I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O [ROHE]
In the Māori Appellate Court of New Zealand
Waiariki District

A20210008502

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Tūhoe – Te Uru Taumatua
I WAENGA I A *Between*	TĀMATI KRUGER on behalf of TŪHOE TE URU TAUMATUA TRUST Kaitono pīra *Appellant*
ME *And*	PAKI NIKORA on behalf of TE KAUNIHERA KAUMĀTUA O TŪHOE Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	10 November 2021, 2021 Māori Appellate Court MB 395-443 (Heard at Rotorua)
Kooti: *Court*	Judge M J Doogan (Presiding) Judge C M Wainwright Judge D H Stone
Kanohi kitea: *Appearances*	M Colson for Appellant P Harman for Respondent
Whakataunga: *Judgment date*	21 December 2021

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

(Proceedings continued)

A20210010967

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Tūhoe – Te Uru Taumatua
I WAENGA I A *Between*	PAKI NIKORA ON BEHALF OF TE KAUNIHERA KAUMĀTUA O TŪHOE Kaitono pīra *Appellant*
ME *And*	TĀMATI KRUGER ON BEHALF OF TŪHOE TE URU TAUMATUA TRUST Kaiurupare pīra *Respondent*

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He kōrero tīmatanga me ngā take
Introduction and issues

[1] For many years now, the Crown has recognised and apologised for its historical breaches of the principles of the founding document of Aotearoa, Te Tiriti o Waitangi (the Treaty of Waitangi).[1] The Crown has accepted that some of those breaches have led to virtual landlessness for many iwi and hapū.[2] To redress those breaches, the Crown has entered into numerous settlements with iwi and hapū. These settlements now cover almost all of the country's land mass. In part, these settlements provide for the transfer of land from the Crown to iwi and hapū, both in recognition of the land they have lost through the Crown's breaches of Te Tiriti and to provide them with a land base from which to develop into the future.

[2] The Crown has a well-settled policy of transferring Te Tiriti settlement redress to entities that are representative of, and accountable to, the affected iwi and hapū. These entities are referred to as "post-settlement governance entities". They are charged with receiving and managing Te Tiriti redress (including land) from the Crown for the benefit of the intended beneficiaries. By definition, all of those beneficiaries are Māori.

[3] Te Uru Taumatua ("TUT") is one such post-settlement governance entity. It is established to be representative of, and accountable to, the iwi of Ngāi Tūhoe. It is a trust. It owns land. A majority, if not all, of its beneficiaries are Māori. It is common ground that, as such, it is a trust that holds or owns General land owned by Māori.

[4] Following this Court's decision in *Moke v Ngāti Tarawhai Iwi Trust*, the Māori Land Court has determined that TUT falls within its jurisdiction, because TUT is a trust that holds General land owned by Māori.[3] TUT disputes this. It says that *Moke* was wrongly decided. Whether *Moke* is correct is the first and primary issue to determine.

[5] The second issue arises because of the first. After determining that TUT falls within its jurisdiction, the Māori Land Court ordered TUT to undertake fresh elections for two of

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1 The first of the modern day "Treaty settlements" occurred in 1993 and there has been a steady stream of similar settlements ever since.

2 See, for example, clause 8.12 of the deed of settlement between the Crown and Ngāti Mutunga dated 31 July 2005. In respect of Ngāi Tūhoe, see the apology at clause 5.6 of the deed of settlement between the Crown and Ngāi Tūhoe dated 4 June 2013.

3 *Moke v The Trustees of Ngāti Tarāwhai Iwi* [2019] Māori Appellate Court MB 265 (2019 APPEAL 265).

its trustees.[4] After filing an appeal to this Court, TUT sought and was granted by the Māori Land Court a partial stay of these orders, resulting in the election for one of the trustees being put on hold until this appeal is determined.[5] The second issue to determine is whether the decision to partially stay the order for TUT to undertake fresh elections was correct.

