of recommendation are the most appropriate in each case of well-founded claims.

[47] I find that the Tribunal approached the application on the basis that it would only make binding recommendations, if satisfied that other forms of recommendation were inadequate. There is a prospect that the Tribunal's imposition of such an additional onus on Ngāti Kahu did not materially influence the outcome. The Tribunal reviewed, in considerable detail, a range of factors that it treated as weighing against the making of binding recommendations. There are no passages in the Tribunal's assessment that are explicitly influenced by a requirement for Ngāti Kahu to establish that an "exceptional" remedy was warranted.

[48] However, for the reasons that follow I accept that the Tribunal's error in treating its power to make binding recommendations effectively as one of last resort may have been material.

[49] First, I observe that there could be no criticism of the Tribunal for not making binding recommendations for the resumption of land if the Crown was unconditionally prepared to transfer sufficient land to redress the grievances in any event. It is consistent with the approach courts adopt, for example, when considering relief in the nature of mandatory injunctions, that the applicant be required to make out the necessity for any order compelling a defendant to take particular steps.[30] Generally it would be inappropriate for a court or tribunal to exercise the coercive powers vested in it to require something that the defendant is prepared to undertake in any event.

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[30] See, for example, Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) at [5.2.2(1)].

[50] The Tribunal's consideration of the need for binding recommendations depended on its view of whether Ngāti Kahu could justify the extent of the claims it was making in relation to the lands it wanted resumed. The Tribunal rejected Ngāti Kahu's claims on the merits, and found that the extent of remedies then offered by the Crown was substantially nearer to the remedies outcome the Tribunal considered appropriate. In circumstances where the Crown had volunteered to transfer interests in land that were more or less the measure of relief considered appropriate by the Tribunal, it took the view that binding recommendations were unnecessary. That appears to have been influenced by an expectation that the Crown might increase the extent of land offered to more or less equate with the recommendations the Tribunal was making.

[51] The Tribunal was mindful that transfers of land pursuant to settlements are preferable to transfers occurring by default to comply with terms of binding recommendations made by it. Coercive orders have necessarily to be cast in mandatory terms and are therefore inflexible. Those empowered to make such orders understandably treat them as a "blunt instrument" when compared with the ability of the parties interested in such orders to vary material details.

[52] The Tribunal's position is highly unusual. Its role in recognising Treaty grievances and facilitating redress ought, in many circumstances, to be facilitated most effectively by the exercise of its recommendatory powers on terms respected by the Crown, claimants and the community. As the Supreme Court has acknowledged in *Haronga*, the additional powers to compel the provision of relief were provided by Parliament to broaden the range of solutions the Tribunal may consider. Recognition of the appropriateness of binding recommendations does not require any additional onus to be discharged by a claimant, but it is entirely legitimate and understandable that the Tribunal approach the use of these coercive powers with restraint.

[53] Even so, binding recommendations are not a remedy of last resort. The Tribunal's analysis may have led it into error when the other relief available was subject to conditions.

[54] The adequacy of relief other than binding recommendations may need to be assessed differently if the Crown's offer of redress is subject to conditions that the claimant finds unacceptable. Ngāti Kahu argued that position here because the Crown insisted that Ngāti Kahu accept the offer it had made in full and final settlement of all its claims, which Ngāti Kahu is not prepared to do.

[55] The Tribunal was mindful that the Crown offer was a package for complete settlement of all Ngāti Kahu claims.[31] Having rejected the total value of what Ngāti Kahu sought as "… inconsistent with the restorative purpose of Treaty redress and is neither reasonable nor practical",[32] the Tribunal evaluated the reasonableness of the Crown offer which was intended to settle all claims relative to the more confined jurisdiction the Tribunal was addressing in relation to well-founded claims only for the period up to 1865.

[56] In its assessment of the reasonableness of the Crown offer, the Tribunal applied a discount of 10 per cent of the commercial quantum it would recommend, if settlement was not full and final, to leave capacity for the settlement of any post-1865 claims.[33] That projection relied on a provisional overview of the relative extent of pre- and post-1865 claims, without in any way imposing an upper limit on what Ngāti Kahu might receive for such post-1865 claims.[34] The Tribunal regretted having to take that approach, acknowledging it was time for Ngāti Kahu to receive full redress.

