IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20180006860

UNDER	Sections 30I & 30(1)(b), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Ngāti Pāoa – an application for review of a determination made pursuant to s 30(1)(b), Te Ture Whenua Māori Act 1993 at 141 Waikato MB 271-291 dated 26 November 2009
BETWEEN	NGĀTI PĀOA IWI TRUST Applicant
AND	NGĀTI PĀOA TRUST BOARD Respondent

Hearing: 6 December 2018
(Heard at Auckland)

Coram: Deputy Chief Judge C L Fox
Dr Valmaine Toki
Mr Shane Gibbons

Appearances: M Mahuika and T Hauraki for the Applicant
J Gardner-Hopkins for the Respondent

Judgment: 12 December 2018

RESERVED JUDGMENT OF THE COURT

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Introduction

[1] On 12 September 2018, an application was filed in the Waikato-Maniapoto District Māori Land Court by Kahui Legal on behalf of the Ngāti Pāoa Iwi Trust (the Iwi Trust). This application sought a review pursuant to s 30I(1)(b) of Te Ture Whenua Māori Act 1993 (the Act) of a 2009 s 30 order made at 141 Waikato MB 271 (the 2009 order) declaring the Ngāti Pāoa Trust Board (the Trust Board) the representative body for Ngāti Pāoa in relation to the Resource Management Act 1991 (RMA) and Local Government Act 2002 (LGA). The applicant seeks to have the 2009 order amended by substituting the Iwi Trust for the Trust Board.

[2] In the alternative, the applicant seeks to have the 2009 order set aside and a fresh order made under s 30(1)(b) naming the Iwi Trust as the representative body.

[3] The Iwi Trust claims that it has been established as the mandated and representative body for Ngāti Pāoa, as approved by the iwi. As such, the circumstances of representation have changed since the current s 30 order was made in 2009 and any orders of this Court should be updated to reflect this change.

[4] The application and all the orders sought are opposed by the Trust Board. It claims, *inter alia*, that the Iwi Trust only has a mandate to act as a post-settlement governance entity (PSGE) and that it will not attain its full powers until a number of outstanding Ngāti Pāoa settlements are ratified. The Iwi Trust is not compelled to account to Ngāti Pāoa and its powers should be constrained to those consented to by the people of Ngāti Pāoa. The Trust Board does not consider there has been a sufficient change of circumstances for an amendment to the 2009 order nor does it believe the Iwi Trust's actions should be sanctioned by an amendment to the order.

Background

[5] In 1995, the court had issued an order pursuant to s 30(1)(b) in 1995, naming the Ngāti Pāoa Whānau Trust as the appropriate representative for liaising on matters of resource

management with local and district councils.[1] This order contained a clause limiting its effect for the term to 31 March 1998 and it expired on that date.

[6] In 2008, certain members of Ngāti Pāoa filed details with the Māori Land Court regarding the establishment of the Trust Board. They sought a fresh s 30 order recognising the Trust Board as the representative for Ngāti Pāoa for certain purposes. Having found it appropriate to appoint new representatives for Ngāti Pāoa on RMA and LGA matters, the Court made the following order:[2]

> [40] Thus we make a determination and order pursuant to section 30(1)(b) of Te Ture Whenua Māori Act 1993 that the Ngāti Pāoa Trust Board is the appropriate representative of Ngāti Pāoa in relation to:
>
> a) The Resource Management Act 1991; and
>
> b) The Local Government Act 2002.

[7] In 2011, the Trust Board was mandated to negotiate the Ngāti Pāoa treaty settlement with the Crown, and to appoint negotiators. In 2012, the Ngāti Pāoa Trust Board and other Tāmaki iwi signed the Tāmaki Collective Deed of Settlement which was enacted by Parliament as Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Tāmaki Settlement).

[8] The Iwi Trust was established as the PSGE in 2013 in order to receive and administer assets associated with that settlement and future settlements. Ngāti Pāoa is also a party to the Pare Hauraki Collective Deed of Settlement, the Marutūāhu Collective Deed of Settlement and the Ngāti Pāoa Deed of Settlement the last two settlements have yet to be signed by Ngāti Pāoa. Thus, Ngāti Pāoa's settlement process explains the simultaneous existence of a body mandated to negotiate settlement and another body as a PSGE. It is party to four separate deeds of settlement and it holds both pre- and post-settlement status.

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[1] *Ngāti Paoa Whānau Trust v Hauraki Māori Trust Board* (1995) 96A Hauraki MB 155 (96A H 155).
[2] *Ngāti Pāoa* (2009) 141 Waikato MB 271 (141 W 271) at [40].

Procedural history

[9] The application for review was filed by the Iwi Trust on 12 September 2018. On 10 October 2018, Chief Judge Isaac issued a minute noting that the case was being assessed and a Judge would shortly be assigned.[3]

[10] On 16 October 2018, Chief Judge Isaac determined the review was necessary and appointed Deputy Chief Judge Fox to complete it.[4] He also directed the respondent to file a response by 19 October 2018, and this was duly provided by Memorandum of Counsel dated 17 October 2018.