[6] We use the shorthand phrase "Māori trust" to refer to a trust for which the majority of beneficiaries are Māori. Post-settlement governance entities are Māori trusts because all of their beneficiaries are Māori.[6]

Te hatepe o ngā pira nei
Procedural history

[7] There is a relatively lengthy procedural history in relation to these appeals that need not be traversed in detail here. It is sufficient to note that Mr Paki Nikora, on behalf of Te Kaunihera Kaumātua o Tūhoe ("TKKoT"), has applied to the Māori Land Court for various orders in relation to TUT and has previously appealed one of those decisions to this court.[7]

[8] Each of the issues to be determined now arises out of separate decisions of the Māori Land Court. Each issue is raised in separate appeals. The first appeal is by TUT against the Māori Land Court order for elections to be held for two TUT trustees. TKKoT is the respondent. This is the appeal that concerns whether *Moke* was wrongly decided.

[9] The second appeal is by TKKoT against the Māori Land Court decision to partially stay its earlier orders requiring TUT to hold elections for two trustees. TUT is the respondent. This is the appeal that challenges the stay decision.

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4 *Nikora v Trustees of Tūhoe – Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAR 157).
5 *Trustees of Tūhoe v Nikora – Te Uru Taumatua* (2021) 260 Waiariki MB 103 (260 WAR 103).
6 We acknowledge that it is possible that non-Māori may be beneficiaries of post-settlement governance entities if they recognise whāngai or legally adopted persons who are not Māori. Irrespective, every post-settlement governance entity will have a majority of beneficiaries who are Māori.
7 *Nikora v Te Uru Taumatua – Te Uru Taumatua Trust* [2020] Māori Appellate Court MB 248 (2020 APPEAL 248).

He mahi whakawā ma te Kooti Whenua Māori ki te TUT?
Does the Māori Land Court have jurisdiction over TUT?

[10] This appeal concerns s 236(1) of Te Ture Whenua Māori Act 1993 ("the Act"). It provides:

> **236 Application of sections 237 to 245**
>
> (1) Subject to subsection (2), sections 237 to 245 shall apply to the following trusts:
>
> (a) every trust constituted under this Part:
>
> (b) every other trust constituted in respect of any Maori land:
>
> (c) every other trust constituted in respect of any General land owned by Māori.

[11] The key provision is s 236(1)(c) and the question is whether it captures post-settlement governance entities. The following key passage from *Moke* confirmed the basis on which this Court determined that post-settlement governance entities come within s 236(1)(c):[8]

> We can discern nothing from Part 12 of the overall statutory scheme which would lead us to conclude that there is a clear legislative purpose to limit the Court's jurisdiction when it comes to trusts that may have been established for receipt of Treaty settlement assets.
>
> If the Court's jurisdiction is limited in the way argued for by the trust, we would have expected a much clearer legislative indication to that effect. In the absence of any such express, or implied restriction we find that, on the facts established in the Court below, the Court does have jurisdiction to hear Ms Moke's application.

The arguments advanced by TUT

[12] TUT says that *Moke* was wrongly decided. In essence, TUT says that s 236(1)(c) of the Act requires a trust to be constituted in relation to land in order to be captured within its scope, and TUT was not constituted in relation to land. Instead, it was constituted in relation to a comprehensive settlement of Te Tiriti claims: a settlement that included a range of redress including, but not limited to, land.

[13] TUT advanced the following arguments in support of its position:

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[8] At [77]-[78].

(a) Section 236(1)(c) requires a trust to be "constituted in respect of" General land owned by Māori. TUT was not so constituted. It was not constituted for the purpose of holding land.

(b) Rather, it was created as part of the Tūhoe Te Tiriti settlement. It holds a broad range of assets. It has wide-ranging purposes to use its assets to address the effect of Crown breaches of Te Tiriti on the economic, social, cultural and political well-being of Ngāi Tūhoe. Its primary purpose is not related to land.

(c) The Preamble, general objectives, and scheme of the Act focus on land. The reasons for TUT's establishment, its broad asset base and its wide-ranging purposes take it outside the scheme of the Act. TUT does not exhibit the required focus on land to bring it within s 236(1)(c).