[57] Ngāti Kahu characterised the Crown's offer as "take it or leave it", because it could only be accepted if Ngāti Kahu agree to it in full and final settlement of the claims that might be brought for all grievances. Given that all the power to effect a settlement by transferring land and paying money rests with the Crown, there is arguably a significant power imbalance if the Crown is able to hold out on any partial settlement until Ngāti Kahu accepts the Crown's offer in full and final

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31 Remedies Report at 111.
32 At 112.
33 At 116, 117.
34 The Tribunal noted that its 1997 report found that post-1865 claims would add little to the relief that could be given. (Remedies Report at 116.)

settlement, despite Ngāti Kahu having undetermined claims for further grievances alleged to arise in the period since 1865.

[58] Mr Hindle argued that the Tribunal had overlooked this power imbalance between the Crown and Ngāti Kahu which ought to have been identified as sufficient to justify the making of binding recommendations. Instead of treating Ngāti Kahu's request for binding recommendations as requiring the discharge of some additional onus, Ngāti Kahu argued that the Tribunal ought to have recognised this situation as one where it should use its "circuit-breaker" role to break an impasse between a claimant and the Crown.

[59] That perception of the power to make binding recommendations was acknowledged by the Supreme Court in *Haronga*, where the proprietors risked losing the opportunity to have the land restored to them by a process from which they were otherwise excluded, unless the Tribunal entertained their application. As the majority commented:[35]

> [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.

[60] Mr Hindle did not point to any passages in the report which would suggest that the Tribunal overlooked the consideration that its power to make binding recommendations might be used as a "circuit-breaker". That followed from the Tribunal's conclusion on the merits of the application, namely that intervention to perform any circuit-breaker role was unnecessary.

[61] There was no criticism of the methodology the Tribunal used to reach its view on the adequacy of redress on offer from the Crown. Rather, it was argued that the Tribunal erred in not treating the stand-off between the Crown's offer only as a full and final settlement, and Ngāti Kahu's insistence on reserving for later pursuit its post-1865 claims, as sufficient to warrant binding recommendations as a "circuit-breaker". Mr Hindle's argument was that the Tribunal was wrongly constrained from assessing whether binding recommendations were appropriate as a circuit-

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35 *Haronga v Waitangi Tribunal*, above n 19.

breaker by its error of law in treating binding recommendations as only a remedy of last resort. That is one respect in which I accept that the Tribunal's mischaracterisation of its power to make binding recommendations may be material.

(2) Was the Tribunal obliged to determine competing claims to resumable properties?

[62] The Tribunal reasoned that it could not resolve competing claims to various parcels of the lands claimed on behalf of Ngāti Kahu as resumable, within the whole of the remedies area in issue. Ngāti Kahu claimed that element of the decision amounts to an error of law. This claim relies on the approach in *Haronga* to the effect that, when asked to make binding recommendations in relation to specific properties, the Tribunal's jurisdiction required it to definitively determine the claim.[36] Arguably, that obligation extends to cases where it involves deciding between competing claimants for the lands in issue, irrespective of how difficult such decisions might be.

[63] Ngāti Kahu's stance was that the Crown had wrongly misappropriated lands from Ngāti Kahu, so that there was no justification for those lands remaining under Crown ownership once the Tribunal had accepted that Ngāti Kahu had well-founded claims. Ngāti Kahu argued that its position was the same as that of Mr Haronga, in that the Tribunal had declined to exercise its jurisdiction to make binding recommendations, when its jurisdiction required it to do so.

[64] Ngāti Kahu criticised the Tribunal for having handed the decision on resumption of land under Crown control back to the Crown in circumstances where Ngāti Kahu had no faith in fair dealing by the Crown. It argued it should not be vulnerable to having to conclude a settlement with the Crown when a fundamental sticking point was the Crown's requirement that it accept any such settlement as being full and final, which Ngāti Kahu is not prepared to do.