[11] On 18 October 2018, Chief Judge Isaac issued a further minute directing that two additional members be appointed to sit alongside Deputy Chief Judge Fox on the review and requesting submissions on the appointment of Dr Valmaine Toki and Mr Shane Gibbons.[5] No objection was received and they were appointed pursuant to s 33 in a further minute dated 30 October 2018.[6]

[12] Also on 30 October, Deputy Chief Judge Fox issued a Direction of the Court on the hearing date and venue, timetabling and submissions from parties.[7]

[13] On 5 November 2018, a Notice of Appointment of Counsel on the Record was received from Mr Gardner-Hopkins for the Trust Board. Previous counsel were not able to continue to represent the Trust Board. Accompanying this notice was a Memorandum of Counsel seeking an urgent telephone conference on timetabling to be convened.

[14] That telephone conference was held at 9am on 6 November 2018 with counsel for the Iwi Trust, the Trust Board and the Crown present. Deputy Chief Judge Fox convened the conference with the assistance of court staff.

[15] Counsel for the Trust Board made an application for an amended timetable and an adjournment of the hearing to a later date. Counsel noted that there had been insufficient time

[3] 2018 Chief Judge MB 586 (2018 CJ 586).
[4] 2018 Chief Judge MB 706 (2018 CJ 706).
[5] 2018 Chief Judge MB 721 (2018 CJ 721).
[6] 2018 Chief Judge MB 736 (2018 CJ 736).
[7] 171 Waikato Maniapoto MB 74 (171 WMN 74).

for the Trust Board to prepare their case in response to the application. He also contended that the kaupapa of ss 30 to 30F envisaged matters being resolved by way of mediation.

[16] Counsel for the Iwi Trust noted that the delay in preparing a response was of the Trust Board's own making as it received notice of the application on the day it was filed. Counsel also drew attention to the statutory time limit contained in s 30I(5) which requires such an application to be completed within three months of filing. The Iwi Trust expressed no interest in mediation. On 9 November 2018, Deputy Chief Judge Fox issued a direction recognising the statutory time limit, and determining that the timetable for filing would essentially remain the same, with only minor variation.[8]

[17] On 15 November 2018, the Trust Board applied for a rehearing of the decision of Chief Judge Isaac to grant the review. The Iwi Trust filed its opposition to the application for rehearing on 23 November 2018. By direction on 16 November 2018, the Court confirmed that the application for rehearing would be dealt with alongside the substantive issue at the hearing.[9]

[18] Evidence was subsequently filed for the applicant and the respondent in line with the timetable for filing. On 21 November 2018, Deputy Chief Judge Fox issued a direction to the Crown asking whether it wished to file evidence and submissions relating to the Ngāti Pāoa treaty negotiations.[10] On 23 November 2018, counsel for the Crown advised that it would be filing evidence and submissions to assist the Court. That material was filed on 30 November 2018.

[19] On 25 November 2018, legal submissions were filed for the Iwi Trust on the substantive application and on 4 December 2018 response submissions for the Trust Board were filed. Mr Mahuika presented oral submissions in reply at the close of the hearing.

[20] On 6 December 2018, the hearing was held at the Environment Court in Auckland. Deputy Chief Judge Fox noted that the panel members, Shane Gibbons and Dr Valmaine Toki, had been sworn in as required by s 34. During the hearing, the application for rehearing was

[8] 171 Waikato Maniapoto MB 243-246 (171 WMN 243-246).
[9] 171 Waikato Maniapoto MB 264-267 (171 WMN 264-267).
[10] 172 Waikato Maniapoto MB 15-16 (171 WMN 15-16).

withdrawn and dismissed by consent. Following the hearing of evidence and submissions, the Court reserved its decision on the substantive application.

Summary of Case for the applicant

[21] The Iwi Trust submits that there has been a fundamental change in circumstances for the iwi of Ngāti Pāoa warranting the review and amendment to the current 2009 s 30 order. Furthermore, the Iwi Trust has been established rendering the 2009 order of the Māori Land Court recognising the Trust Board as the representative for the iwi on RMA and LGM matters nugatory or ineffective.

[22] It notes that 96.1% of voting adult members of Ngāti Pāoa were in favour of its ratification as the PSGE for Ngāti Pāoa following the Tāmaki Settlement. It was also established to receive the redress expected from that settlement along with the redress expected from the three remaining settlement deeds that Ngāti Pāoa will benefit from.

[23] Since its inception in 2013, the Iwi Trust has acted in a representative capacity for Ngāti Pāoa, including liaising on RMA and LGA matters with Auckland Council. This, it is claimed, coincided with a lull in Trust Board action, where the Trust Board was operating ineffectively or not at all.

[24] The Iwi Trust also relies upon an AGM held on 7 September 2013, where the people of Ngāti Pāoa present moved a unanimous resolution to transfer all the day to day operations and assets of the Trust Board to the Iwi Trust. It was acknowledged that the published agenda for the AGM did not include a copy of this resolution and that it was moved from the floor after lunch following the AGM. Not long after, Gary Thompson who had been a trustee of the Trust Board became chairman of the Iwi Trust. The Iwi Trust acknowledges that the Trust Board retained its role as the mandated body for settlement negotiations.

[25] The Iwi Trust contends it is accountable and transparent in its operations. For example, despite there being no immediate requirement under the trust deed, it has undertaken regular reporting back to the people of Ngāti Pāoa, providing audited financial updates for the years ending 30 June 2016 and 30 June 2017. It has held Hui-ā-Tau (AGMs), Hui-ā-Iwi, meetings regarding treaty settlements and general consultation meetings. In consultation with

the Office of Treaty Settlements, it has also updated its trust deed to allow the election of further trustees prior to any further settlements occurring.

