

CHAPTER 7

THE CROWN SANCTIONS ARBITRATION

7.1 INTRODUCTION

In chapter 5, we discussed Governor Hobson's indication to Colonel Wakefield in September 1841 that the Government would sanction 'any equitable arrangement' to induce Maori to give up land claimed by settlers. However, Hobson clearly envisaged that Maori could 'yield up possession of their habitations' only voluntarily and that the company could not be granted any land until there had been a proper investigation of its claim to have purchased the Port Nicholson block. This investigation, by land claims commissioner Spain, began in May 1842, but it was never completed. In this chapter, we examine how what started as an inquiry into the validity of the Port Nicholson deed turned into an arbitration between the New Zealand Company and those who purported to represent Port Nicholson Maori.

The move to arbitration was the subject of lengthy negotiations between the Crown and the company, beginning in August 1842, which we detail in this chapter. Finally, in February 1844, Wakefield agreed that the New Zealand Company would pay £1500 'compensation' to Maori for some 67,000 acres within the Port Nicholson block. The land for which Maori were to be 'compensated' was set out in a schedule enclosed with a letter from protector George Clarke junior, and this schedule will play an important part in our discussion of the deeds of release in chapter 8. The chapter concludes by considering whether £1500 was an adequate payment for the land at issue; whether Maori freely consented to the move to arbitration; and whether, in sanctioning the move to arbitration, the Crown favoured settlers over Maori.

7.2 SPAIN'S INQUIRY

In section 3.7, we discussed Spain's hearings, which began on 15 May 1842, in terms of the evidence presented about the validity of the Port Nicholson deed. Just before Spain commenced his first hearing, Wakefield presented him with documentation to support the company's claim based on Pennington's award. Included was a letter from Vernon Smith of the Colonial Office stating that Pennington had awarded the company 531,929 acres, including

111,100 acres at Port Nicholson.¹ This neatly coincided with the original company plan for 111,100 acres, consisting of 110,000 acres of rural lots and 1100 acres of urban lots, all of which had been sold in the original land orders, apart from 11,110 acres ostensibly set aside for Maori urban and rural tenths.

There were several counterclaims from other Europeans who claimed to have purchased small areas within the block prior to the Crown's prohibition of private purchases from Maori. To Wakefield's dismay, Spain took his responsibilities seriously. Indeed, he decided that any grant to the company of the land it claimed according to the November 1840 agreement and the Pennington award, 'without obliging it to prove the extinction of the native title, would have been a direct contravention of and in utter opposition to the spirit of the treaty of Waitangi, and in violation of all assurances of Her Majesty's Government to the aborigines, of affording them justice and protection'.² We agree, but note that neither Spain nor the Government stuck by these principles.

At the hearings, Spain received little help from Colonel Wakefield, who hoped to get away with a perfunctory inquiry. On 30 May 1842, by which time he could see that Spain was intent on conducting a thorough inquiry, Wakefield wrote to the company secretary in London. He saw Spain's investigation as being incompatible with the November 1840 agreement and the Pennington award, which he considered entitled the company to select land in the Port Nicholson and New Plymouth neighbourhoods. Wakefield considered that any inquiry into the company's titles should be little more than a matter of form. He sought instructions.³ We note that correspondence between New Zealand and London then took several months each way, often delaying responses to Wellington by six to nine months.

7.3 ARBITRATION PROPOSED

With the company's claim collapsing by the day, and notwithstanding his view that Spain's inquiries were misconceived, Wakefield felt obliged to make a firm proposal to Spain. On 22 August 1842, he expressed a willingness to make further payments to those Maori with grievances, a number of which he instanced, and he agreed to accept the decision of Spain and protector Halswell as to the amount of compensation payable to all Maori in cases of disputed possession of or title to land.⁴ Spain forwarded a copy of this letter to the Governor around 14 September, unaware that Hobson had died some days earlier.⁵ It was not until January 1843 that Spain was advised that Colonial Secretary Shortland (who temporarily took over government following Hobson's death) had approved the appointment of George

1. Wakefield to Spain, 14 May 1842 (doc A29, p 323)

2. Spain's first report, 12 September 1843, BPP, vol 2, apps, p 294

3. Wakefield to secretary, New Zealand Company, 30 May 1842, BPP, vol 2, apps, pp 558–559

4. Wakefield to Spain, 22 August 1842, BPP, vol 2, apps, pp 56–57

5. Spain to Wakefield, 14 September 1842, BPP, vol 2, apps, p 58

Clarke junior and an agent of the New Zealand Company to be referees. They were to recommend the amount of compensation that the company was to pay Maori in the case of disputed land. In the event of a difference, Spain was to act as arbitrator (or 'umpire').⁶ In the meantime, through 1842 Maori had been growing increasingly resistant to company colonists encroaching on disputed land around the harbour.⁷

Shortland gave detailed instructions to Clarke in January 1843 as to how he was to perform his duties as a referee. He was told that Spain would advise him of the cases in which the commissioner considered further payments were due to Maori. On receiving this information, he was to communicate with the other referee (to be appointed by Wakefield) for the purpose of deciding the appropriate payment. If the two referees could not agree, the matter was to be referred to Spain, as umpire, and his decision would be final. Clarke was further directed:

In the execution of the important trust committed to your charge, it will be necessary to use a sound discretion in ascertaining what are the real interests of the natives. Such lands must be retained for their present use as will ensure their satisfaction, and will prevent their interference with the property of the settlers resident within the Company's claims; but that object effected, it is not considered expedient to prevent the alienation of the remainder, as the provision made for their future welfare, both by the reservation of the tenth of all lands by the New Zealand Company, and of one-fifteenth of all lands sold by the Government, will be an ample provision for their future wants.

While maintaining with every possible firmness what you may consider to be the rights of the natives, your intercourse with agents of the New Zealand Company should be marked with the greatest courtesy and forbearance.⁸

It appears that the Crown's objective was to ensure the preservation only of land needed by Maori 'for their present use', so that they would be satisfied and not interfere with the property of the resident settlers. It was considered that there was no need for the protector to prevent the alienation of the remainder. The decision as to what Maori land should be retained by Maori and what could be alienated was to be made by Clarke, subject to Spain's directions. Spain would settle any difference between Clarke and the company's representative as to the appropriate payment. The Maori owners were apparently to have minimal input, especially since they could neither choose their own representative nor instruct that representative on a negotiating position. It is difficult to reconcile this with article 2 of the Treaty.

6. Freeman (for Colonial Secretary) to Spain, 16 January 1843; Freeman (for Colonial Secretary) to Wakefield, 16 January 1843, BPP, vol 2, apps, pp 59–60

7. Document E4, pp 284–289

8. Freeman (for Colonial Secretary) to Clarke, 27 January 1843, BPP, vol 2, apps, pp 60–61. As for the 15 per cent fund, see footnote 58.

Moreover, the arbitration process was irreconcilable with the Land Claims Ordinance 1841 under which Spain was authorised to hold an inquiry with full opportunity for the parties, Maori and the company, to be heard. The inquiry was abandoned, and Spain's role was converted from that of a judicial officer into an umpire directing and, when required, deciding the outcome of negotiations between the company and the protector. Maori had no independent voice and were entirely in the hands of the protector, Clarke junior, who, in turn, was subject to pressure by Spain to reach an agreement with Wakefield.

7.3.1 Negotiations proceed

On 14 February 1843, Spain advised Wakefield that, having recently heard Richard Barrett's evidence, he thought it appropriate that Wakefield should take advantage of Shortland's proposals for compensating Maori in cases of disputed possession or title to land. He referred in particular to the cases of Te Aro, Kumutoto, and Pipitea. If Wakefield wished to pursue the matter, Spain advised that he would immediately instruct protector Clarke to cooperate with Wakefield.⁹ It is not surprising that Spain, after hearing Barrett's evidence, decided that it would be to Wakefield's advantage to resort to arbitration. Barrett's testimony had made it clear that his purported explanation of the 1839 Port Nicholson deed of purchase was worthless. It would have been apparent to Spain that the Port Nicholson Maori had not received any intelligible explanation, let alone translation, of the deed. It is significant that in his letter to Wakefield he referred to proposals for compensating Maori in cases not only of disputed possession but also of disputed title to land.

Spain, in his letter, gave Wakefield a choice between two mutually exclusive alternatives. He could follow the arbitration route or he could choose to proceed with his case. Spain stated that he was equally ready to hear any further evidence Wakefield might have to offer prior to 'allowing the Protector to go into his case on behalf of the natives'.¹⁰ It is clear that at this stage the case for Maori had not yet begun. We agree with the conclusion drawn by historian Duncan Moore:

Given that Wakefield chose the arbitration option, and that there was, in fact, no further inquiry into the Company's Port Nicholson claim, we can be sure that the Land Claims Court never heard a 'case on behalf of the natives'.¹¹

Not surprisingly, Wakefield responded at once, saying that he was prepared to go into the question of further payment to Te Aro Maori.¹² Spain accordingly requested that Clarke

9. Spain to Wakefield, 14 February 1843, BPP, vol 2, apps, pp 307–308

10. Ibid, p 308

11. Document E5, p 378

12. Wakefield to Spain, 14 February 1843, BPP, vol 2, apps, p 308

actively cooperate with Wakefield, and offered his assistance.¹³ Clarke replied the same day, advising Spain that he had called a meeting of Te Aro Maori for the following morning, ‘when the question of compensation will be discussed publicly’. He invited Spain to attend and render his valuable assistance.¹⁴ However, it appears that Spain did not attend. On 17 February, Clarke wrote to Spain advising that he had told the Te Aro Maori resident at their pa of the Government’s wishes respecting the compensation due to them for ‘the lands they claim in Port Nicholson’. After several meetings, they declined to enter into any arrangement with the New Zealand Company respecting the lands claimed by the company, ‘which they declare they have never alienated to that body’.¹⁵