[65] However, for the following reasons I do not accept that the Tribunal made any error in this regard. Ngāti Kahu's proposition overlooks the steps in any such determination, including whether Ngāti Kahu's well-founded claims require the

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[36] See *Haronga v Waitangi Tribunal*, above n 19, at [78]–[80].

return of all land it sought to effect an appropriate remedy. Further, whether the evidence before the Tribunal was sufficient for the Tribunal to make definitive decisions as to which of the competing claimants should acquire title to the exclusion of the others in relation to each piece of land. Ngāti Kahu would contend that the Tribunal was obliged to focus solely on what was required to remedy its grievances. However, I consider that last issue might include consideration of how the resolution of grievances for all the affected claimants would be advanced by the Tribunal making binding recommendations in favour of one or more of them.

[66] There is a material difference between the circumstances considered in *Haronga*, and Ngāti Kahu's predicament. In *Haronga*, the Tribunal had declined the request for an urgent remedies hearing and therefore avoided considering whether it should exercise the power to make binding recommendations. The Supreme Court found that the Tribunal was wrong to do that. In the present case the Tribunal was mindful that it had been found to have erred in Mr Haronga's case.

[67] In contrast, in the present case the Tribunal did convene a hearing on the application for remedies and fully considered the application. As Mr Tyson put it for the Crown, it is not that the Tribunal declined to address the question whether Ngāti Kahu should have binding recommendations, but rather that Ngāti Kahu do not like the Tribunal's negative answer on the merits of that question.

[68] There is also a difference in context. In *Haronga*, a specific recent grievance had been recognised arising out of the Crown's dealings with the specific piece of land which the proprietors were wanting back, where they lacked any other opportunity to seek redress. In contrast, Ngāti Kahu has pursued a remedies application in the context of a more generalised claim for historic grievances that was not tagged to specific pieces of land, but instead relied on a combination of grievances as justification for its land claims. There is accordingly not the same level of direct nexus between the grievance and the land in this case as was present in *Haronga*. In addition, because of the structure of the settlement proposals between the Crown and the larger hapū in *Haronga*, the proprietors had nowhere else to go. Here, the Tribunal found that a reasonable alternative was open to Ngāti Kahu by virtue of the extent of the Crown offer available to Ngāti Kahu.

[69] Ngāti Kahu's criticism relied on the characterisation of the Tribunal's powers by Baragwanath J in *Mair*.[37] Commenting on the effect of the introduction of s 8HB, Baragwanath J observed:

> [103] The result is that the bundle of rights possessed by a claimant to Crown forest land with a sound case for the exercise of the judgment of the Tribunal is, or is very close to, a proprietary right that is justiciable before the Tribunal essentially as if it were a court.

[70] I do not take that statement as constraining the Tribunal in the exercise of its discretion, so that it could not decline to make binding recommendations once a well-founded claim relating to land that is in issue has been established.

[71] The terms of ss 8A and 8HB, particularly when read in the context of s 6 of the Act, recognise a discretion for the Tribunal to consider whether binding recommendations are appropriate in all the circumstances of the case. If the Tribunal reaches a lawful decision on the merits that binding recommendations are not appropriate, then it would be artificial to require it to hypothetically determine which of the properties in issue it would recommend for resumption, if such a recommendation was appropriate.

[72] The Crown relied on the factual circumstances in the present case to point out that Ngāti Kahu's insistence on the Tribunal being compelled to rule which among competing claimants was entitled to resumption of individual properties (or a definitive ruling that none of them were so entitled) is antithetical to the purposes of the Act, and the policy behind its application. None of the remaining Te Hiku iwi initiated claims for binding recommendations, and to the extent that any were pursued it was only as a defence mechanism in competing against Ngāti Kahu. The preference for all the other Te Hiku iwi was to receive the properties they had negotiated with the Crown and by way of compromises between themselves, pursuant to the settlements that have now been agreed.

[73] The Crown's concern is that it would be perverse for a claimant in Ngāti Kahu's position to be able to insist that the Tribunal make individual definitive determinations for each property in circumstances such as these.

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[37] *Attorney-General v Mair*, above n 18.