[26] Because of the transfer of assets and operations to the Iwi Trust, it became necessary for the Iwi Trust to resource the negotiations for treaty settlement. The Iwi Trust has also provided financial support alongside administrative and technical support to the mandated negotiators.

[27] It relies further upon the Hui-ā-Iwi held on 25 October 2018, where a motion of no confidence was unanimously passed against the Trust Board being the representative body for Ngāti Pāoa. Although the hui concerned treaty settlements, the Iwi Trust contends this was indicative of the lack of trust the people of Ngāti Pāoa have in the Trust Board. It was noted that confusion preceded this hui, as the Trust Board attempted to prevent it occurring by publishing notices of its cancellation.

Summary of Case for the respondent

[28] The Trust Board was appointed under the 2009 s 30(1)(b) order as the most appropriate body to represent Ngāti Pāoa for the RMA and LGA. It claims that it continues to be the most appropriate representative because it is the only entity that is fully accountable to the iwi and it maintains a transparent election process.

[29] The Trust Board accepts that it was arguable that it was legally in abeyance for the period of time 2014 to 2017. Among other reasons, it considers that this lull was because its former Chairman, Gary Thompson, resigned and was appointed as Chairman of the Iwi Trust. Other trustees of the Trust Board also resigned and shifted alliances. The tenure of the trustees also expired in 2015. However, the Trust Board continued to operate informally with the remaining trustees co-opting members to assist them to reactivate the organisation. The Trust Board obtained a High Court order in 2016 approving its process (the Validation Committee) for updating its Ngāti Pāoa register to enable trustee elections.[11] These were eventually held in 2017 and the Trust Board has reactivated and continues to function.

[11] *Roebeck v The Ngāti Pāoa Trust Board* [2016] NZHC 2458.

[30] According to the Trust Board, these circumstances do not constitute the fundamental change in circumstances that would trigger a variation of the 2009 s 30(1)(b) order. Rather, the Trust Board is the representative body of the iwi and the Iwi Trust is acting outside its remit. There has been no formal resolution to disestablish the Trust Board, nor have any of the trustees passed away. In fact, the Trust Board has been functioning as normal since the election of new trustees in 2017.

[31] The Trust Board is still participating in settlement negotiations and it has notified the Auckland Council that it holds representative capacity pursuant to s 30 for RMA and LGA purposes. The Crown has acknowledged its status but the Auckland Council has refused to deal with anybody except the Iwi Trust on RMA and LGA matters.

[32] The Trust Board alleges that the Iwi Trust has been acting outside of its principal purpose since its establishment. It was never intended that it would be the representative entity for RMA and LGA purposes while treaty negotiations were extant. The Trust Board accepts that this means that when the principal settlement for Ngāti Pāoa has been enacted in legislation it will no longer have a mandate to act. At that point the Iwi Trust will take over as the representative entity for the iwi but this cannot happen before such a date.

[33] In response to the evidence of the resolution passed on 7 September 2013 at the Hui-ā-Iwi, the Trust Board argues it was passed improperly in that it occurred after lunch and at a time when all the participants understood that the hui had been adjourned. The former administrator for the Trust Board, Ngarui Tamamui Pasene was the minute taker at this AGM. Ms Pasene confirms that the AGM was adjourned until such time as the accounts could be audited. Because of this adjournment, the majority of attendees left the AGM before the resolution was passed. At that time, there was only one trustee recorded as present. It was noted that in practical terms nothing was done to implement the resolution, as no formal winding up of the Trust Board occurred and no assets were transferred.

[34] In terms of the Hui-a-Iwi held on 25 October 2018, this hui was not called by the Trust Board and yet it is the only mandated body holding the power to select negotiators. Again the procedure was irregular and thus tainted.

[35] Therefore, the Trust Board considers that these proceedings filed pursuant to ss 30I and 30(1)(b) are a power-grab by the Iwi Trust and are inextricably linked with the question of who has the mandate to conduct and supervise the vote on the ratification of the Treaty Settlement. The proceedings are also about the commercial opportunities that may exist in the RMA space, contrary to the intent and purpose of key sections of the RMA recognising the relationship of Māori with their ancestral lands and waters, their kaitiakitanga and Treaty principles.

[36] There is a related concern that because the Trust Board believes the Iwi Trust's register of beneficiaries is inaccurate and contains individuals who do not whakapapa to Ngāti Pāoa, this also indicates that they cannot truly represent the interests of Ngāti Pāoa. This impacts on voting matters and provides an inaccurate view of the opinion of Ngāti Pāoa iwi. After witnesses for both parties were questioned at length about the process for ascertaining who should be registered as Ngāti Pāoa, counsel for the Trust Board conceded that both the Iwi Trust and the Trust Board use the same definition of who is Ngāti Pāoa. They also use a similar process (Validation Committees) for ascertaining members, with one variation being that the Iwi Trust also uses a Kaumātua Council to vet members. Both organisations undertake research using late 19th century and early 20th century census data, Māori Land Court records and oral whakapapa sources. However, the Trust Board contended that it's process was more authoritative as it was approved by the High Court. Counsel later conceded that the process approved by the High Court was limited to the purpose of electing trustees to the Trust Board in 2017 after which time the powers and duties of the validation committee ceased.