Spain, in replying to Clarke, expressed surprise at the contents of his letter because leading Maori of the district had visited him and expressed their anxiety to have the matter settled. Spain told Clarke he should immediately inform Wakefield of the terms he thought ought to be granted to the Te Aro Maori and endeavour to obtain their agreement. If he and Wakefield could not agree, Spain told Clarke to ‘submit your points in difference to my decision’.¹⁶ Clarke advised Wakefield of the attitude of the Te Aro Maori. However, he indicated that he thought the Kumutoto and Pipitea Maori might be amenable to the payment of compensation, provided suitable reserves were made for them. He suggested that, if Wakefield were willing to negotiate with them, the sight of a payment might induce Te Aro Maori to accept fair compensation for their lands.¹⁷ Wakefield agreed to a further payment to those at Pipitea and Kumutoto.¹⁸

Clarke acted promptly, and six days later he advised Wakefield that he considered the Maori at Pipitea, Kumutoto, and Te Aro were fairly entitled to a payment of £1050. In addition, Maori were to be allowed to retain their pa and cultivated grounds until they felt disposed to alienate them. However, Clarke felt it his duty, in cases where pa and cultivations interfered with the public convenience, to induce Maori to alienate such lands for a fair payment, provided another suitable spot could be found for them.¹⁹ Wakefield was outraged by these proposals, which he rejected. Among other matters, he considered the figure £1050 unacceptable, referring to the ‘enormous value’ conferred by the company’s colonisation on the reserves made for Maori. He also expressed fear over the fire and public health dangers of the pa being located so close to the town centre. He urged ‘the imperative necessity of making our arrangements not merely reasonable, but final, conclusive, and as general as possible in their application’. He also asked Clarke to include in one proposal all claims for the Port Nicholson district, if there were any beyond those he had advanced, and on such terms as to

13. Spain to Clarke, 15 February 1843, BPP, vol 2, apps, p 309

14. Clarke to Spain, 15 February 1843, BPP, vol 2, apps, p 310

15. Clarke to Spain, 17 February 1843, BPP, vol 2, apps, p 310

16. Spain to Clarke, 20 February 1843, BPP, vol 2, apps, pp 310–311

17. Clarke to Wakefield, 20 February 1843, BPP, vol 4, p 468

18. Wakefield to Clarke, 21 February 1843, BPP, vol 4, p 468

19. Clarke to Wakefield, 27 February 1843, BPP, vol 2, apps, p 322

leave no question as to the surrender of the pa and cultivations required for the settlement as soon as Maori could be reasonably expected to leave them.²⁰

Clarke replied immediately to Wakefield's letter.²¹ Among other matters, he pointed out that:

- ▶ the permission to compensate Maori was granted by the Government at Wakefield's request, and it was for Wakefield to decide whether to take up the compensation option or to continue with the evidence and await Spain's decision;
- ▶ Barrett had recently stated in his evidence that the Maori of Pipitea and Te Aro were unwilling to sell their lands;
- ▶ the majority of the tenths reserves said by Wakefield to be of 'enormous value' were badly chosen, without sufficient regard having been paid to the wishes and interests of the Maori themselves;
- ▶ the inferiority of the land selected for Maori was a principal reason for their objecting to occupy the reserves;
- ▶ Maori had repeatedly stated (as was confirmed by Barrett's testimony) that the only explanation they had ever received of the reserves system was that one portion (or side) of land was for the Europeans, the other for themselves; and
- ▶ he had repeatedly been instructed by the Government that it would maintain Maori in the possession of their pa and cultivations for so long as they wished to retain them, and he was not aware of any permission granted by the Government to the company allowing it to allot to settlers portions of pa occupied by Maori.

Wakefield, in reply, denied that permission to compensate Maori had been granted at his request, stating he would have been willing to abide by Spain's report. He also denied that the reserve sites had been badly chosen by the company's surveyor, Smith.²² At some point prior to 15 March 1843, Clarke advised Wakefield that he would need time to visit Maori and promised to 'estimate the value of the native claim' in the wider Port Nicholson district.²³

No further discussions took place between Clarke and Wakefield for some 12 weeks. Then, on 23 May, Clarke wrote to Wakefield in reference to the latter's proposal that he should include all claims of Maori resident within the limits described in the New Zealand Company's Port Nicholson deed when calculating the amount of compensation to which he considered they were entitled. He informed Wakefield of his conclusion that such Maori were entitled to compensation equal in value to £1500.²⁴ It was not clear at this point what this £1500 was to cover. How Clarke reconciled the figure of £1500 for all Maori claims in the district with his earlier figure of £1050 for only the Maori at Pipitea, Kumutoto, and Te Aro he did not

20. Wakefield to Clarke, 1 March 1843, BPP, vol 2, apps, pp 322–323. Wakefield advised Spain of this request by letter dated 24 May 1843: BPP, vol 2, apps, p 320.

21. Clarke to Wakefield, 2 March 1843, BPP, vol 2, apps, pp 323–325

22. Wakefield to Clarke, 6 March 1843, BPP, vol 2, apps, p 325

23. Clarke junior to Clarke senior, 15 March 1843, qms/CLA/1822-71, vol 7, ATL (doc c1(g), p 42)

24. Clarke to Wakefield, 23 May 1843, BPP, vol 2, apps, pp 325–326

explain. Wakefield commented in a letter of 1 April 1843 that, based on Clarke's assessment of compensation for Pipitea, Kumutoto, and Te Aro, he thought at least £100,000 would be required for the whole award.²⁵

Wakefield responded to Clarke's letter by advising that he had recently been informed that the New Zealand Company in London was in active correspondence with the Imperial Government on the matter that he and Clarke were considering. He therefore sought a short postponement of the correspondence.²⁶ We note that the preceding month Wakefield had written to the company secretary expressing his great satisfaction at the remonstrance made by the company's directors to the Secretary of State for the Colonies, Lord Stanley, against Spain's proceedings in respect of the company's titles. He noted that the New Zealand Government had taken no steps to fulfil its part of the November 1840 agreement, which, in Wakefield's view, required it to make a grant to the company of the land awarded under the agreement. He advised that he awaited with considerable anxiety the outcome of the directors' remonstrance and in the meantime had suspended negotiations with Clarke.²⁷

7.3.2 Stanley authorises conditional grants

The correspondence between the New Zealand Company and the Imperial Government to which Wakefield referred had been going on for some time. In response to Wakefield's May 1842 complaints about Spain's inquiry, in October 1842 the New Zealand Company directors asked Lord Stanley to direct that a Crown grant be made pursuant to the November 1840 agreement and Pennington's award and without reference to Spain's proceedings.²⁸ Stanley rejected the company's contention that the title Maori had to their lands was extinguished by the November 1840 agreement. He emphasised that it was:

impossible to maintain that the rights of the natives of New Zealand to the soil which had been recognized as indisputable by Her Majesty's Government in 1839, could be thereby affected; or that the Crown either intended thereby to deprive them, or did in fact deprive them of 'the full, exclusive and undisturbed possession of their lands and estates', which had been 'confirmed and guaranteed' to them by the treaty of Waitangi.²⁹

This response, however, failed to satisfy the company directors, and they persisted for some months with frequent and lengthy letters to Stanley in an endeavour to have him change his mind.³⁰

25. Extract from private letter from Colonel Wakefield, 1 April 1843 (doc A29, p 335)

26. Wakefield to Clarke, 24 May 1843, BPP, vol 2, apps, p 326

27. Wakefield to secretary, New Zealand Company, 15 April 1843 (doc A29, pp 335–336)

28. Somes to Stanley, 24 October 1842, BPP, vol 2, apps, pp 8–9

29. Hope (for Stanley) to Somes, 7 November 1842, BPP, vol 2, apps, p 14

30. This correspondence is in BPP, vol 2, apps, pp 15–46.

Stanley's position was clearly stated in a Colonial Office letter to Joseph Somes of the New Zealand Company on 10 January 1843.³¹ He pointed out that:

- ▶ The November 1840 agreement was founded on the assumed correctness of two allegations made by the company: that it had 'acquired by purchase from the natives a proprietary right to about 20,000,000 acres of land' and that it had expended large sums in the colonisation of parts of such land.
- ▶ It was in reliance on the accuracy of these statements that the Government had entered into an agreement with the company.
- ▶ 'Lord Stanley cannot now permit it to be maintained, either that the natives had no proprietary right in the face of the Company's declaration that they had purchased those very rights, or that it is the duty of the Crown, either to extinguish those rights, or set them aside in favour of the Company.'
- ▶ 'The fact of the validity or invalidity of the purchase was known to the Company, and to them alone; the assumed validity was the basis of the promised grant.'
- ▶ If the facts were incorrectly stated at the time or could not be proved, it was for the company to bear the 'loss resulting from their own mis-statements'.
- ▶ Pennington's award had nothing to do with the title to the land but was simply a declaration that 'at the rate of 5s per acre, the previous expenditure by the Company was equivalent to a given number of acres', which the company was authorised to select only if the native title were found to have been validly purchased.
- ▶ The grant by the Crown of any land 'must be taken to be conditional upon the fact asserted by the Company'; that, by its previous arrangements, the Crown had the land in fact to grant. The investigation of that question was committed by law, with which Stanley could not interfere, to a local and legally constituted tribunal and not to Pennington.

Thus far, Stanley had stood his ground and his contentions appear to us entirely convincing. However, he then went on to note that he was 'fully alive to the great inconvenience resulting to a large body of Her Majesty's subjects, from the uncertainty now hanging over titles derived from the Company in the Wellington districts'. He wished to remedy this inconvenience by some means consistent with justice and good faith towards others. Stanley proceeded to hold out an olive branch to the company, conscious no doubt of the influence which some of the directors held in parliamentary circles in London.