[74] I agree that there is nothing in the terms of the relevant sections, or the analysis by the Supreme Court of the nature of the jurisdiction, that would justify such a confining of the Tribunal's discretion. That discretion must extend to deciding not to make a binding recommendation in appropriate circumstances notwithstanding the existence of well-founded claims.

[75] The Supreme Court characterised the Tribunal's position when considering an application for binding recommendations as comprising three options.[38] Ngāti Kahu argued that this analysis required the Tribunal to make definitive rulings on each property claimed by it. The first option described was to recommend that the land be not liable to return to Māori ownership if the relevant claims are held not to be well-founded. If the claims are well-founded, then that triggers second and third options for the Tribunal. It is obliged to consider whether remedial action to compensate for or remove the prejudice should include the return to Māori ownership of the whole or part of the land in issue. That involves a discretion which, in terms of s 6(3), requires the appropriateness of such binding recommendations to be considered in light of all the circumstances of the case. The Tribunal's second option is to recommend resumption.

[76] The third option arises if, despite a finding that well-founded claims exist, the Tribunal decides that a binding recommendation is not required in the case before it. Depending on whether the land may be subject to other claims, clearance of the land from potential liability to return to Māori ownership may be premature.[39]

[77] Subsequent to the Supreme Court decision in *Haronga*, the proprietors of the Mangatu Block went back to the Tribunal for a remedies hearing in which they were unsuccessful on their application for binding recommendations for the return of the contested land. The proprietors then pursued fresh judicial review proceedings in the High Court and were successful in obtaining findings that the Tribunal had erred in law in misconstruing the scheme of the binding recommendation regime.[40] In that decision, Clifford J bifurcated the third option as described in [76] above. The third option arising in cases where well-founded claims have been held to exist is that,

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38 *Haronga v Waitangi Tribunal*, above n 19, at [91].
39 *Haronga v Waitangi Tribunal*, above n 19, at [91].
40 *Haronga v The Waitangi Tribunal* [2015] NZHC 1115. [*Haronga* (HC)]

notwithstanding that, binding recommendations are not required and (in the absence of other claims to that land) a determination could be made that the land was not liable to be returned to Māori ownership. Where other claims to the lands in question were outstanding, the fourth option for the Tribunal would be to make no recommendation in relation to them at all.

[78] Both the Supreme Court and Clifford J have confirmed the Tribunal's discretion to decline to make binding recommendations in cases where it has held that well-founded claims existed. It is also relevant that *Haronga* involved directly competing claims to a single block of land, whereas Ngāti Kahu's claims involve an array of properties with numerous iwi competing on different grounds for various of the areas in issue. Where there was an unusual extent of overlapping interests, the task was therefore measurably more complex for the Tribunal in this case.

[79] I do not accept that the discretions available in the relevant sections compel the Tribunal to make definitive rulings on entitlement to resumption as between Ngāti Kahu and the other Te Hiku iwi, where the Tribunal was satisfied that binding recommendations were not appropriate, having regard to the overall circumstances of the case. To do so would involve reading down the appropriate scope of the discretion conveyed by the use of "may" when the structure of the relevant provisions do not justify it. To constrain the Tribunal's discretion in those circumstances would be inconsistent with the statutory purposes of resolving grievances.

(3) The Tribunal took insufficient account of uncontested claims

[80] This was characterised as a separate error of law, but might also be treated as an aspect of the first ground of review, namely a misapprehension as to when binding recommendations could be made.

[81] There is no explicit consideration in the report of the prospect of making binding recommendations in respect of parts only of the lands for which Ngāti Kahu sought binding recommendations. The analysis was on the basis that Ngāti Kahu had pressed for the return of all resumable lands within the remedies area. There was only muted criticism of the Tribunal in Ngāti Kahu's submissions for it not

considering the prospect of binding recommendations in relation to less than all the lands claimed:[41]

> It is difficult to understand why the Tribunal did not make binding declarations in relation to those properties [ie forest assets that the Tribunal recommended the Crown should offer to Ngāti Kahu].