[37] The Trust Board also contended that the financial information received from the Iwi Trust is not transparent demonstrating that it is not accountable to iwi members. What was demanded was that the Iwi Trust should present detailed finances to an iwi forum where questions could be answered and the spending probed. The Trust Board has particular concerns about payments made for consulting, directors' fees and legal expenses, a bank loan of more than $10 million, and the sale of certain properties. It is alleged that some payments may have been made in breach of the trust deed (which contains clauses on how fees should be determined) and that the accounts may not be a true reflection of actual spending and income. Counsel for the Trust Board acknowledged that these allegations were more appropriately the subject of trust review proceedings in the High Court but noted the evidence

was relevant in determining whether the Iwi Trust was the appropriate body to be recognised as the appropriate representative of the iwi.

Position of the Crown

[38] The Crown understands that this application does not relate particularly to matters of its concern, however, it has taken the opportunity to respond to evidence concerning Treaty settlement matters.

[39] The affidavit of Leigh McNicoll, acting director of the Office of Treaty Settlements (OTS) describes the current position of Ngāti Pāoa settlements and the mandate held. The Crown has accepted that the Trust Broad was effectively in abeyance for a period of time, this was due to the term of appointment of eight of the ten trustees coming to an end on 8 July 2015 and the remaining two on 20 December 2015. New trustees were not elected until March 2017 following the High Court orders of 2016.[12]

[40] Following the resignation of Hauāuru Rawiri as negotiator earlier this year, the Trust Board appointed its chairperson, Harry Williams as an interim replacement negotiator. It was proposed that a SGM would be held to confirm this appointment but that did not occur. Morehu Wilson, the remaining original negotiator called a Hui-ā-Iwi which was held on 25 October 2018. The register of attendance was lost but the Crown was advised that between 90 and 150 people attended the hui. According to Mr Wilson, a vote of no confidence in the Trust Board as the mandated entity was passed, Mr Wilson was reaffirmed as a negotiator; and no seconder could be found for the appointment of Mr Williams. Despite this report, the Crown continues to recognise the mandate held by the Trust Board as the vote held was not compliant with the accepted process for removing mandates obtained for Treaty settlements.

[41] The Crown states that the negotiation for the settlement of the historic Treaty claims of Ngāti Pāoa is essentially complete. There remain only some small matters to finalise. As such, ratification of the Ngāti Pāoa Deed of Settlement could commence shortly and the Crown has suggested that both the Iwi Trust's and the Trust Board's registers of iwi members could be used. The role of the trust board and the negotiators has, therefore, almost concluded.

[12] Above n 11.

[42] The Crown notes that the PSGE, the Iwi Trust, was ratified by a vote in which some 22.3% of eligible members voted, with 96% of that number in favour. The two initial trustees (Bryce Herron and Gary Thompson) were joined by a further five trustees, appointed in April 2017, and a full board met for the first time on 10 November 2018. Approval for the appointment of further trustees and for financial reporting was given because it was believed that settlement was imminent. The Minister for Treaty Negotiations requested the Iwi Trust's deeds be revised to meet the requirements on trustees and reporting on 18 September 2018.

[43] It is not unusual for both a PSGE and a mandated iwi authority to co-exist for some time after settlement, however, when this occurs pre-settlement, the Crown will continue to negotiate with the mandated body. Although the Iwi Trust supported the negotiators for a period, the mandate did not change and the appointment of new trustees to the Trust Board allowed the Crown to resume engagement with them.

[44] The Crown, in response to the evidence of the parties, submits the following:

(a) The Ngāti Pāoa deed of mandate allowed the Trust Board to appoint negotiators; the Trust Board chose to hold elections to determine those negotiators.

(b) The deed of mandate does not explicitly state that the Trust Board was not expected to continue following settlement.

(c) The responsibility for appointing negotiators is explicitly given to the Trust Board in the deed of mandate but the Trust Board allowed the people of Ngāti Pāoa to appoint the original negotiators. The deed of mandate does not contain any clause requiring the same process for further appointments.

(d) The Crown does not agree that there is any need to separate the roles of the two entities with regard to use of the two tribal registers. Both registers contain details of members and use of both will ensure as many people as possible are informed of and able to vote on the proposed deed of settlement.

Law

[45] Although previous applications have been filed under s 30I, only one has resulted in judgment, namely *Edwards – Whakatōhea*.[13] In that decision, the Court set out the legislative history of s 30I, including the Parliamentary debates as recorded in *Hansard*. We do not intend to repeat that analysis here. The Court concluded:

(a) The legislation implies that any changes of circumstance or fact must be of enough gravity to warrant amendment to any s 30 order;[14]

(b) Amending an order under s 30I will cause it to be a fresh order regardless that the original issued before the 2002 amendments were made.[15]

[46] The Court only briefly considered whether the order was still in force. It found that unless the order contains an end-date or there has been subsequent litigation overturning the order, it is still in effect. The Court then had regard to the purpose of the s 30(1)(b) order at the time it was made by reference to:

(a) the application to the Court;

(b) the wording of the referral letter from the Chief Judge;

(c) the wording of the order itself;