Stanley noted that what the company complained of was being required to establish titles which no one disputed and to demonstrate the purchase of extensive 'waste' lands, 'of which no person could be proved to be entitled to act as vendor'. Stanley was prepared to put any lands which ultimately proved to be 'waste' at the company's disposal, but he could not exclude 'inquiry on the spot' into native title or prior title of others. Subject to such inquiry

31. Hope (for Stanley) to Somes, 10 January 1843, BPP, vol 2, apps, pp 20–22

but 'being anxious to go so far as his duty will permit', he would not object to a grant being made to the company of a prima facie title in the lands claimed.

Should the company agree with his view, he would instruct the Governor to make to the company:

a conditional grant, subject to prior titles to be established as by law provided, not only of such portion of the Wellington settlement as is in the actual occupation of the settlers under them, but also of all parts not in the occupation or possession of others; the extent of such grant, of course, not to exceed that to which they are entitled, under Mr Pennington's award.

It would appear that, in devising the plan for a conditional grant of land occupied by the settlers and of 'waste' or unoccupied land, Stanley contemplated that the company would receive title to a substantial area of land. He must have been conscious of the fact that, by permitting the Governor to make a conditional grant of such lands in favour of the company, he was transferring to Maori in the Port Nicholson block the burden of proving their title to the land. In short, the burden of proof of ownership was being reversed.

Finally, Stanley dealt with a proposal by the company that settlers who had been unable to obtain particular lands should be compensated out of the tenths reserves. Stanley noted that these reserves were proportionate parts of the lands sold by Maori which had been conveyed to the Government for the benefit of Maori, and were in addition to their unsold lands. The statement that the reserves had been conveyed to the Government was apparently a reference to clause 13 of the November 1840 agreement. Stanley turned down the company's proposal as involving injustice to Maori and a breach of trust on the part of the Government.

Two weeks later, the company directors in London responded to Stanley's proposal for a conditional grant, which they rejected out of hand, since acceptance would be tantamount to abandoning their right to the land. They proceeded at great length to reargue their claim that the Crown was obliged to 'fulfil the agreement of November 1840' entitling the company to a Crown grant in terms of the Pennington award.³²

In responding to this letter, Stanley reiterated his previous offer of a conditional grant, subject to prior titles, emphasising that this was as far as he could go. He refused, as Secretary of State for the Colonies, to:

join with the Company in setting aside the treaty of Waitangi, after obtaining the advantages guaranteed by it, even though it might be made 'with naked savages,' or though it might 'be treated by lawyers as a praiseworthy device for amusing and pacifying savages for the moment.'³³

32. *Somes to Stanley*, 24 January 1843, BPP, vol 2, apps, pp 22–33

33. The disparaging references to the Treaty are from *Somes to Stanley*, 24 January 1843, BPP, vol 2, apps, p 30.

In conclusion, he affirmed that, as a servant of the Crown, he would not admit that any person or government acting for the Crown could contract a legal or moral obligation to 'despoil others of their lawful and equitable rights'.³⁴

Further correspondence from February to May 1843 between the company and Stanley failed to change Stanley's position. On 8 May, *Somes* again wrote to Stanley. Among other matters, the company now agreed to accept a conditional grant of the lands selected by their agents. They proposed that, in the event of prior claims being made, the company should either exclude such claims from the selected lands, in which case they would receive a corresponding number of acres in lieu, or include those portions, subject to the prior title but with the Crown giving over to the company its exclusive pre-emptive right to purchase that land.

In addition, the company asked that the New Zealand Government be instructed to establish some general rule for defining native titles and settling claims to land, and to do their best to aid the company's agents in effecting the necessary arrangements with Maori, either to purchase their unimproved land or to compensate them for the original value of land which had been occupied by company settlers without sufficient title and on which they had made improvements.³⁵

On 12 May 1843, Stanley's assent to those proposals was communicated to the company.³⁶ Shortly thereafter, Stanley sent a copy of the company's letter of 8 May and his response of 12 May to Shortland for the latter's information and guidance but told him it was not necessary for him to implement the arrangements for settling the company's title to land because these matters were reserved for the newly appointed Governor, who would shortly be leaving for New Zealand.³⁷

7.3.3 Negotiations break down

Early in August 1843, *Spain*, who was soon to leave Wellington, proposed to *Wakefield* that he should resume the arbitration process at the point at which it had been left off in May.³⁸ *Wakefield* agreed to this and advised *Clarke* that he was willing to resume negotiations on the basis set out in *Clarke*'s letter to him of 23 May, from which he inferred that *Clarke* had waived his objection to 'the cession of the paha and cultivated grounds'.³⁹ *Clarke* showed this letter to *Spain*. *Wakefield* followed it with a separate letter to *Spain* in which he said that nothing short of 'a final and conclusive settlement' of the claims of all Maori living within the limits of the New Zealand Company's Port Nicholson deed would satisfy the settlers.⁴⁰ Since

34. *Hope* (for *Stanley*) to *Somes*, 1 February 1843, BPP, vol 2, apps, p 36

35. *Somes* to *Stanley*, 8 May 1843, BPP, vol 2, apps, pp 90–91

36. *Hope* to *Somes*, 12 May 1843, BPP, vol 2, apps, p 92

37. *Stanley* to Shortland, 19 May 1843, BPP, vol 2, apps, pp 92–93

38. *Spain* to *Wakefield*, 5 August 1843, BPP, vol 2, apps, pp 326–327

39. *Wakefield* to *Clarke*, 24 August 1843, BPP, vol 2, apps, p 329

40. *Wakefield* to *Spain*, 25 August 1843, BPP, vol 2, apps, p 329

Spain had already made it clear to Wakefield that he could not accept the imposition of any condition ‘inconsistent with the original terms of the arbitration’,⁴¹ his immediate reaction to the letter was to terminate the arbitration, saying that the terms proposed by Wakefield were ‘such as to interdict the resumption of the negotiation’.⁴²

7.3.4 Spain’s preliminary report

Having broken off negotiations, Spain proceeded to Auckland, where, in September, he wrote a preliminary report to the Acting Governor.⁴³ In this report, Spain reviewed events since taking up his appointment in early 1842. He considered that the November 1840 agreement did not entitle the company to expect a grant from the Crown irrespective of whether or not native title had been extinguished by a valid purchase. As he put it, ‘the Crown could not grant what the Crown did not possess’.⁴⁴ He emphasised that he could not agree to pa, cultivations, and burial grounds being taken from Maori without their free consent, ‘because it appeared clear, from the evidence, that they had never alienated them’.⁴⁵ Spain made it clear that the chief reason for his breaking off the arbitration process was that Wakefield was proposing that the negotiations should proceed on the basis that the pa, cultivations, and burial grounds would be ceded by Maori.⁴⁶

However, Spain still believed that Port Nicholson was a case that ‘might easily be settled by carrying out the compensation system’. He continued:

supposing I were called upon to make a final report of purchase or no purchase, or to separate the sold from the unsold portions of land, in both cases innumerable difficulties would present themselves; and, if the report showed that the purchase, as a whole, was not good, I fear that the natives, with their notions of the increased value of their land by the establishment upon it of the town of Wellington, would never consent to alienate their lands at a fair and reasonable price. The consequence of this would be the total ruin of the settlement, which would fall with equal severity upon the European and the native population; as the land of the latter would, in that case, decrease as rapidly as it had previously risen in value, while its restoration, thus reduced in value, would form but a poor equivalent to them for the advantages they were daily deriving from the European community around them, and of which, under these circumstances, they would be deprived. Had I to separate the parts

41. Spain to Wakefield, 24 August 1843, BPP, vol 2, apps, p 329

42. Spain to Wakefield, 25 August 1843, BPP, vol 2, apps, p 330

43. Report of Commissioner Spain, 12 September 1843, BPP, vol 2, apps, pp 291–307. Certain aspects of this report, chiefly concerning Spain’s findings in relation to the 1839 Port Nicholson deed of purchase, are noted at section 3.7.3 above.

44. Spain’s report, BPP, vol 2, apps, p 295

45. *Ibid*, p 296

46. *Ibid*, p 303

sold from the parts not sold, there would be the greatest difficulty in ascertaining correctly the boundaries and the quantities of the lands belonging to each division or family, or individual native claimant.⁴⁷

Spain also emphasised the need for a survey to be made of the excepted pa, cultivations, and burial grounds, with the survey plans to be attached to the Crown grants, in order to prevent future disputes.⁴⁸

7.4 GOVERNOR FITZROY'S INSTRUCTIONS

Captain Robert FitzRoy, the new Governor, while still in London wrote to Lord Stanley on 15 June 1843. He sought confirmation of his understanding of Stanley's arrangements with the New Zealand Company respecting its title to land in New Zealand. His understanding was that:

- ▶ out of a certain extent of land said to have been purchased by the company, the Government would confirm the company's title to one acre for every five shillings spent by it in colonisation, provided it proved the validity of its purchase; and
- ▶ the Government would assist the company in making good its claims, so far as could be done with propriety.⁴⁹

In his reply, on the first point, Stanley referred FitzRoy to his correspondence of 8 and 12 May 1843 with the company, copies of which he had sent to Shortland in New Zealand on 19 May. He added:

Her Majesty's Government have conceded to the Company, as regards the district included in the original agreement, that with a view to facilitate the adjustment of their titles, the local government of New Zealand should be directed to make to the Company's agents a conditional grant of the lands selected by them on the terms definitely stated in that correspondence, the principle of that concession being to allow to the Company a *prima facie* title to such lands, under the condition that the validity of their purchases shall not be successfully impugned by other parties. Subject to this qualification, I concur in the view taken by you on this point.⁵⁰

On the second point, Stanley authorised FitzRoy to assist the company in making good its claims, so far as might be consistent with the interests of other parties and of the community at large, on which point he referred FitzRoy to the correspondence sent to Shortland. These, then, were the instructions FitzRoy took with him to New Zealand.