(d) It is true that TUT holds General land owned by Māori. But that does not bring it within the scheme of the Act. Such a conclusion divorces TUT from its context and the reasons for its establishment.

[14] TUT says that, when interpreted in light of the Act's purpose, objectives, and scheme, it follows that land must be the primary reason for a trust's establishment before s 236 applies. This is because:

(a) The Preamble focuses on land. It recognises land as a taonga tuku iho of special significance to Māori. It promotes the retention of land in the hands of its owners, their whānau, and their hapū. Section 2(1) then states Parliament's intention that the Act shall be interpreted in a manner that best furthers these principles.

(b) The primary objective of the Court as set out in s 17(1) is to promote and assist in the retention of General land owned by Māori in the hands of its owners and the effective use, management, and development of that land by or on behalf of its owners. Again, the focus of the primary objective of the Court is on land.

(c) All of the further objectives of the Court set out in s 17(2) relate to land.

(d) The general jurisdiction of the Court set out in s 18 focuses on land. Other than ss 18(1)(e) and (f), which relate to whether a person is Māori or within a certain class of Māori, all of the subsections in s 18 focus on land.

[15] TUT says that simply holding land cannot be determinative of jurisdiction under s 236(1)(c). Rather, the test is the purposes for which the trust is established. This is what the words "constituted in respect of" mean. These words require an analysis of the purposes of a trust to determine whether it is constituted in respect of General land owned by Māori. Additionally, if s 236 is engaged simply by a Māori trust holding land, then the Court's jurisdiction could be engaged and disengaged based on whether the trust held land at the relevant time. This, TUT argued, makes no sense.

[16] TUT sought to illustrate the point through an example involving a Māori trust that is constituted initially for investment purposes. Initially the trust may hold shares. At that stage, the trust would not fall within the scope of s 236 as it would not hold land. Subsequently, the trust may sell some of its investment shares and buy land. Then, the trust would hold General land owned by Māori, and on the *Moke* analysis would be captured by s 236(1)(c). This, TUT argued, produces arbitrary results. A trust could fall in and out of the Court's jurisdiction from time to time based on whether it owned land. TUT argued that the better approach is to assess whether the trust's primary purpose relates to land. This can best be ascertained by looking at the circumstances when the trust was established. In the example of the trust constituted for investment purposes, the trust would never fall within the Court's jurisdiction, even if it later owned land.

The arguments advance by TKKoT

[17] Mr Harman, counsel for TKKoT made comprehensive submissions rejecting these arguments. He urged us to uphold the *Moke* decision.

Was Moke wrongly decided?

[18] TUT's arguments invoke the art of statutory interpretation. This Court applied that art in *Moke*. We need not rehearse the detail of that analysis here. It is enough to say that

we concur with the *Moke* analysis, as far as it goes. In particular, we agree with the following principles:

(a) Consistent with the Court of Appeal's analysis in *Grace v Grace*, there is a discernible statutory scheme that carefully identifies where the jurisdiction of the Māori Land Court is to be exclusive and non-exclusive.

(b) Section 236(1)(c) expressly confirms that the Court has jurisdiction over trusts constituted in respect of General land owned by Māori.

(c) The words "constituted in respect of" have wide import, and the word "constitute" in this context appears to be equivalent to "established".

(d) There is an absence in Part 12 of any clear limitation on the extent of the Court's jurisdiction with respect to a trust constituted in respect of any General land owned by Māori.

(e) There is nothing in Part 12 or the overall statutory scheme to conclude that there is a clear legislative purpose to limit the Court's jurisdiction when it comes to trusts that are post-settlement governance entities.

[19] TUT argued that s 236(1)(c) requires an assessment of the purpose of a trust. To this extent, we agree. A trust must have been constituted or established in respect of General land owned by Māori for s 236(1)(c) to apply, which inherently requires an assessment of the background to its constitution. This background must surely include the purpose of the trust.