(d) whether the purpose of the order had been addressed, namely whether the relevant treaty claim had been settled. The Court found that the order was intended for negotiations of one Treaty of Waitangi claim conducted in 1996 and that all parties believed the negotiations would end in settlement.[16]

[47] Having determined the purpose of the order, the Court then turned to whether the facts or circumstances had changed to such a degree to render the order ineffective. The Court

[13] *Edwards – Whakatōhea* (2018) 183 Waiariki MB 169 (183 WAR 169).
[14] At [41].
[15] At [44], note that this comment is obiter and is more directly related to the terms of s 30H and whether the order would be binding on the Crown.
[16] At [66].

noted the resignation of the representatives recognised by the order, the formal decision to disband the representative group, and the fact only a minority of the representatives originally appointed were still living. Furthermore, of those surviving representatives, the majority were not in favour of the order continuing. There had also been litigation; the filing of further Treaty of Waitangi claims; a process for, and the formation of, a mandated working party; and the appointment of new negotiators.

[48] The Court did not find a need to determine exactly when the order ceased to be effective, finding only that it was no longer effective. Although the Court found the order was no longer effective, it could not replace those deceased or retired representatives with new representatives as this was tantamount to creating a fresh order, which cannot be done under s 30I. However, the Court indicated in obiter that any party who puts themselves forward to be a replacement representative must show they have the appropriate support from those they seek to represent. Given the order was no longer effective, the Court found it appropriate to amend the order to include an expiration date. We turn now to the issues and case before us.

Issues

[49] The issues on review are as follows:

(a) Is the s 30 order still in force;

(b) What was the purpose of the s 30 order and is it still effective;

(c) Should the order be amended to appoint new representatives; and

(d) Should other amendments be made.

Is the s 30 order still in force?

[50] The Court, when granting the 2009 order, did not specify an expiry date. All parties agree that the 2009 order remains in force.

What was the purpose of the s 30 Order?

[51] In *Ngāti Pāoa*, the Court outlined the background to the making of the 2009 order.[17] It noted that during the period 2002-2004 various Ngāti Pāoa people set about the task of forming the entity which they wanted to be the single governing entity for Ngāti Pāoa.[18] The Court made a determination and order pursuant to s 30(1)(b) recognising the Trust Board as the appropriate representative of Ngāti Pāoa in relation to the RMA 1991 and the LGA 2002. No expiration date was given. The Court did not recognise the Trust Board as having representative capacity with respect to other statutes, namely the Historic Places Act 1993, the Hazardous Substances and New Organisms Act 1996 and the Public Works Act 1981. It did acknowledge that the application was widely framed but the issues were narrowed by agreement to the RMA and LGA representation. Thus, the purpose of the order was to recognise the Trust Board as the appropriate representative of Ngāti Pāoa only with respect to the RMA and LGA.

[52] Mr Gardiner-Hopkins submits for the Trust Board that the purpose of the 2009 order was to represent Ngāti Pāoa on RMA and LGA matters. He contends that the purpose of the order must be considered with reference to ss 6(e), 7(a) and 8 of the RMA and the Privy Council's observations on those sections in *Maguire v Hastings District Council*.[19] He notes that cultural values and issues have substantive weight in RMA matters, as do the Treaty principles; and this has been recognised, for example, in the Auckland Unitary Plan and other planning instruments. If mana whenua evidence is to carry such weight as to be determinative, then attributing that evidence to the appropriate body is crucial.

[53] Mr Gardiner-Hopkins submits that the 2009 order remains effective in terms of its purpose insofar as the Trust Board continues to enter into discussions on the RMA and LGA, however it has been frustrated by the stance taken by Auckland Council. The Council has been ignoring the Trust Board's authority to represent Ngāti Pāoa despite a current s 30(1)(b) order in its favour.

[54] In effect, the position of the Trust Board would require that this Court recognise that if it amends the 2009 s 30 order in favour of the Iwi Trust we would defeat the purpose of that

[17] Above n 2.
[18] At [9].
[19] *Maguire v Hastings District Council* [2000] UKPC 43, (2002) 2 NZLR 577.

order. This view is based upon a narrow interpretation of the purpose of the Iwi Trust as outlined in its deed of trust and upon allegations made in the evidence that the Iwi Trust is solely motivated by commercial concerns. Conversely, counsel for the Iwi Trust argues that its purpose goes beyond simply holding assets and commercial matters. It extends to the representation of Ngāti Pāoa and the promotion of its interests. The Iwi Trust points to clause 2.4 of it's Deed of Trust as indicative of the broad nature of its mandate. That clause provides that:

> *The purpose for which the Trust is established is to receive, manage, hold and administer the Trust's Assets on behalf of and for the benefit of the present and future Members of Ngāti Pāoa in accordance with this Deed of Trust.*
>
> *Without limiting in any way the generality of the foregoing, the trustees may:*
>
> *(a) Promote the educational, spiritual, economic, social and cultural advancement or wellbeing of Ngāti Pāoa and its Members;*
>
> *(b) Provide for the on-going maintenance and establishment of places of cultural or spiritual significance to Ngāti Pāoa and its Members;*
>
> *(c) Promote the health and well-being generally, including of the aged or those suffering from mental or physical sickness or disability of Ngāti Pāoa and its Members;*
>
> *(d) Undertake commercial activities to support the object and purpose of the Trust;*
>
> *(e) Any other purpose that is considered by the Trustees from time to time to be beneficial to the Trust and its Members.*