47. Spain's report, BPP, vol 2, apps, p 306

48. Ibid, p 307

49. FitzRoy to Stanley, 15 June 1843, BPP, vol 2, apps, p 93

50. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, apps, pp 93–94

We have earlier noted that, in sanctioning the Governor to make conditional grants of lands selected by the company, which gave it a prima facie title to such lands, the Crown had reversed the onus of proving title to Maori land. It was now for Maori to prove that they had not sold the land, rather than for the company to prove its purchase and right to title.

Article 2 of the Treaty confirms and guarantees to Maori the full, exclusive, and undisturbed possession of their lands and other properties for so long as it is their wish and desire to retain them. The onus must surely rest on any 'purchaser' to establish that Maori, in any given instance, have willingly and knowingly agreed to part with their ownership of such land. As we have seen, the company signally failed to prove a valid sale of the land included in the Port Nicholson deed.

The arrangement for the conditional grants of land was made in England. Maori were totally ignorant of the negotiations which led to Stanley's instructions to FitzRoy. There is no evidence that they were ever advised of the arrangement or consulted in any way. In the event, however, as we later note, no 'conditional grant' as proposed by Stanley was in fact made by FitzRoy.

7.5 FITZROY ARRIVES IN WELLINGTON

Governor FitzRoy arrived in Wellington on 26 January 1844, and on that day Wi Tako Ngatata presented him with a petition from 21 Maori of Kumutoto. In it, they asked that the Governor pay them for the land. If he agreed, 'let one part of the land be for you, the other for us'. They said that they had not been paid by Wakefield, nor did they want Wakefield to pay them: 'we say, let the Governor pay us'.⁵¹ In a dispatch sent some months later, FitzRoy reported that he had found a tense atmosphere in Wellington, with the Pakeha settlers expressing great hostility towards Maori as a result of 'the land question'. Maori were equally agitated, most of them believing that 'one-half of the land was for the settlers, and one-half for themselves'.⁵²

7.5.1 FitzRoy's agreement with Wakefield

On 29 January at police magistrate Major Matthew Richmond's house, FitzRoy met with Wakefield, Spain, and others, including the protector, Clarke junior, and Thomas Forsaith (whom FitzRoy had brought down with him from Auckland as an additional protector and interpreter). Full minutes of the meeting were kept by Forsaith.⁵³ They make no reference to the representations of the Kumutoto people, nor were any Maori present at the meeting,

51. BPP, vol 4, p 180

52. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 172

53. 'Minutes of the Conference held at Major Richmond's, on Monday, 29 January 1844', BPP, vol 5, pp 26-28

notwithstanding their expressed wish to deal directly with the Crown and not with Wakefield. After considerable discussion, FitzRoy asked Wakefield whether he was 'prepared to make a fair compensation to the natives who may be entitled to receive it, without including their paha, their burying places, and their grounds actually in cultivation'. We note that at no point did FitzRoy or any other Crown official suggest that the full complement of use rights discussed in section 2.2 should be guaranteed to Maori; only their rights to the obvious physical sites of pa, cultivations, and burial grounds were to be protected.

After some further discussion, FitzRoy repeated his question, remarking that:

If we agree upon this general principle of compensating the natives for lands for which they are entitled to receive it, without reference to their paha and cultivations, the details of the arrangement can be adjusted to mutual satisfaction afterwards.

Wakefield then said in answer to the question, 'I am prepared'.

It is not clear what FitzRoy had in mind in stating that the details of the arrangement could be adjusted to mutual satisfaction. He may have envisaged that the exception of pa and cultivations was a provisional matter that could be modified later. Duncan Moore points out that this would have been in line with previous promises made by Hobson and Shortland that such land could be negotiated for but not acquired compulsorily.⁵⁴

Discussion next ensued as to the meanings of 'pa' and 'cultivation grounds'. FitzRoy considered the limits of a pa to be 'the ground that is fenced around their native houses, including the ground in cultivation or occupation around the adjoining houses without [outside] the fence'. 'Cultivation grounds' FitzRoy understood to be 'those tracts of country which are now used by the natives for vegetable productions, or which have been so used by the aboriginal natives of New Zealand since the establishment of the colony'. These definitions of 'pa' and 'cultivation grounds' were adopted by Spain in his final report in 1845.⁵⁵

After receiving an assurance that Wakefield would provide the necessary funds for compensating Maori, FitzRoy turned to Spain. He asked him, 'as Her Majesty's Commissioner, to resume your duties, or rather to continue your exertions as umpire, in effecting the speedy settlement of this question'. We note that FitzRoy here draws a distinction between Spain exercising his duties as a land claims commissioner and the duties of an umpire in arbitration proceedings. FitzRoy next obtained an assurance from Wakefield that he had no objection to the earlier arrangement for the conduct of the arbitration, with Clarke acting on behalf of Maori, Wakefield or his appointee acting for the New Zealand Company, and Spain acting as umpire, 'whose award will be finally referred to me'. FitzRoy reserved to himself the power of final ratification. Wakefield made no objection to this arrangement. Discussion then took place on the extent of the lands for which Maori were to be compensated; it was defined as

54. Document E5, pp 464-465

55. *Ibid*, pp 467-468

‘all that had been surveyed, or given out for selection in the Port Nicholson district, independent of the paha, cultivations and reserves’.

These arrangements were of critical importance to Maori, but they were not included in the meeting. Presumably, protector Clarke was there to represent their interests, though he had not been chosen by Maori as their representative. There is, however, no mention in the detailed account of the discussions in the minutes that Clarke was consulted or that he made any contribution on behalf of Maori to the matters under discussion, apart from confirming one statement made by Spain and explaining that a ‘pah’ would include any Maori settlement. He was there to receive instructions from the Governor, who, in addressing Clarke in particular, said:

I trust you will consider it a sacred duty to be as moderate as justice will allow. We know that the natives are apt to be exorbitant, and you must not fail to impress upon their minds the comparatively valueless nature of their lands when the settlement was formed.

7.5.2 Clarke’s assessment of compensation

Clarke described how he calculated the compensation to be paid to Port Nicholson Maori in a letter to his father, the chief protector, in June 1844:

On the arrival of his Excellency the Governor at Wellington, last January, I was directed by him to resume negotiations with Colonel Wakefield, which had been for some time suspended, and we finally concurred in awarding the sum of 1500*l* to the natives, as compensation for their unsatisfied claims in the surveyed district of Port Nicholson and the vicinity. Having previously obtained the general consent of the natives to accept of a fair award, I based my estimate of it upon what I deemed to have been the marketable value of the land at the time when Colonel Wakefield commenced to treat about the sale of it, modified by the consideration some of them had already received, for dividing the sum I have named. I carefully considered the situation, quality and extent of the land claimed by each tribe, as well as the comparative strength of the claims they respectively advanced.⁵⁶

How, on that basis, Clarke reached the figure of £1500 is not known. In fact, as we earlier related, this sum was fixed by him in May 1843 (see s 7.3.1). As Moore points out, when Clarke first proposed this sum all the associated purchase policies remained in place. Clarke’s instructions required him to take account of the policies that Maori were to receive ‘one fifteenth’ (properly, 15 percent) of the proceeds of Crown land sales (this being intended to pay for services such as hospitals and schools), plus one-tenth of the company’s award of land. Maori pa and cultivation lands were also to be excepted from sale (enabling Maori to

⁵⁶ Clarke junior to Clarke senior, 26 June 1844, BPP, vol 4, pp 464–465

continue to participate in the local produce markets).⁵⁷ We note that Maori saw little if any benefit from the 15 per cent fund, while the reserves set aside for them in the Port Nicholson block amounted to significantly less than one-tenth of the land finally awarded to the New Zealand Company by Spain (see s 8.8.1).⁵⁸

It seems clear that Clarke, in fixing £1500 as compensation, was strongly influenced by FitzRoy's stricture that he impress on the Maori owners that their land was 'comparatively valueless' when the settlement was established. But much of this land was of great value to the settlers, especially those sections with harbour frontage. And, moreover, the land was of considerable value to Maori regardless of its settlement value. It provided them with a good living, with ready access to birds, berries, fish, and other customary foods (the importance of which was not recognised by the Crown and the company), and it sustained substantial cultivations. Already, by 1839, some traders had settled among the Maori, presumably because they, too, thought the area valuable.

In insisting that compensation should be based on the value that the land had when the settlement was formed, FitzRoy presumably meant when Wakefield entered into the 1839 deed of purchase. At section 7.6, we consider the question of whether or not it was reasonable to assess compensation on this basis. It is important to emphasise that in 1844 Wakefield was seeking to purchase only some of the land within the surveyed or selected area over which Port Nicholson Maori had customary rights. Both Governor FitzRoy and the New Zealand Company recognised that Maori would continue to own their pa, cultivations, and burial grounds.