[82] The Tribunal's obligation under ss 8A and 8HB is to consider making recommendations in respect of claims to land, or parts of land, which it has held to be well-founded. The Supreme Court in *Haronga* followed the statutory wording in identifying the requirement to consider resumption in respect of the whole or parts of the land.[42]

[83] In this case, I am reluctant to impute any material error to the Tribunal for failing to consider the prospect of binding recommendations on each individual property to which Ngāti Kahu's application related, where Ngāti Kahu appear not to have sought that as an alternative to its larger claims. The report is on the premise that Ngāti Kahu advanced its claims in respect of all the properties on a uniform basis that did not accommodate any compromise or fallback position in respect of parts only of the lands sought. However, the terms of the legislation required such an assessment and therefore the Tribunal was in error.

[84] I sense that matters had moved on by the time of the present hearing in relation to advancing claims to parts only of the larger areas. Mr Hindle characterised the situation as one where the Tribunal recognised that redress for Ngāti Kahu was overdue, and that a partial settlement was not possible because the Crown insisted only on a full and final settlement. In these circumstances, arguably the Tribunal ought to have considered the case for binding recommendations in relation to parts of the lands sought to prevent the Crown exploiting its power imbalance by pressuring Ngāti Kahu to abandon its later claims for the sake of achieving control now over assets that it is inarguably entitled to.

[85] On the basis of *Mair* to the effect that rights to properties where well-founded claims are accepted amount to a proprietary right (or very close to it), and inviting

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41 Written submissions at [50].

42 *Haronga v Waitangi Tribunal*, above n 19, at [91].

binding recommendations from the Tribunal in its circuit-breaker role, Ngāti Kahu would urge the Tribunal to separately recognise its entitlement to resumable properties which are not contested by others of the Te Hiku iwi. From that premise, Ngāti Kahu would then want to argue that the Crown should not abuse its negotiating position by refusing to transfer assets that the Tribunal has found Ngāti Kahu should have, until Ngāti Kahu waive their rights to later claims.

[86] Where the numerous alternatives as to the scope of binding recommendations sought appears not to have been squarely before the Tribunal, it is understandable that it would not separately consider the claims for resumption of each area of its own volition. However, a failure to consider the application in respect of an identifiable subset of the properties sought was an error of law. If such alternatives were before the Tribunal, then the appropriateness of binding recommendations in respect of those properties would be a valid consideration affecting the Tribunal's discretion.

[87] The Tribunal might still legitimately decide that binding recommendations were unnecessary because the uncontested properties where binding recommendations might be made were otherwise available in terms of the Crown offer made to Ngāti Kahu. That decision would have to weigh in the balance the disadvantage Ngāti Kahu claims as arising from the "full and final" condition imposed by the Crown. Thus far at least, the Tribunal has not seen the Crown's stipulation that any settlement be full and final as rendering that offer an unacceptable alternative to binding recommendations, because the Tribunal was satisfied of the adequacy of the offer even if it had to be accepted on those terms.

[88] Nonetheless, there is a gap in the Tribunal's analysis in that it has not separately considered the appropriateness of binding recommendations for areas less than the whole of the lands sought by Ngāti Kahu.

(4) Error alleged in deferring to Crown settlement policy

[89] A further alleged error of law was that the Tribunal misconceived the nature of its jurisdiction by deferring to Crown settlement policy. Clifford J applied the reasoning of the Supreme Court in *Haronga* to determine that the Tribunal is not

entitled to defer to the existence of Crown negotiations to adjourn a resumption application.[43] That analysis arose in the different situation where the Tribunal had declined to grant a hearing for a claimant on a remedies application in part because of the Crown approach to on-going settlement negotiations.

[90] The possible analogy here is the relevance attributed by the Tribunal to the terms of the Crown's settlement with other Te Hiku iwi. However, that is distinguishable from the situation in *Haronga*. It is not a situation in which the Tribunal has deferred to an on-going settlement process that might or might not address the concerns motivating the claimant in seeking a remedies hearing. Rather, here the Crown and remaining Te Hiku iwi who opposed binding recommendations had concluded terms for settlements which could not proceed if the binding recommendations Ngāti Kahu sought were granted. It would be perverse if the Tribunal's assessment of all the circumstances of Ngāti Kahu's case had to disregard those arrangements as irrelevant.