[55] While it is true that the purpose of the Iwi Trust is to "receive, manage, hold and administer the Trust's Assets on behalf of and for the benefit of the present and future Members of Ngāti Pāoa in accordance with this Deed of Trust", its potential to move beyond its commercial focus is also outlined in the same clause of the deed. It is not prevented by the deed from reflecting the concerns of tangata whenua under s 6(e) with respect to their

ancestral lands and waters, s 7(a) kaitiakitanga and s 8 treaty principles as it engages under the RMA and LGA. In practical terms that is exactly what the Iwi Trust did when the Trust Board went into legal abeyance for a period. Whether the Trust Board now disagrees with the outcome of the RMA arrangements and negotiations the Iwi Trust entered into with the Auckland Council or developers is not relevant to this review. In terms of the evidence of a commercial bias the only negotiated agreement received in evidence demonstrates a concern for matters beyond commercial interests. This concerns Stony Ridge Quarry, where the intention around that agreement was mitigation, the return of control over time, recognition of Ngāti Pāoa, restoration of the site, and restoration of the connection of the iwi with the site. The Iwi Trust negotiated for more than commercial matters.

[56] We consider that the purpose of the s 30(1)(b) order would not be defeated if we decide to amend the 2009 order as clearly both the Iwi Trust and the Trust Board are actively participating in RMA and LGA matters. That is unlikely to stop, regardless of what we decide in this case.

Is the 2009 s 30 order still effective?

[57] Mr Mahuika conceded that at the time of the 2009 order, the Trust Board was the only representative body for Ngāti Pāoa and therefore it rightly had charge of advancing issues on the iwi's behalf. However, the 2009 order was made before the creation of the Iwi Trust and is no longer reflective of the reality of representation of Ngāti Pāoa. The Iwi Trust now represents Ngāti Pāoa on all matters and its establishment is so fundamental a change of circumstances as to warrant amendment of the 2009 order. The Iwi Trust also relies upon:

(a) The lack of activity from the Trust Board between 2014 and 2017. The lack of activity is corroborated by comments made by the High Court in *Roebeck v The Ngāti Pāoa Trust Board*.[20] It is clear the Trust Board was legally inactive and therefore not representative between 2013 and 2017 as elections were required to fill the vacant trustee roles.

[20] Above n 11.

(b) The Trust Board did not, in that same period, undertake its mandated role in supporting treaty settlement negotiations, necessitating action from the Iwi Trust.

(c) The ratification of the Iwi Trust not only created it as a representative body, but it was also intended to overtake the functions of the Trust Board. This was the clear intention of Ngāti Pāoa as 96.1% of voters were in favour of the Iwi Trust as the PSGE and, as envisaged in the trust deed, it was to exercise broad representative powers.

(d) Ngāti Pāoa is at an advanced stage for all three remaining treaty settlements.

(e) There was a clear intention for the Iwi Trust to begin its representative role before final settlement as evidenced by the 2013 resolution to transfer the functions and assets of the Trust Board to the Iwi Trust. Although the Trust Board may allege that the vote on transfer was not passed according to due process, there remains the fact that the decision was made by Ngāti Pāoa and acted upon by the Iwi Trust.

(f) The motion of no confidence in the Trust Board passed unanimously from the Hui-ā-Iwi of 25 October 2018 is a further illustration of the will of the iwi, although it is also tainted by poor procedure.

[58] We note the Trust Board opposes all orders sought by the Iwi Trust and that it considers that the Iwi Trust has failed to make out its case on why the 2009 order should be amended.

[59] The Trust Board acknowledges that the establishment of the PSGE does represent a change of circumstance but submit that is not sufficient to render the 2009 s 30 ineffective. The Trust Board argues that there was never any intention for the Iwi Trust to do more than receive and hold settlement assets. This intention was evidenced by the limited number and means of appointment of trustees to the Iwi Trust. Until the April 2017 appointment of further trustees could be confirmed in December 2018, the two initial trustees were the only means through which the Iwi Trust could act. Only one of those persons is Ngāti Pāoa. The information circulated prior to the ratification of the PSGE did not mention a transfer of

functions and powers from the Trust Board. The Iwi Trust's trust deed does not note a handover of power nor does it comment on RMA and LGA representation. No resolution was ever put to the Trust Board to transfer its powers or assets to the Iwi Trust. There has also been no evidence of any current intention to transfer these representative powers to the Iwi Trust beyond the Iwi Trust's own assertions.

[60] All these points are well made but that does not mean that the 2009 s 30 order remains effective. Rather it indicates the Iwi Trust by incremental means, largely due to the legal abeyance of the Trust Board between 2014 and 2017, has become the effective representative for Ngāti Pāoa. This in practical terms, coupled with the matters listed by Mr Mahuika at paragraph 57(a)-(d), rendered the 2009 s 30 order nugatory. In addition, the evidence is that the Iwi Trust expected that the primary iwi settlement would occur in 2014. The idea was that there would be a swift transition from the Trust Board to the Iwi Trust.