7.5.3 The arbitration is resumed

The youthful protector Clarke lost no time in resuming negotiations with Wakefield. We note that the Crown had not heeded Spain's proposal in his preliminary report of September 1843 that in any future negotiations Clarke should be assisted by an experienced person with an understanding of the Maori character and language. Spain considered that Clarke's duty of acting for Maori was far too difficult and onerous to be carried out by Clarke on his own.⁵⁹

Clarke wrote to Wakefield after the conclusion of the 29 January meeting at Richmond's house. He asked Wakefield for a certified plan and statement showing the exact quantity of land, either surveyed or given out for selection, together with the extent of the native reserves, within the limits described in the company's Port Nicholson deed. Clarke needed

57. Document E5, p 479

58. Up to 1846, the 15 per cent fund failed even to meet the running costs of the office of the protector of aborigines, and it was discontinued after 1846. The history of the fund is covered briefly in Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, pp 28, 460–461. For a more detailed history, see Robert Hayes, 'Brief of Evidence of Robert Hayes on the Mangawhai Block', June 2001 (Wai 674 RO1, doc P5), ch 2. See also doc P1, pp 23–24.

59. Spain's preliminary report, 12 September 1843, BPP, vol 2, apps, p 307

this information in order to estimate the amount of compensation to be awarded to unsatisfied Maori claimants, in accordance with the arrangements which Wakefield had just agreed with FitzRoy for 'the final adjustment of the land question'.⁶⁰

Two days later, Wakefield responded by sending Clarke a report and schedule of land from the company's principal surveyor, Samuel Brees. Brees's report included a sketch showing 'the land surveyed, and under survey' within the limits of the Port Nicholson deed. On its face, this wording differed from the statement made at the meeting with FitzRoy, which had referred to all the land that had been surveyed or given out for selection (see s 7.5.1). According to Brees's schedule, the land surveyed – which included the town of Wellington but excluded public reserves, the town belt, roads, and native reserves – totalled 45,440 acres. Another 2700 acres were still under survey at the time. In addition, 110 town sections of one acre each and 34 rural sections of 100 acres each – amounting in all to 3510 acres – had been set aside as tenths reserves for Maori. The total area of land surveyed and under survey amounted to 51,650 acres. Nothing was said about land occupied by Maori which was not tenths land or about Maori land neither surveyed nor under survey. A table showed the number of 100-acre sections in each of 18 districts, which included seven sections in Porirua and one in 'Tukapu' (Takapu), both districts being outside the Port Nicholson block. No lands were identified nor were any acreages estimated for compensation outside of the 51,650 acres surveyed or under survey for the company.⁶¹

Following discussions with Wakefield, Clarke replied to him on 7 February acknowledging receipt of the Brees report and plan.⁶² Owing to uncertainty about the precise location of the eastern and western boundaries of the Port Nicholson block and to 'a desire not to embarrass the negotiation by including within those limits any land to which the natives of Porerua may lay claim', Clarke proposed:

That under the present negotiation, the New Zealand Company shall compensate the natives who lay claim to the districts specified in the enclosed Schedule, excepting native reserves, pahs, cultivations and burial-grounds.

Clarke gave £1500 as the amount necessary to compensate the Maori claimants.

The schedule enclosed by Clarke is reproduced on the following page.⁶³ The heading to the schedule described it as 'showing the probable extent of land for which it is proposed to compensate the Native claimants'. In other words, the schedule set out the land for which Maori were to be paid.⁶⁴ There is no suggestion that the £1500 proposed by Clarke was to be payment for all the land within the boundaries of the Port Nicholson deed.

60. Clarke to Wakefield, 29 January 1844, BPP, vol 2, apps, p 417

61. Brees to Wakefield, 31 January 1844, BPP, vol 2, apps, pp 417–418

62. Clarke to Wakefield, 7 February 1844, BPP, vol 2, apps, p 419

63. Schedule attached to Clarke to Wakefield, 7 February 1844, BPP, vol 2, apps, p 419

64. The headnote to the schedule refers to the 'probable' extent of land, whereas a handwritten copy of the same schedule in Internal Affairs files omits 'probable' from the headnote: Internal Affairs inwards correspondence files concerning Wellington tenths, 1A1 (doc c1(a), p 257).

SCHEDULE referred to in the accompanying Letter, showing the probable extent of Land for which it is proposed to compensate the Native Claimants.

Names of Districts.	No of Sections Surveyed on Plan.	No of Sections chosen on Plan.	No of Sections left unchosen.	No of Sections reserved.	No of Native Reserves.	No of Native Reserves reserved.
Watt's Peninsula	18	18	—	—	—	—
Evan's Bay	6	6	—	—	—	—
Town District	9	9	—	—	2	—
Ohiro District	18	18	—	—	4	—
Karore	25	25	—	—	—	—
Kaiwarawara	9	9	—	—	—	—
Upper Kaiwarawara	7	7	—	—	—	—
Te Rawite	5	5	—	3	—	—
Oterongo	—	—	—	6	—	—
Ohan [Ohaua]	—	—	—	9	—	—
Makara	40	40	—	—	4	—
Ohariu	71	67	4	15	5	2
Kinapora	26	26	—	—	3	—
Harbour	67	28	39	—	3	—
Horokiwi Road	34	20	14	—	1	—
Lower Hutt	80	80	—	3	8	—
Upper Hutt	100	63	37	6	—	—
Lowry Bay	9	6	3	3	2	—
Pakuratahi, &c	—	—	—	50	—	—
Wainuitmate, &c, west of Turakirae	—	—	—	50	—	—
Block at Kaiwarawara	—	—	—	—	5	—
Total No of Sections	524	427	97	145	37	2
Total in Acres	52,400	42,700	9,700	14,500	3,700	200
Town in Acres	990	990	—	—	110	—
TOTAL IN ACRES	53,390	43,690	9,700	14,500	3,810	200

(signed)

George Clarke, jun.

Protector of Aborigines.

The schedule lists the names of 'districts' in the first column. The second column gives particulars of the number of sections 'surveyed on plan'. All the 'districts' referred to in this column appear to be in the nature of survey districts,⁶⁵ although the districts of Oterongo, Ohaua, Pakuratahi, and Wainuiomata were yet to be surveyed. The fifth column of Clarke's schedule also listed sections which had not yet been surveyed in the four districts just mentioned, as well as other sections which were to be surveyed at Terawhiti ('Te Rawite'), Ohariu, Lower Hutt, Upper Hutt, and Lowry Bay.

65. See the plan showing the boundaries of the 'Port Nicholson Purchase' dated 7 October 1844 (doc 13(d)).

It is evident that Clarke had incorporated in his schedule substantially more land than had Brees. While Clarke omitted the land at Porirua and Takapu that was in Brees's schedule, he had added the districts of Oterongo, Ohau ('Ohan'), Makara, Pakuratahi, and Wainuiomata, as well as adding sections in most of the other districts. On 12 February, Wakefield reported that, in response to a request from the New Zealand Company in London, he had ordered the surveying of land at Pakuratahi, to the east of the Hutt River, and of 5000 acres in the Wainuiomata Valley. He noted that he had 'secured quiet possession of these lands, by including them in the schedule of those for which the natives of this district are to receive further payment'.⁶⁶ It appears, then, that these and other areas were included in Clarke's schedule as a result of discussions with Wakefield. They were lands given out for selection and under survey by the company in addition to those already surveyed.

The total extent of land in Clarke's schedule of land surveyed and under survey (in columns 2, 5, 6, and 7) amounted to 71,900 acres. Of this area, 4010 acres consisted of native reserves, leaving 67,890 acres for the company. However, as Clarke made clear, and as had been stipulated by FitzRoy and agreed by Wakefield, Maori pa, cultivations, and burial grounds were also to be excepted from the land to be granted to the company. These exceptions had not been surveyed and are not referred to in Clarke's schedule. It is not apparent, therefore, precisely what area of land Clarke took into account in assessing £1500 as the amount necessary to compensate Maori. In the absence of a survey of pa, cultivations, and burial grounds, he could not have had an accurate knowledge of the extent of land for which Maori were to be compensated. It must have been less than the 67,890 acres but considerably more than Brees's figure of 51,650 acres. We have deducted 890 acres for pa, cultivations, and burial grounds and have assessed the land acquired by the company under the 1844 deeds of release (see ch 8) at 67,000 acres.⁶⁷

Wakefield acknowledged receipt of Clarke's letter 'enclosing a Schedule of land, for which it is proposed to compensate the native claimants, exclusively of the native reserves, pahs, cultivations and burial grounds contained therein'. We note that this wording indicates a clear understanding on Wakefield's part that only the land specifically identified in the schedule (minus reserves, pa, cultivations, and burial grounds) was to be covered by the compensation payments. Wakefield went on to note that he was unaware whether or not Spain had reported that any portion of the lands included in the schedule had been alienated by Maori. As a consequence, he was not in a position to estimate what further payment might

66. Wakefield to secretary, New Zealand Company, 12 February 1844, BPP, vol 2, apps, pp 416-417

67. The figure of 890-900 acres for pa, cultivations, and burial grounds is a rough estimate based on Colonel McCleverty's assessment in 1847 that there were 576 acres of Maori cultivations on sections claimed by settlers; evidence that McCleverty may have underestimated the area under cultivation or that this area may already have fallen by 1847; and an allowance for pa and urupa (bearing in mind that FitzRoy's definition of 'pa' included land occupied or cultivated outside the fence, while his definition of 'cultivation' included any land which Maori had cultivated since the establishment of the colony): McCleverty, 'Report on Port Nicholson Cultivations', enclosed with Governor Grey to Earl Grey, 21 April 1847, in Turton, *Epitome* (doc A26), s D, p 11; doc 18, pp 50-51.

reasonably be due to them. However, to avoid delay he stated that he was prepared at once to provide the £1500 required.⁶⁸

Wakefield appears to have contemplated that, if Spain did report that some of the land described in the schedule had in fact already been validly purchased by the company, then the payment of £1500 should be reduced. There is nothing in Wakefield's letter to suggest that he considered that the £1500 was intended to constitute payment for all the lands within the limits of the Port Nicholson deed of purchase. On the contrary, it is clear that he was relating the proposed payment of £1500 to the lands already surveyed and under survey referred to in Clarke's schedule. It was these categories of land which were detailed in Brees's schedule, which Wakefield had supplied to Clarke. And it is these same categories (along with native reserves, also noted by Brees) which are detailed in Clarke's schedule.