[20] However, we do not agree that the wording of s 236(1)(c) requires that the *primary* purpose of a trust must relate to land for it to fall within the scope of that provision. Our reasons are as follows:

(a) First, the plain words of the provision do not expressly call for an assessment of the *primary* purpose of the trust.

(b) Second, the broader scheme in Part 12 does not support such a narrow reading of s 236(1)(c). Those provisions, particularly ss 237-245, do not focus on land, and instead deal with matters such as the enforcement of trustee obligations, the appointment and removal of trustees, and termination and variation of trusts. The focus is not limited to land.

(c) Third, the Act's clear focus on the retention of land undermines, rather than supports, the argument that the Court should assess the primary purpose of a trust. The Preamble confirms that land is a taonga tuku iho to be retained in the hands of its owners. This strong statutory language regarding the significance of land to Māori, together with the statutory direction that the Act be interpreted in a manner that best furthers this principle, supports an approach that invokes the Court's jurisdiction simply if land is owned by a Māori trust.

[21] In this context it is also relevant to highlight the following from the TUT Trust Deed dated 13 December 2013. Recital G of the Deed records:

> Tūhoe wishes to create the Tūhoe Trust to act as their Iwi Authority and Post-Settlement Governance Entity (that is transparent, accountable and representative of the iwi) and for the trustees to hold property upon the Trusts and with the duties, powers and discretions set out in this Deed.

[22] Property is defined and "means all real and personal property (including choses and action, rights, interests and money)".

[23] Clause 3.5 provides:

> All land that is part of the of the Trust Fund and that is situated within the Tūhoe ahikāroa shall not be sold or otherwise disposed of by the Trustees.

[24] We highlight these provisions, because whilst it is fair to characterise the Trust Deed as encompassing objectives beyond the holding and retention of land, assessments of the purpose for which a trust is constituted based on some form of "primacy" test is not straight forward. Taking a purposive approach to the interpretation of the Act, and Part 12 in particular, we conclude that interpreting the jurisdiction of the Court over trusts that hold

General land owned by Māori based upon a primacy of purpose test unnecessarily strains what we see as the clear statutory words and a clear statutory scheme.

[25] If primacy of purpose is not the test, what is required for a trust to be constituted in respect of General land owned by Māori? If a Māori trust owns land from inception, or is set up to hold land that will be transferred to it in the future, it must surely be constituted in respect of that land. That is the case for post-settlement governance entities. They are constituted to receive and manage land, together with other assets. It is therefore a purpose of these entities to receive and hold land. They are captured by s 236(1)(c).

[26] We acknowledge that there may be some uncertainty in respect of Māori trusts that are not established initially to hold land, but subsequently acquire it. This is the example TUT raised with us. The uncertainty arises because, if the phrase "constituted in respect of" is similar to "established", the trust in this example would not have been established in respect of land, even though it subsequently acquires it. We need not be too concerned with this example for three reasons. First, TUT is not one such example. TUT was constituted to hold Te Tiriti settlement land. Second, the nature and extent of any uncertainty is difficult to assess in the abstract. Finally, if there is any uncertainty, it does not alter fundamentally the statutory interpretation analysis in *Moke*.

[27] We also acknowledge that the court in *Moke* did not expressly address the argument now raised by TUT regarding the potential arbitrariness of a Māori trust falling in and out of the Court's jurisdiction simply by holding land. But it did not need to. When the scheme of the Act is considered carefully, there is nothing arbitrary about a Māori trust falling in and out of the Court's jurisdiction based on whether it owns land or not. It is, after all, a land court.

[28] Moreover, it is important to remember that this jurisdiction is non-exclusive. It is shared with the High Court per s 237 of the Act. Recourse is always available to that court. When viewed in that context, an outcome that invokes concurrent jurisdiction in the Māori Land Court based on whether a trust holds land is not arbitrary. Rather, it simply recognises that when a Māori trust holds land (even if only from time to time), a second and additional jurisdiction becomes available – the Māori Land Court.