[61] We note the evidence for the Trust Board was that it did not cease to operate in the period 2014-2017. However, what is omitted is the fact that the Trust Board was incapable of meeting the requirements of its trust deed to ensure effective decision making for much of this period. The following is a list of activities identifying how the remaining trustees and members of the Trust Board engaged with the logistical difficulty of administering the activities of the Trust:

(a) *Members* were seeking advice in early 2014 with regard to the Stony Ridge quarrying consent;

(b) *Members* called for an AGM set for 14 April 2014;

(c) *Members* asserted representative capacity to the Auckland Council in March and April 2014;

(d) *Members* raised concerns about Iwi Trust finances in November 2015;

(e) *Members* joined with the Iwi Trust to notify an AGM in November 2015;

(f) *Members* applied for and were granted a High Court order in October 2016;

(g) Trustee elections were conducted in March 2017; and

(h) The Trust Board claims to represent the Iwi's cultural interests in relation to the Kennedy Point Marina application, the America's Cup and a proposed 1080 drop.

[62] We find that, at least during the period 2015 and 2017 the Trust Board was legally inoperative. We also note the view of the Trust Board that the Iwi Trust has been attempting to usurp the role of the Trust Board since 2013 and that it could have filed an application for review earlier. We agree the opportunity to seek a review was available during the period 2014-2017 and taking advantage of that opportunity would have made for a less contested case. However, the legal reactivation of the Trust Board in 2017 cannot be sufficient to revitalise a s 30 order that for at least 3-4 years was ineffective. More was needed to demonstrate representative capacity has been restored to the Trust Board. It was contended that, with a compliant register and a full board of ten elected trustees, the Trust Board remains the most representative body for Ngāti Pāoa and the most transparent in its processes. Such an argument may have been true before the incremental acquisition of representative capacity by the Iwi Trust, but it comes too late and with too many unknowns for this Court to be convinced that the Trust Board is representative. Equally, the Iwi Trust has been through a revitalisation process with the election of more trustees.

[63] The numbers on the Trust Board register are not sufficient to demonstrate representative capacity either, as only 1000 members are on that list whereas there are 1500 on the Iwi Trust register. While the Trust Board is willing to consolidate the registers according to its own processes of determining who is an eligible member, likewise the Iwi Trust is prepared to undertake this role.

[64] Thus, we find that the changes in circumstances listed at paragraph 57(a)-(d) along with the establishment of the Iwi Trust and its incremental acquisition of representative capacity do amount to circumstantial changes rendering the 2009 order ineffective.

Should the order be amended to appoint new representatives?

[65] The role of the Trust Board in treaty negotiations will soon be finished as the three remaining settlements are all but concluded. Gradually, the Iwi Trust will further fill the RMA

and LGA space, but the Trust Board will still have standing in certain fora such as the Environment Court. That is a legislative right that will continue regardless of any s 30 order. We accept that both organisations are working hard to represent the interests of Ngāti Pāoa at this time. However, we agree with the Court in *Edwards – Whakatōhea*[21] that it is not possible to amend the 2009 order to reflect the significant changes of circumstances and facts that have occurred for the reasons given in that judgment.

Should other amendments be made?

[66] Although not all orders pursuant to s 30 of the Act will contain end-date clauses, the Court has previously found they are not intended to have eternal effect but will cease as circumstances change.[22] Although the 2009 order does not specify an end-date, and although the Trust Board was the most appropriate representative at the time the order was made in 2009, we have found that the circumstances have since changed to such a degree that the order is no longer effective.

[67] Mr Gardiner-Hopkins submitted that the 2009 order should expire on finalisation of settlement or enactment of settlement legislation or soon thereafter. In this manner, Ngāti Pāoa would have notice of that expiry date. The iwi could decide for itself who should take on the RMA and LGA matters at that point in time. There could be a number of ways that Ngāti Pāoa might decide how to deal with RMA and LGA matters. The 2009 order should remain as it gives everybody certainty, however, the Trust Board does not object to a defined end-point to the order. The end-point preferred was the date the Ngāti Pāoa settlement is enacted by legislation. That would give Ngāti Pāoa the ability to look to that date and resolve for itself how to proceed at that point in time.

[68] Given the order is no longer effective, we find the prospect of the 2009 order remaining in place longer than necessary will not provide certainty. Rather it will continue the confusion that currently exists as to who is the appropriate representative for the iwi. We would rather deal with the matter as we detail below in terms of the s 30(1)(b) application. Therefore, we consider it appropriate to amend the order to include an expiration date, and the order will therefore expire within 7 working days after the release of this judgment.

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[21] Above n 13.

[22] *McClutchie-Morrell v Te Runanga o Ngāti Porou* (2010) 12 Tairawhiti MB 278 (12 TRW 278) at [47]; *Edwards– Whakatōhea* (2018) 183 Waiariki MB 169 (183 WAR 169) at [64]-[65] and [78]-[80].

Alternative – Should a s30(1)(b) order be made?

[69] The Iwi Trust has made an application for a new order pursuant to section 30(1)(b) recognising it as the most appropriate representative for Ngāti Pāoa for the purposes of the RMA and LGA matters.