Later in February, Wakefield reported to the New Zealand Company his payment of the £1500 to Clarke.⁶⁹ He enclosed copies of his correspondence with Clarke on what he termed the 'termination of the negotiation, respecting further payment to the natives by the Company for land in this district'. By 'district', he probably meant the Port Nicholson district. He did not say that the payment was for all the land within the limits of the Port Nicholson deed of purchase. On the contrary, he stated that the £1500 amounted to 'about sixpence per acre', which makes the total area some 60,000 acres.⁷⁰

If the 4010 acres of native reserves (tenths) noted in the last two columns of the schedule are set aside, 67,890 acres are left. However, Maori pa, cultivations, and burial grounds had not been separately surveyed, and most were included in that acreage, although some were on tenths reserves. Wakefield had agreed with FitzRoy that these sites would be excluded from the area for which compensation was to be paid. He may have overestimated the acreage of the pa, cultivations, and burial grounds excepted from the transaction as amounting to some 8000 acres, hence his assessment that 60,000 acres would be available for the company. We have estimated that if pa, cultivations, and burial grounds are assessed at, say, 890 acres, and if this area is deducted from the 67,890 acres referred to above, the acreage being acquired by the company as set out in the foregoing schedule is some 67,000 acres.

7.6 WAS THE SUM OF £1500 ADEQUATE FOR THE LAND AT ISSUE?

7.6.1 Claimant and Crown submissions

The Wai 145 claimants allege in their amended statement of claim that the compensation of £1500 paid to Maori was inadequate for the amount of land at issue; that is, some 67,000

68. Wakefield to Clarke, 8 February 1844, BPP, vol 2, apps, pp 419–420

69. Wakefield to secretary, New Zealand Company, 19 February 1844, BPP, vol 2, apps, p 417

70. $\text{£}1500 \times 240\text{p} / \text{£}1 \times 1 \text{ acre} / 6\text{p} = 60,000 \text{ acres}$

acres within the Port Nicholson block.⁷¹ We calculate this to be very roughly fivepence per acre. Counsel for the Wai 145 claimants and counsel for the Crown each made detailed submissions on this question, and we have given careful consideration to those submissions.⁷²

Mr Green for the claimants acknowledged that goods which he estimated as having a maximum value of £900 were distributed by the company to some Maori in 1839. He invoked the average price of 2.2 shillings per acre said to have been paid to Maori vendors by purchasers in Muriwhenua who pursued their claims through the land claims inquiry. Counsel stressed that, at the time that the £1500 was first proposed by Clarke in 1843, associated policies of Maori receiving 15 to 20 per cent of the proceeds of Crown land sales and being allocated a full tenth of land purchased by the company were in place. Maori received little if any benefit from the Crown land sale fund, and the provision of tenths reserves was honoured in part only. Mr Green also cited, by way of example, estimates made in 1843 by a trader, David Scott, that in 1840 his three acres at Kumutoto were worth £500, regardless of the company's settlement.

Crown counsel in reply quoted FitzRoy's insistence that Maori should be paid no more than the fair value of the land 'when it was bought, for this is no new purchase, but the completion of a purchase made four years ago'.⁷³ Unfortunately, the Governor mistakenly assumed that the 1839 Port Nicholson deed effected a valid, if partial, purchase. The Governor stressed that the New Zealand Company had expended funds in sending ships, immigrants, and property to New Zealand and had made roads and other improvements in Wellington. That all this added value to the land is readily apparent.

Crown counsel also referred to a statement by Te Aro chief Mohi Ngaponga at the meetings in February 1844 before the first deeds of release were signed (see s8.2) that Maori were not satisfied with the payment when compared with the amount the company had received from the Europeans. Ngaponga said Maori considered that the company should pay them the same sum it had received from the settlers.

Crown counsel characterised this debate between FitzRoy and Ngaponga as demonstrating that the issue was whether Maori were entitled to the price the company received from its purchasers – something akin to market value – or whether it was fair to measure value as at 1839, 'before annexation and before the Company's massive expenditure'.⁷⁴

7.6.2 Tribunal consideration

Giving the matter the best consideration we can and given the vagaries and uncertainties in the period 1839 to 1844, the Tribunal considers that the answer should be somewhere

71. Claim 1.2(d), para 11.20. The actual amount paid to Maori for this land between 1844 and 1846 was £1510 (see s8.4.7 below).

72. See doc 02, pp 185–193; doc Q11, pp 74–75; doc P3, pp 20–28.

73. FitzRoy quoted in doc P3, p 22

74. Document P3, p 23

between the two competing views. As we have earlier noted, the land was immensely valuable to Maori; they had established their homes and their livelihood in the Port Nicholson block or, in the case of Ngati Toa, adjacent to it. Maori living in the block had customary rights to well-established cultivations and ready access to forest and bird resources and the sea and its fisheries. Moreover, they had room for considerable expansion to land then sought by the company. Neither the company, through its own default, nor the settlers had title to any land in the Port Nicholson block. It was all subject to the customary rights of Maori, who were being pressured and induced to part with much of their best land in the block to accommodate the settlers. The Tribunal considers that Maori were entitled to be fairly compensated for making it possible for the several thousand immigrants to be accommodated in the Port Nicholson block, at very considerable inconvenience to Maori and at the cost of losing much productive land. The Tribunal concludes that the Crown erred in insisting that, in fixing a price for the land, no regard could be had to the situation as at 1844 and the sacrifice required of Maori to part with much valuable land for the benefit of the company and its settlers.

7.6.3 Tribunal finding of Treaty breach

The Tribunal finds that, in insisting that the price to be paid by the New Zealand Company to Maori for 67,000 acres in the Port Nicholson block should be based on the assessed value of the land at the time of the invalid 1839 deed of purchase of the block, the Crown failed to protect the article 2 Treaty rights of Maori to sell the land at a price freely agreed upon by them. As a consequence, those Maori who released their customary interests in the 67,000 acres in exchange for such payments (namely, Te Atiawa, Taranaki, Ngati Ruanui, Ngati Tama, and Ngati Toa) were prejudiced thereby.

7.7 THE TRANSITION FROM THE SPAIN LAND CLAIMS INQUIRY TO ARBITRATION PROCEEDINGS

In the preceding sections, we recounted the shift by Spain from conducting a public inquiry under the Land Claims Ordinance 1841 into the validity of the New Zealand Company's 1839 Port Nicholson deed of purchase to a role as an arbitrator or umpire in proceedings of a quite different nature. A number of the claims of the Wellington Tenth's Trust and Ngati Tama claimants relate to Spain's decision, which was sanctioned by the Crown, to make this important transition. Inevitably, there is some overlap and repetition in the claims, and we propose to confine our discussion to what we perceive to be the principal issues raised by the claimants under this head.

The Wellington Tenth Trust claimants allege that the Crown failed to affirm Maori title to Maori lands once it knew that the sale of land at Te Whanganui a Tara was invalid.⁷⁵ However, this proposition was modified somewhat in closing submissions, when the Crown was said to have accepted the company's alleged purchase as 'partly valid'.⁷⁶

This Tribunal, with the benefit of a much fuller appreciation of the nature and fundamental defects of the company's 1839 'purchase' than Spain could have had, given his incomplete investigation, is in no doubt about the invalidity of the 1839 'purchase'. Spain, as he recorded in his interim 1843 report, considered that Te Puni and his associates at Petone had always admitted a sale, although those at Lambton Harbour had not done so. However, Spain also wrote that he could not agree to Maori 'pahs, cultivations and burying-grounds being taken from them without their own free consent, because it appeared clear, from the evidence, that they had never alienated them'.⁷⁷

We believe that Spain was unduly influenced by the admission of the chiefs at Petone that they had 'sold' their land. He failed to see that this was inconsistent with his belief that they and all other Maori at Te Whanganui a Tara had not sold their pa, cultivations, and burial grounds. Yet, it was over much of these that the company surveyors had laid out the town and country sections subsequently selected by the settlers. It could not have been at all clear to Spain just what Te Puni and his colleagues had purported to sell. Nor would it have been at all clear to them, as Barrett's evidence so convincingly demonstrated.

7.7.1 Were Maori consulted about the move to arbitration?

The response of Crown counsel is that the Crown 'proceeded on the basis that Maori were agreeable to the correction of the flaws in the Company purchase by means of further payments and the setting aside of suitable reserves'.⁷⁸ The Crown denies that 'compensation' was a solution imposed on Maori without consultation or agreement.⁷⁹ Crown counsel invoked an incident when the Colonial Secretary, Shortland, visited Port Nicholson in 1840 accompanied by a detachment of troops. This visit coincided with the selection by the settlers of the town acres and is discussed in some detail at sections 5.3.4 and 5.3.5. Crown counsel suggested that the resulting 'agreement' with Te Aro Maori 'envisaged compensation as the appropriate solution in cases where the Company claim was justly disputed'.⁸⁰ However, the Tribunal believes the arrangement entered into was devised principally to defuse a possibly explosive situation between Maori and the settlers. It cannot reasonably be invoked as indicating that Maori, properly informed and in peaceful conditions, considered that

75. Claim 1.2(d), para 8.2

76. Document 01, p 112

77. Spain's report, 12 September 1843, BPP, vol 2, apps, pp 295–296

78. Document Q1, p 3

79. Document P1, pp 42–55

80. *Ibid*, p 42

compensation might be a fair way of dealing with land disputes between Maori and the company or its settlers.