[91] The position confronting the Tribunal was therefore whether the binding recommendations sought on terms that would disrupt those settlements was consistent with advancing the settlement processes overall when it balanced the interests of all iwi involved. I can see no inappropriate deference to "Crown settlement policy" in the relevance attributed to this matter in the Tribunal's report.

[92] A separate form of deference might be said to arise in the Tribunal's acceptance of the Crown's settlement offer as sufficient, including its policy that it would only conclude settlements on full and final terms. The Tribunal's acceptance of the legitimacy of that stance involves implicit rejection of Ngāti Kahu's stance that it is unconscionable for the Crown to negotiate on that basis when it allegedly exploits the power imbalance in doing so.

[93] I do not accept that the Tribunal's assessment of the adequacy of the Crown offer, including the condition that it could only be accepted in full and final settlement, involved any error of law as to the legitimacy or otherwise of the imposition of that condition. The Tribunal was able to form its own view on the

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[43] *Haronga* (HC) at [100].

substantive merits of the adequacy of the Crown offer without deferring to the Crown in respect of its entitlement to negotiate on those terms.

(5) Unacknowledged effect of the Tribunal's refusal being final

[94] Ngāti Kahu listed as a separate ground for review an apparent failure by the Tribunal to appreciate that its decision not to make binding recommendations on its application foreclosed the prospect of such recommendations at any future time. That is not recognised in the terms of the report but is a realistic assessment of the position Ngāti Kahu was left in.

[95] The finality of the outcome on such an application is an incident of the process and I cannot see any error of law in the Tribunal not recognising that consequence, as a factor that it should have taken into account in deciding whether to make the binding recommendations that were sought.

(6) Unacknowledged effect of leaving Ngāti Kahu without Crown forest compensation

[96] Again, this is a consequence of declining the request for binding recommendations. I am not persuaded that the Tribunal erred as a matter of law by failing to take into account before reaching its decision that one consequence of its doing so would be to deprive Ngāti Kahu of the allocation of income from Crown forest rentals that would have accompanied any binding recommendation in relation to forest assets.

[97] The Tribunal was mindful that the Crown's offer to Ngāti Kahu included an allocation for redress under this heading. In a narrow sense therefore, binding recommendations were not necessary to provide this as a component of appropriate redress.

Utility of relief?

[98] Ngāti Kahu has made out two errors of law by the Tribunal. First, that it treated binding recommendations as a remedy of last resort. That may have involved imposing an additional onus for Ngāti Kahu to establish that all other forms of relief

were insufficient before the Tribunal would make such binding recommendations. Secondly, the Tribunal failed to consider the appropriateness of making binding recommendations for parts only of the lands for which such a remedy was sought.

[99] I am not persuaded that any of the other criticisms of the Tribunal's reasoning and decision argued for Ngāti Kahu involved any error of law.

[100] Mr Tyson submitted that if any errors of law were made out, the Court ought to exercise its discretion to withhold relief. He emphasised that the Tribunal was a specialist body that ought to be given a degree of latitude if errors made out had not been critical to the outcome. He also made the point that the Tribunal no longer had jurisdiction to consider the application for binding recommendations in its original form. This is because once the future ownership of land has been addressed in a parliamentary bill that has been introduced into the House of Representatives, the Tribunal loses its jurisdiction to consider that land.[44]

[101] Any renewed reconsideration by the Tribunal would therefore be limited to properties that the Crown is not allocating to the other Te Hiku iwi as part of the settlements with them. The remaining areas, summarised by Mr Tyson as the Mangonui Blocks in the Aupōuri Forest, the Kohumaru Blocks in the Otangaroa Forest, Rangiputa Station and Kohumaru Station are already available to Ngāti Kahu as components of the Crown's existing offer. Ngāti Kahu could only make out a case for binding recommendations in relation to the resumption of these lands if it persuaded the Tribunal that the Crown's requirement that the lands be accepted as part of an existing offer in full and final settlement of all Ngāti Kahu claims was unacceptable. Nothing has changed on that issue and the Tribunal has not accepted Ngāti Kahu's position on it. It follows, on Mr Tyson's analysis, that there would be no utility in granting Ngāti Kahu relief.