Are there other statutory interpretation reasons in support of the Moke decision?

[29] There are two reasons in addition to those expressed in *Moke* as to why post-settlement governance entities fall within s 236(1)(c).

[30] First, there is an additional statutory interpretation argument arising out of the language of s 236 itself. Like s 236(1)(c), s 236(1)(b) also uses the phrase "constituted in respect of". It captures trusts that are constituted in respect of Māori land (being Māori customary land or Māori freehold land). If we were to adopt TUT's primacy of purpose approach in respect of that subsection, only trusts the primary purpose of which is Māori land would be captured. The theoretical result is that some trusts that hold Māori land could fall outside of the Act. That result would clearly be contrary to the principles and objectives of the Act. If the purposive test cannot be sustained in s 236(1)(b), it cannot be sustained in s 236(1)(c).

[31] Second, there is also a discernible scheme in Part 12. Part 12 allows for five different types of trusts over Māori land or General land owned by Māori. This is one of the instances in the Act where the jurisdiction expressly includes General land owned by Māori and that jurisdiction extends to every type of trust constituted under the Act. Section 236(1)(a) then deals with those trusts (all of which can be constituted over both Māori land and General land owned by Māori), s 236(1)(b) deals with trusts constituted in respect of Māori land and s 236(1)(c) deals with trusts constituted in respect of General land owned by Māori. There is a clear pattern that is designed to capture any trust that holds Māori land or General land owned by Māori, including those trusts not constituted under Part 12. That is the intent of s 236, having regard to the scheme in Part 12. This scheme does not easily permit a reading that would exclude some trusts that hold these land statuses.

[32] Mr Harman encouraged us to observe that the Preamble, and in particular its reaffirmation of rangatiratanga, imports into the Act a focus that is much broader than land. He argued this broader focus does not require trusts to be focussed on land to fall within s 236. This argument has some attraction, but we need not decide it conclusively. We find that *Moke* is correct law for the reasons already stated.

Te ture menemana o 2020
The 2020 amendment Act

[33] Since *Moke* was decided, the Act has been amended by the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 ("the amendment Act").[9] Section 236 was not amended to either confirm or overturn *Moke*. Two questions arise. Firstly, did Parliament turn its mind to this issue when considering these amendments? Secondly, can any conclusions be drawn?

The Parliamentary process

[34] Clause 6 of the First Reading version of the Bill proposed amending s 19(1)(a) of the Act (jurisdiction in respect of injunctions) to replace "Māori freehold land, Māori reservation, or wahi tapu" with "Māori land, Māori reservation, or General land owned by Māori". The Explanatory Note recorded that this clause expanded:[10]

> the range of remedies that a Judge of the Māori Land Court can employ to achieve an adequate outcome of a matter, including – extending the ability to issue injunctions to include the power to compel action.

[35] The Bill was referred to the Māori Affairs Committee. It received 73 submissions on the Bill. The Departmental Report advised the Māori Affairs Committee that three submitters were:[11]

> apprehensive about expanding the Court's powers to issue injunctions to General land owned by Māori, particularly given that this term has recently been expanded to include lands held by a post-Treaty settlement governance entity.

[36] This must have been a reference to the effect of the *Moke* decision.

[37] In its report back to Parliament on the Bill, the Māori Affairs Committee amended the clause relating to injunctive relief. The Committee explained:[12]

> Clause 6, which would amend section 19, sets out the court's jurisdiction in respect of injunctions. The bill provides that when whānau apply for an injunction, the Māori

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9 The amendment Act was granted Royal assent on 6 August 2020 and came into force on 6 February 2021.
10 Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179-1) (explanatory note) at 3.
11 Te Puni Kōkiri and Ministry of Justice "Departmental Report - Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters)" at [163], citing the various submissions on the Bill.
12 Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (179–2)(Māori Affairs Committee report) at 5.