As an indication of Maori willingness to compromise with the company, Crown counsel referred to a meeting with chiefs of the Port Nicholson district at which Wakefield, Spain, and the protector Clarke were present.⁸¹ This is described by Acting Governor Shortland in an April 1843 letter to Lord Stanley.⁸² The purpose of the meeting, which appears to have been held in February 1843, was to explain to ‘the chiefs of the district’ the nature of the arrangement reached with Wakefield. Shortland informed them that Wakefield ‘had promised to give them satisfaction in cases where their Protector considered that their demands upon the Company were just’. He continued:

I assured them that their interests would be most anxiously protected by the Government, and advised them to place the fullest reliance on the decisions of Mr Clarke and Mr Spain. The chiefs declared themselves perfectly satisfied with what was proposed to be done, and expressed perfect confidence in the Government. They said that their only wish was to be allowed to live peaceably with the Pakeha, and to cultivate the lands to which they were habituated; but that the boundaries of the land of the white man and of the Maori must be clearly defined.

When I left Port Nicholson, Mr Commissioner Spain had concluded the sitting of his court at Wellington, by the evidence of Richard Barrett, the principal actor in the purchases of Colonel Wakefield, and had notified to the Company’s agent some points which required to be completed in conformity with the arrangement noticed above.

It is necessary to consider this meeting, and the suggested satisfaction of Maori, in the light of the situation on the ground, as related by Clarke junior in a letter of 15 March 1843 to his father, the chief protector. In early March, in the course of his negotiations with Wakefield, Clarke visited various Maori cultivations. He recorded that:

I found that the white settlers did just as they liked pulled down the fences and drove the cattle on the potatoes, this is the systematic robbery by which the company’s settlers deprived the natives of the plantations and all this while they have borne it patiently and not even once attempted to avenge their wrongs – this is the way in which H . . . I got possession of his farm. Since the settlers have heard that in any arrangement with the company I make it a *sina qua non* that the natives shall retain possession of their cultivated lands – there has been an evident attempt on the part of some of them to drive the natives off and it requires my very utmost energies to keep the Europeans in check and the natives from adopting violent measures in self defence.⁸³

81. Document P1, pp 43–44

82. Shortland to Stanley, 17 April 1843, BPP, vol 2, apps, pp 53–54

83. Clarke junior to Clarke senior, 15 March 1843, qms/CLA/1822-71, vol 7, ATL (doc CI(g), p 43)

In these circumstances, it is not surprising that the assembled chiefs addressed by Acting Governor Shortland should have welcomed his assurances that their interests would be protected by the Government. It is obvious that they needed protection from the hostile activities of the settlers and would have regarded Shortland's undertaking as reassuring. We accept Mr Green's submissions that 'Maori saw before them a highly uncertain situation which promised only to become more uncertain and less secure as the settlement increased. They were in no position to reject the overtures of the Crown.'⁸⁴

7.7.2 Pressure from Spain

We note that Shortland, in the passage from his letter to Lord Stanley quoted in the previous section, referred to Spain having concluded the sitting of his court at Wellington with the evidence of Richard Barrett. We have earlier noted that, given the nature of Barrett's evidence, Spain had on 14 February 1843 considered it would be to Wakefield's advantage to act on Shortland's proposals for making further payments to Maori (see s7.3.1). In fact, Spain gave Wakefield the option of adopting this procedure or proceeding with his case. The latter option would also have involved allowing protector Clarke to go into the case on behalf of Maori. While Wakefield would have been well aware of the devastating effect of Barrett's evidence on his attempt to establish a valid purchase in 1839, it by no means follows that Maori would have had the same appreciation, for they had at best a very imperfect notion of what constituted a sale, a concept which was foreign to them. Thus, while most Port Nicholson Maori denied the company's claims that they had parted with their land, they were probably unaware of the weakness of the company's case before the land claims commissioner.

In his letter of 15 February 1843 to Clarke, Spain requested that he enter into 'active co-operation with Colonel Wakefield'. It is apparent that Spain put pressure on Clarke to reach a speedy settlement with Wakefield.⁸⁵ Clarke complained at some length to his father of Spain's overbearing attitude towards him: 'if I differ with him in opinion he up[b]raids me with my youth, my pertinacious obstinacy or my want of deference . . . I cannot do a single thing with the natives about their land but the Commissioner must interfere'.⁸⁶

A further example of such interference by Spain, and also of his overbearing and dictatorial attitude to Clarke and to Maori, is to be found in a passage in a private and confidential letter from Spain to Shortland in May 1843:

The natives who have been, through their Protector, parties to the negotiation, are naturally most indignant at Colonel Wakefield's refusal to pay them the compensation to which I may decide they are entitled, but I have assured them that the Government will insist

84. Document Q11, p 13

85. See, for example, Spain to Clarke, 23 February 1843, BPP, vol 2, apps, p 312

86. Clarke junior to Clarke senior, 15 March 1843, qms/CLA/1822-71, vol 7, ATL (doc C1(g), pp 44-45)

upon their being satisfied; and I am happy to say that I have been fortunate enough to pacify them for the present. In first entering upon the affairs at this place, I had the greatest difficulties to contend against, in the exorbitant demands of the natives, but I met them with firmness, and ultimately succeeded in reducing them to reason; even when I found Mr Clarke disposed to advise them to ask extravagant prices, I immediately interfered, and in the exercise of the discretion with which you were pleased to trust me, told them, through my interpreter, that I would not listen to them. The most annoying part of the business is, that after encountering all sorts of opposition and difficulties, and just as I had got all the natives to listen to reason, and ready to settle the question, Colonel Wakefield should draw back and refuse to fulfil his engagement . . . I can with ease settle the Port Nicholson district for a sum of 1,500*l*, reserving, of course, the paha and cultivations, which, in my opinion, the natives have never alienated.⁸⁷

We note that £1500 is the same sum proposed by Clarke in May 1843 (see s7.3.1). It was also the sum Clarke proposed, following his discussions with Wakefield in February 1844, for the land in the schedule attached to the various deeds of release (see ss7.5.2–7.5.3).

7.7.3 Did Maori freely consent to arbitration?

Crown counsel submitted that it is apparent from comments made by Clarke in 1844 that he subsequently obtained authority from Maori to represent the various pa affected by the New Zealand Company's claim.⁸⁸ Crown counsel cited a remark made in passing by Clarke in a letter to his father reporting on the resumption of negotiations with Wakefield following the arrival of Governor FitzRoy in Wellington in January 1844. In this letter, Clarke junior remarked that, having 'previously obtained the general consent of the natives to accept of a fair award', he had based his estimate of the compensation on the marketable value of the land at the time Wakefield 'commenced to treat about the sale of it' (presumably in 1839).⁸⁹ That the Port Nicholson Maori entered into these discussions with Clarke may well have been the result of the unenviable situation they were in following the unauthorised occupation of their lands by the settlers. We believe that their situation was such that they lacked any real alternative to becoming involved in the discussions which Spain had directed Clarke to prosecute without delay.⁹⁰ Neither did they know what sum Clarke would decide on as a 'fair award' for them. The Tribunal finds that neither Maori nor Clarke, acting as the Crown-appointed protector of aborigines, took part in the decision to switch to arbitration. Nor

87. Spain to Shortland, 31 May 1843, BPP, vol 2, apps, pp 87–88

88. Document P1, p 47

89. Clarke junior to Clarke senior, 29 June 1844, BPP, vol 4, p 465

90. See, for example, Spain's letters to Clarke of 15 and 20 February 1843, BPP, vol 2, apps, pp 309–311

were Port Nicholson Maori consulted as to who should be appointed as arbitrator or arbitrators. They were simply told.

7.7.4 Tribunal finding of Treaty breach

The Tribunal finds that the Crown acted in breach of Treaty principles in that:

- ▶ it failed adequately to consult with Maori having customary interests in the Port Nicholson block before deciding to switch from proceeding with the Spain inquiry to a form of arbitration;
- ▶ it proceeded to implement the arbitration process without the informed consent of such Maori; and
- ▶ it failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that he reserved the right to impose conditions and settle compensation without the willing consent of Maori, which was required by article 2 of the Treaty,

and that as a consequence such Maori were prejudicially affected by the arbitration proceedings.

7.8 DID THE CROWN FAVOUR SETTLERS OVER MAORI?

7.8.1 Claimant and Crown submissions

The Wellington Tenth Trust claimants contend that the Crown favoured settlers over Maori when attempting to resolve the dispute over land at Port Nicholson.⁹¹ In support of this claim, the Tribunal was referred to a statement by the chief protector, George Clarke senior, in a letter to Acting Governor Shortland expressing his opinion on certain statements made by Wakefield to his company directors.⁹² Clarke senior advised Shortland that:

The natives have been frequently assured that Her Majesty's Government would administer justice impartially both to natives and Europeans, and this assurance alone, with their confident reliance upon it, has kept them from driving the Company's settlers from lands which have been [allocated], but which the natives constantly affirm were never sold. To relieve the Company in some measure from their embarrassments, the natives have been informed that they cannot now resume the lands which have been built upon by the settlers, even though they were not purchased, but that in the event of such fact being established in the Commissioners' Court, they would be awarded compensation.