[102] The errors of law that are made out were certainly not critical to the Tribunal's decision to decline binding recommendations. It would be difficult to justify granting Ngāti Kahu relief that required the Tribunal to commit the substantial resources that would be involved in a re-hearing of Ngāti Kahu's

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[44] Treaty of Waitangi Act 1975, s 6(6).

remedies application if correcting the errors of law that have been made out did not trigger realistic prospects for a different outcome.

[103] There is a real prospect that if the Tribunal is directed to reconsider the application for binding recommendations adopting the correct approach to the errors made out, then other considerations that were clearly important to the Tribunal and legitimately taken into account might still dictate the same answer. There is therefore an issue, which routinely arises in applications for judicial review, as to whether relief should be withheld from a plaintiff who makes out an error of law that was not material to the challenged decision, or where relief would be futile**.**

[104] In *Chiu v Minister of Immigration*, the Court of Appeal observed that the courts will be slow to deny a remedy solely on the ground that the same outcome from the decision-maker appears inevitable. In many situations it will be difficult for the Court to predict the so-called inevitability of the outcome and a reconsideration may involve material issues being perceived differently. If justice is to be seen to be done, generally an unsuccessful party to the impugned decision ought to be afforded the opportunity of having the decision made again in accordance with the law.[45]

[105] On the other hand, caution is appropriate in quashing the Tribunal's decision and directing reconsideration, where the process has already been so protracted, the basis for the specialist Tribunal's decision most likely stands irrespective of the errors that have been made out, and where the objective prospects for a successful reconsideration from Ngāti Kahu's perspective are not strong.

[106] Adopting a broad approach to the Court's discretion on relief, I note the movement in position that has occurred since the Tribunal issued its report. After its recent acknowledgement in these proceedings that it no longer challenged the allocation of the lands the Crown has committed to settlements with the other Te Hiku iwi, Ngāti Kahu might invite the Tribunal to consider its application for binding recommendations in respect of lesser areas of land, such as those lands within the remedies area that are not allocated to others. From Ngāti Kahu's

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[45] *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 552–553. These considerations were approved by the Privy Council in *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 at [27].

perspective, a binding recommendation in relation to those lands would free it from the unattractive option of obtaining those lands pursuant to a settlement with the Crown that required Ngāti Kahu to abandon claims yet to be determined.

[107] That outcome may either not be sought by Ngāti Kahu, and if it was, might ultimately not be granted by the Tribunal. However, given the importance of the matter, so long as that is a live prospect, I am persuaded that relief ought to be available.

[108] However, it is appropriate to pause before committing the parties to that course by setting the Tribunal's decision aside in respect of binding recommendations and directing reconsideration consistently with the findings in this judgment. I invite Ngāti Kahu to reflect on whether it would pursue a reconsideration by the Tribunal where the relief sought would now be some variant on the position I have outlined in the preceding paragraphs. Full account should be taken of the prospects that the Tribunal might well reach an entirely lawful decision that still declined Ngāti Kahu's application for binding recommendations. Any application to reconsider would inevitably involve substantial delay, cost and uncertainty, when compared with resumption of negotiations with the Crown, however unattractive Ngāti Kahu presently perceives the prospects of negotiation to be.

[109] I will defer making formal orders in accordance with this judgment for a period of 28 days. I invite a memorandum from solicitors for Ngāti Kahu to be filed within that period of time, confirming whether Ngāti Kahu wishes the Court to make orders setting aside those parts of the Tribunal's report dealing with its application for binding recommendations, and directing reconsideration of that aspect of it. Confirmation from Ngāti Kahu that it did not want to re-argue its application for binding recommendations pursuant to the terms of this judgment would be treated as acknowledgement that the errors it has made out are indeed not material, so that relief would not have utility.

Costs

[110] Ngāti Kahu has succeeded in making out errors of law and is accordingly entitled to costs. If the matter of costs cannot be resolved, I invite memoranda, but defer a resolution of costs until final determination in accordance with the preceding paragraph.

Dobson J

Solicitors:
Wackrow Williams & Davies, Auckland for applicant
Crown Law, Wellington for respondents