[70] We note that the law with respect to s 30(1)(b) applications has been reviewed in a number of decisions of the Court. In *Manuirirangi v Ngā Hapū o Ngā Ruahine Iwi Inc*, for example, two applications were brought to determine representation and both were opposed by Ngā Hapū o Ngā Ruahine Iwi Inc.[23] Both dealt with treaty settlement negotiations and the second dealt also with other matters. In this case Judge Clark considered the practical applications of s 30 in light of surrounding material. First, he considered the memorandum of Chief Judge Durie stating that s 30 was not designed to determine representation for all time on all matters or matters not of immediate concern. Second, he found that regardless of whether an application is made under s 30(1)(a) or s 30(1)(b), the comments of the former Chief Judge still stand. Judge Clark considered that both the advisory s 30(1)(a) and adjudicatory s 30(1)(b) functions of the Court should be remedies of last resort on these matters. Reading s 30 alongside s 30C and s 30H, he considered that the jurisdiction to make such an order is discretionary. Judge Clark dismissed the treaty negotiation application for having little purpose and the remainder of the application for not presenting serious issues for determination. That is, they did not relate to current or intended proceedings, negotiations, consultations, or allocations of property involving dispute.

[71] Another particularly helpful decision is *Shaw v Ngāti Huarere ki Whangapoua* where the Court found that ideally, representation should be determined by the following factors, but that in a case where all could be proven, it would be unlikely court adjudication would be needed:[24]

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[23] *Manuirirangi v Ngā Hapū o Ngā Ruahine Iwi Inc* [2010] Chief Judge MB 355 (2010 CJ 355).
[24] *Shaw v Ngāti Huarere ki Whangapoua - Ngati Pu* (2015) 113 Waikato Maniapoto MB 82 (113 WMN 82) at [27].

(a) Broad based consent of people or mandate;

(b) Due process of consultation according to tikanga;

(c) Creditability in terms of leadership;

(d) Approval of rangatira and kaumātua; and

(e) Provision for accountability to the tribe.

[72] The implication is that the evidence provided must point to some of the above factors, but there is no need for an application to show all five factors. In addition, the Court should keep in mind that a s 30 order should not easily be given.[25] Though a s 30 order may resolve a dispute, it is in fundamental opposition to the tribe's right to appoint its own representatives. Placing one party in a position of strength by way of a court order is unlikely to be the most acceptable solution to the iwi. Therefore, traditional means of dispute resolution should be encouraged.

[73] The cases indicate that the issues for guiding whether the Court should exercise its discretion under s 30 are as follows: (a) is there an urgent issue that requires consultation or negotiation?; (b) is it not immediately clear who should undertake a representative role?; (c) if it is, has the person or group purporting to fulfil that role demonstrated some of the factors outlined in *Shaw v Ngāti Huarere ki Whangapoua*?*;* (d) is there clear evidence that the person or group has been undertaking representative activities?; (e) is there any utility in making the order?; (f) does the order provide clarity for groups seeking to enter discussions with that group of Māori?; and (g) the issue cannot be resolved outside the Court.

[74] We agree with these decisions and consider that any advisory or adjudicatory decision by the Court under s 30(1)(b) should be a remedy of last resort. Therefore, we have chosen to defer the hearing of the application as we do not believe that the full gambit of s 30(1)(b) matters listed above that should be addressed by the parties have been addressed in the evidence and submissions currently before us.

[25] Above n 1 at 159.

[75] In addition, although the Iwi Trust has argued that mediation and facilitation on other matters between the Trust Board and the Iwi Trust have previously failed and that it is unrealistic to expect that the parties will reach agreement, we are not convinced. We do not consider that the relationship is so fractured that mediation should not be attempted to resolve the issue of representation in terms of the RMA and LGA. We consider such an approach is in keeping with the intent of the legislation and the Trust Board wanted the opportunity to enter mediation from the commencement of these proceedings.

[76] Therefore, we refer the parties to mediation. I note that this decision is made by the Coram and is referenced to s 40 of the Act using the procedures generally adopted for applications before the Court. Therefore, the Registrar is directed to engage a mediator as an expert acceptable to both parties and to ensure the mediation is conducted before the end of February 2019. The issues to be referred to mediation are:

(a) Whether the two lists of the Iwi Trust and the Trust Board are able to be compiled into one list.

(b) Who is the most appropriate representative for Ngāti Pāoa for the purposes of RMA and LGA matters.

(c) Any other matter agreed by the parties.

[77] A report is required from the Registrar pursuant to s 40 and is to be produced with the assistance of the mediator recording the results of the mediation, including whether settlement was achieved or not. The report is to be filed with the Court no later than 2 weeks following the mediation. Payment for the mediators fees is to be made pursuant to s 98(9)(aa).

[78] At that point if there is no settlement through mediation, counsel are to confer with the Registrar as to the Coram's availability for a further hearing and then to agree on the issues to be determined and a timetable for the filing of evidence and submissions. That timetable, if needed, should be filed 2 weeks after receipt of the Registrar's report.

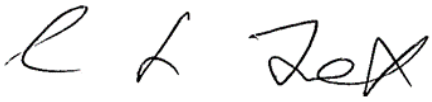
Decision

[79] We make the following orders:

(a) The 2009 order made at 141 Waikato MB 271-291 is amended to have an end date of Friday 21 December 2018 pursuant to s 30I(4); and

(b) The Registrar is directed to liaise with parties and engage a mediator in the terms set out at [76] with a report to follow pursuant to s 40.

Pronounced at 3.00pm in Gisborne on 12 December 2018.



C L Fox (presiding)
DEPUTY CHIEF JUDGE

V Toki
MEMBER

S Gibbons
MEMBER