> Land Court would be able to require a person to remove or reinstate any object or structure, or repair any damage to the land.
>
> The bill also provides that an injunction could apply to Māori land, Māori reservation land, or General land owned by Māori. At present, the Act generally limits the court's injunctive powers to Māori freehold land. **We are aware of concern that expanding the court's injunctive powers to include General land owned by Māori could increase compliance requirements for Māori entities, as General land owned by Māori has been held to include land held by post-settlement governance entities.** Because of this, we recommend amending this clause to remove the reference to "General land owned by Māori" in clause 6 of the bill. We were advised that this issue may be considered in future policy work on the Act.
>
> (Emphasis added)

[38] Hansard then notes Hon Nanaia Mahuta speaking to the Second Reading of the Bill, in particular the reference to post-settlement governance entities:[13]

> Some of the recommended changes include that the Māori Land Court's powers to grant injunctions be limited to Māori land and Māori reservations, removing the proposed extension of the court's powers to include issuing injunctions over general land owned by Māori. **This would avoid land held by post-settlement governance entities being included in this category.** The committee recommended that the Māori Land Court have the power to determine applications about the performance of an easement. The Māori Land Court already considers applications to establish, modify, or cancel an easement that involves both Māori freehold and general land. On that basis, the bill should be amended to allow applications to be heard by either the District Court or the Māori Land Court if the application wholly relates to Māori freehold land or relates to Māori freehold land and other land.
>
> (Emphasis added)

Did Parliament turn its mind to the Court's jurisdiction over post-settlement governance entities?

[39] Parliament was clearly aware that, as a result of *Moke*, General land owned by Māori includes land held by post-settlement governance entities. The Departmental Report on the Bill, the Māori Affairs Committee report and Hansard all make this point. The decision then made was not to revoke that jurisdiction and effectively overturn *Moke* through amending legislation, but instead to limit the Court's proposed injunctive relief powers to exclude jurisdiction over General land owned by Māori. This amendment affects any land owned by a Māori trust, not just post-settlement governance entities. But the amendment recognised

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13 (24 June 2020) 747 NZPD 19140-19141.

the apprehension expressed in submissions in relation to the effect on post-settlement governance entities.

Can any conclusions be drawn from the amendment Act?

[40] TUT says that that the changes to clause 6 of the Bill as it went through the Parliamentary process is of limited assistance to the interpretative question before this Court because they merely reflect the current state of the law at the time the amendment Act was passed. Instead, TUT says the exclusion of "General land owned by Māori" from the scope of injunctive relief in response to *Moke* illustrates a degree of discomfort at the Māori Land Court's jurisdiction over post-settlement governance entities. This supports the conclusion that including TUT under s 236(1)(c) is not only inconsistent with the legislative wording, but is also incongruous with the scheme of the Act.

[41] Mr Harman on the other hand argues that the amendments demonstrate that Parliament had the opportunity to amend the law following the *Moke* decision but chose not to do so, save for the removal of injunctive relief with respect to entities holding general land owned by Māori.

[42] We are not aware of any principle or case law that would prevent us from ascribing to Parliament an intention that supports the findings in *Moke* through its failure to overturn those findings when it had an opportunity to do so. However, there are conceptual and constitutional problems with this proposition.[14] We would go too far if we said that Parliament endorsed the outcome in *Moke* because it passed the amendment Act that did not contradict it.

[43] It is nevertheless open to us to observe that the amendment Act, and in particular the changes that occurred through the Parliamentary process regarding the proposal to extend the Court's injunctive powers, evinced no policy concern with the Māori Land Court's general jurisdiction over post-settlement governance entities. Our observation is strengthened by the fact that jurisdiction was squarely before Parliament in the injunction

[14] For a discussion of these conceptual and constitutional problems, see Diggory Bailey "Interpreting Parliamentary Inaction" (2020) 79(2) CLJ 254.

context. If anything, the comments in the Departmental Report, the Committee report and Hansard suggest an acknowledgement of (rather than concern with) the status quo.

[44] Thus, we take little from the amendment Act. Instead, we rely on statutory interpretation for our conclusion that *Moke* was correctly decided.