91. Claim 1.2(d), para 11.5

92. Document 02, pp 153–154

Responding to a request from the company that Maori be prevented from taking the law into their own hands, Clarke observed that ‘the way in which the natives have been annoyed by being dispossessed of their cultivations is beyond endurance’.⁹³ Spain likewise thought that, if a prohibition against aggression were enforced against both Maori and Pakeha:

our courts of law would be pretty fully occupied in hearing cases where the natives would be complainants against Europeans for having taken possession of their land, which they had never either agreed to sell or received payment for.⁹⁴

Crown counsel responded to the claim that the Crown favoured settlers over Maori when attempting to resolve the dispute over land at Port Nicholson by suggesting that Spain endeavoured to follow a ‘middling course’, which he believed would be in the best interests of both Maori and settlers.⁹⁵ Counsel noted that Spain explained to Shortland on 16 September 1842 that compensation would represent ‘a middling course, calculated . . . to be beneficial alike to the Europeans and aborigines, and to prove conducive to the prosperity of the Company’s settlements’.⁹⁶

7.8.2 Spain’s interim report

Crown counsel also quoted extensively from Spain’s 1843 report.⁹⁷ We now consider the main matters which fall for consideration from Spain’s review of the situation at Port Nicholson in 1843:

- ▶ Spain concluded that, if he had proceeded to make his final report after the conclusion of his hearing of the evidence, ‘it must have been most unfavourable generally to the Company’s title, and left it, or rather its purchasers, in possession of a very inconsiderable portion of the district’.⁹⁸
- ▶ Only Te Puni and his people at Petone said they adhered to the sale. We note, however, that it is by no means clear that Te Puni and his people understood that this would oblige them to give up possession of their pa, cultivations, and burial grounds and other use rights, or that they had any real comprehension of the tenths scheme or indeed of the wider implications of a ‘sale’ of land. In short, they had no informed comprehension that the Port Nicholson deed was intended by the company to constitute a sale of their land under English law.
- ▶ Spain saw advantage in acceding to Wakefield’s proposition to compensate Maori in cases of disputed possession or title to land because this would enable an equitable

93. Clarke senior to Shortland, 26 October 1843, BPP, vol 2, apps, pp 283–284

94. Spain to Shortland, 19 November 1843, BPP, vol 2, apps, p 283

95. Document P1, pp 36–42

96. Spain to Colonial Secretary, 16 September 1842, BPP, vol 2, apps, p 59

97. Document P1, pp 37–40

98. Spain’s report, 12 September 1843, BPP, vol 2, apps, p 295

settlement of the disputes, having regard to the need to carry out the November 1840 Russell agreement between the Crown and the company while also complying with the Treaty of Waitangi.⁹⁹ We are unable to agree that requiring Maori, without their willing and informed consent, to accept compensation for land which they had not sold was either equitable or in any way in compliance with article 2 of the Treaty of Waitangi.

As we have seen, notwithstanding the company's view to the contrary, the November 1840 agreement was based on the assumption that the company had acquired a valid title to the land. By this time, Spain was well aware that this assumption was without foundation, save perhaps (in his opinion) for Te Puni's interest in some unspecified land in the vicinity of Petone. We believe that Spain was mistaken in assuming even this, given Barrett's failure to inform Te Puni and other signatories to the 1839 deed of purchase of its meaning and significance.

- ▶ Spain was of the opinion that those Maori who denied the sale (ie, almost all of them) 'seemed to be more anxious to obtain payment for their land than to dispossess the settlers then in the occupation of it, and that they pressed for a final settlement of the question'.¹⁰⁰ But Spain was only too well aware, as was Clarke, that the company's settlers were steadily dispossessing Maori of their lands, which they had not sold, and that Maori had even been prevented from occupying their lands which had been built on by settlers. They had been told they would not receive such lands back but would be awarded compensation. In the circumstances, many Maori would have concluded that there was no prospect of the trespassing settlers being removed from their land, and they were left with no alternative but to accept this 'compensation'. But they had no effective voice in determining the level of compensation to be offered to them or in setting the terms of the arbitration proceedings.

We believe that, given the choice, Port Nicholson Maori would have opted for the return of their unsold land while still agreeing to make some land available for settlers. But Spain's 'solution' did not allow for this. Port Nicholson Maori were faced with a fait accompli. The only exception was to be in respect of their 'pahs, cultivations and burying-grounds', which Spain found they 'did not consent to alienate'.¹⁰¹ Their other rights to use resources (see s 2.2) were given no consideration.

- ▶ Spain considered that the plan of compensating Maori who had not received payment in 1839 for their lands (ie, who had not sold their lands) was 'the only method likely to effect an amicable and speedy settlement of the question with advantage and justice to both races, and to enable the Government and the company to carry into effect the agreement of November 1840'.¹⁰² The 'advantage and justice' to Maori are not readily

99. Ibid

100. Ibid, pp 295–296

101. Ibid, p 305

102. Ibid, p 306

apparent. Because of the settlers' widespread unlawful occupation of land belonging to Port Nicholson Maori, which occupation included the erection of buildings, Maori were seriously prejudiced in the free and untrammelled exercise of their undoubted right to occupy their lands. There is no evidence that the Crown took any effective steps to remove trespassing settlers from Maori land.

- ▶ We believe that the passages which follow the reference near the end of Spain's 1843 report to compensation effecting 'an amicable and speedy settlement' reveal the fundamental reasons for Spain's recommendation that 'the local Government should carry into effect the arbitration commenced by the company's agent, and pay the natives the amount of compensation that I may declare them entitled to receive'.¹⁰³

Spain considered the implications of his being required to complete his inquiry under the Land Claims Ordinance 1841 in a passage which we have earlier quoted at section 7.3.4. It is apparent from the passage referred to that Spain was very anxious to avoid being required to carry on with his incomplete inquiry into the validity of the 1839 Port Nicholson deed of purchase because of the 'innumerable difficulties' he foresaw in doing so. He raised the spectre of Maori refusing to sell their lands at a fair and reasonable price. Spain was well aware of the provisions of article 2 of the Treaty; he cited it earlier in his report.¹⁰⁴ It was the right of Maori to retain the full, exclusive, and undisturbed possession of their lands, forests, and other possessions for as long as they wished to do so. Spain was essentially speculating that, if Maori were made a fair and reasonable offer for their land, they would not agree to a sale. Moreover, the proposal to 'compensate' Maori through the arbitration procedure would be in conformity with article 2 of the Treaty only if Maori gave their free and willing agreement to any such proposal and to the price offered by the company. Yet, Spain recommended, in the passage already cited, that Maori would simply be paid 'the amount of compensation that I [Spain] may declare them entitled to receive'.¹⁰⁵

It is difficult to escape the conclusion that Spain saw the arbitration as a convenient means of avoiding the 'innumerable difficulties' he foresaw should his formal inquiry proceed. Moreover, should Maori seek 'compensation' (a euphemism for the 'purchase price') which Spain considered excessive, he as arbitrator would make a binding decision as to the amount of 'compensation' which they were to receive, whether they agreed to it or not. Spain made no attempt to reconcile such an outcome with article 2 of the Treaty. Nor, in our view, could he possibly have done so.

We also consider that Spain's prediction that the settlement at Wellington faced 'total ruin' if arbitration proceedings were not implemented was highly speculative. Settlement may have been impeded for a time (as it already had been, owing to Wakefield's

103. Spain's report, 12 September 1843, BPP, vol 2, apps, p 306

104. Ibid, p 292

105. Ibid, p 306

procrastination), or it may have proceeded on a reduced scale. But, sooner rather than later, given the obvious great advantages of the Port Nicholson site (not least its splendid harbour), a flourishing settlement would have been established.

► Spain followed the passage under discussion by observing that:

the entering into new contracts with the natives for the purchase of those lands would, for the reasons I have before stated, be attended with great difficulty; but the equitable completion of the old contracts would be more easily effected.¹⁰⁶

We consider that Spain was being disingenuous in proposing ‘the equitable completion of the old contracts’, which assumes that there existed valid old contracts which were capable of being completed. No such contracts existed, and Spain himself was only too conscious of the grave difficulty he would have experienced if he had been required to decide whether the 1839 deed constituted a valid purchase of the Port Nicholson land. We have found that no such valid contract existed.

The Tribunal is not convinced that the ‘middling course’ – that is, the abandonment of Spain’s formal inquiry and the substitution of arbitration – was fair to Maori. Nor are we satisfied that Maori freely and willingly agreed to the arbitration process. The circumstances were such that they were left with no alternative. The arbitration clearly favoured the settlers over Maori, who, as a result of the settlers’ wrongful occupation of their land, were now placed in the invidious position of being obliged to establish their right to compensation. In short, the onus was now placed on Maori to establish that they had not sold their land, whereas the onus properly lay with the New Zealand Company to prove that it had validly purchased the land from Maori. This, the company was in no position to prove. Moreover, Maori who had not sold their land were not to be given the option of retaining that land but were to be required to accept compensation.

7.8.3 Tribunal finding of Treaty breaches

The Tribunal finds that the Crown imposed on Maori having customary interests in the Port Nicholson block an arbitration regime which was intended to complete the extinguishment of any claims to title by Maori without a determinative inquiry into, and finding on, whether or not a valid sale had occurred and which lands, if any, Maori had knowingly and willingly wished to alienate; and, further, that the Crown imposed on Maori the burden of establishing a valid claim to their lands and thereby shifted the burden of proof to Maori. In so doing, the Crown acted in breach of article 2 of the Treaty by failing to protect the rangatiratanga of Maori in and over their lands and by failing to ensure that Maori freely agreed to such a regime. As a consequence, Maori were prejudicially affected thereby.

106. Ibid

7.8.3

The Tribunal further finds that the Crown favoured the interests of the settlers over those of Maori by requiring Maori not to resume any of their lands built upon by settlers and by failing to prevent settlers from pulling down fences erected by Maori and from driving their cattle on Maori cultivations. In so failing to protect Maori rangatiratanga in and over their lands, the Crown acted in breach of article 2 of the Treaty, and those Maori having customary interests in the Port Nicholson block (other than Ngati Toa) were prejudicially affected thereby.¹⁰⁷

107. Ngati Toa did not reside or have cultivations within the Port Nicholson block.