[45] Finally, we note that TKKoT raised the issue of *res judicata*. The argument is that, because TUT did not participate in the Māori Land Court proceedings, the issues have already been determined or TUT is estopped from appealing the decisions arising from those proceedings. The principles of *res judicata* or issue estoppel do not apply here, as this is an appeal of a decision from a court of first instance.

Kei te tika te whakataunga whakakati?
Was the stay decision correct?

[46] The decision to grant a stay of the orders requiring TUT to hold trustee elections was an exercise of discretion. This decision can only be impugned on limited grounds if it is shown that the Māori Land Court erred in law or principle, took into account irrelevant considerations, failed to take account of a relevant consideration or that the decision was plainly wrong.[15]

[47] TKKoT raised two appeal grounds in their notice of appeal. The first was that the Māori Land Court erred because it treated as determinative the finding that the appeal on the Court's jurisdiction over post-settlement governance entities would be rendered nugatory if the stay was not granted. The second was that the Māori Land Court failed to take into account a relevant consideration, in that TUT had acted contemptuously by commencing only one trustee election by the time the stay was sought, despite being ordered to hold two trustee elections. At hearing, counsel for TKKoT raised a further issue, in that the stay decision was made on the papers in breach of the principles of natural justice. This last issue was not raised in the notice of appeal so we decline to consider it.[16]

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15 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
16 *Nikora v Te Uru Taumatua – Te Uru Taumatua Trust* [2020] Māori Appellate Court MB 248 (2020 APPEAL 248) at [63].

Did the Court treat as determinative the issue of whether the appeal would be rendered nugatory if the stay was not granted?

[48] On our reading of the Māori Land Court decision, we do not agree that the Court treated as determinative the fact that the appeal would be rendered nugatory unless the stay was granted. The Court heard submissions on the range of factors relevant to the granting of a stay. Those submissions are summarised in the decision.[17] The Court clearly took those factors into account. There is no error of law in the approach taken by the Court, nor is the decision plainly wrong in this respect.

Did the Court fail to take into account a relevant consideration?

[49] TKKoT argued that the Māori Land Court failed to take into account a relevant consideration because it was not aware that TUT had already commenced an election for one trustee before the stay decision was issued, but had failed to commence the election for the second trustee. This, it was argued, was contemptuous conduct by TUT because it demonstrated that TUT had no intention of complying with the Court order to hold two elections. Through an administrative oversight, this detail was not put before the Māori Land Court before the stay decision was issued.

[50] It is unfortunate that the information submitted by TKKoT was not put before the Court before the stay decision was issued. However, the information does not prove contemptuous conduct. Firstly, the Court had ordered elections to be held by 21 October 2021. The stay decision was issued on 17 August 2021. There was still time for TUT to comply with the Court order if the stay had not been granted.

[51] Secondly, as noted in the Māori Land Court decision, under the TUT trust deed the election for one trustee would have ordinarily commenced by August 2021. That was the election that had been commenced prior to the stay being granted. Under the TUT trust deed, the election for the second trustee was not due to commence until August 2022. Accordingly, we see nothing contemptuous in not commencing that second election prior to the stay being granted. It was reasonable for TUT to delay that election until a decision on the stay application was made.

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17 Above n 5, at [9] and [10].

[52] Therefore, we are not satisfied that the Court failed to take into account a relevant consideration. The fact that only one election had been commenced prior to the stay being issued was not contemptuous conduct and was therefore not a relevant consideration.

Whakataunga
Decision

[53] The appeal by TUT against the Māori Land Court decision to order it to undertake elections for two trustees is dismissed.

[54] The appeal by TKKoT against the Māori Land Court decision to partially stay the order for TUT to undertake elections for two trustees is also dismissed.

I whakapuaki i te 11.00 am i Te Whanganui-a-Tara, tekau mā tahi o ngā rā o Hakihea i te tau 2021.

M J Doogan	C M Wainwright	D H Stone
JUDGE	**JUDGE**	**JUDGE**