IN THE MAORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT

2010 Chief Judge's MB 355
(2010 CJ 355)
A20100007368
A20100010143

UNDER	Section 30(1)(b), Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Applications to determine the appropriate representatives for Nga Ruahine
BETWEEN	HORI MANUIRIRANGI AND RATA PUE First Applicants
AND	FRANCES KINGI KATENE AND OTHERS Second Applicants
AND	NGA HAPU O NGA RUAHINE IWI INC Respondent

Hearing: 8 September 2010, 255 Aotea MB 113-136
(Heard at Hawera)

Appearances: Rata Pue and Hori Manuirirangi in person
Frances Katene in person
Professor R Boast and D Edmunds, Counsel for the Respondent

Judgment: 8 December 2010

RESERVED JUDGMENT OF JUDGE S R CLARK

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Introduction

[1] The Court has before it two separate applications to determine, by order, who are the most appropriate representatives of a class or group of Māori. The first application is brought by Rata Pue and Hori Manuirirangi ("first applicants").[1] The second application is brought by Frances Kingi Katene and others ("second applicants").[2]

[2] The applications are opposed by Ngā Hapū o Ngā Ruahine Iwi Inc ("Ngā Hapū"). On 24 August 2010 Ngā Hapū's Deed of Mandate to conduct Treaty negotiations was recognised by the Minister of Treaty Settlements.

[3] An initial conference was held at Hawera on 8 September 2010 to discuss issues concerning both applications.

[4] During the course of the conference, jurisdictional issues and questions of law were discussed. In order to assist me to determine those issues I asked all parties to file written submissions on the interpretation of various s 30, Te Ture Whenua Māori Act 1993 ("TTWMA") provisions.

[5] I also raised with the first applicants that I did not understand the scope of their application. In particular whether it was intended to seek an order solely in relation to current Treaty negotiations with the Crown or was it broader than that? Thus the first applicants were given time to file an amended s 30 application.

[6] The further submissions called for, the amended application from the first applicants and responses to the amended application have now been received from all parties. The issues that I need to decide in this decision are as follows:

a) What is the correct interpretation of s 30H(2)?

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[1] Application A20100007368

[2] Application A20100010143

b) To the extent that both applications seek a s 30(1)(b) TTWMA order concerning Treaty settlement negotiations, what steps should I take pursuant to s 30C?

c) To the extent that the first applicants seek a s 30(1)(b) TTWMA order in relation to matters other than Treaty settlement negotiations, what steps should I take pursuant to s 30C?

Background

[7] Ngā Ruahine are a Taranaki iwi. They along with other Taranaki iwi suffered at the hands of the New Zealand government in the 19th century when war was waged against them and their lands were confiscated. Ngā Ruahine's claims along with other Taranaki iwi have been reported upon by the Waitangi Tribunal in its 1996 Taranaki Report. In its concluding remarks the Waitangi Tribunal unhesitatingly recommended that Ngā Ruahine along with other Taranaki iwi and hapū be generously compensated by the Crown.[3]

[8] In March 1997 the Crown recognised the mandate of an entity called "Muru me te Raupatu mō Ngā Hapu o Ngā Ruahine" ("Muru me te Raupatu"), to negotiate the settlement of Ngā Ruahine treaty claims.

[9] Unfortunately there has been an ongoing mandate dispute within Ngā Ruahine. In February 1999 the Crown advised Muru me te Raupatu that its mandate would need to be reconfirmed if progress were to be made towards settlement.

[10] On 28 April 2004 the Office of Treaty Settlements advised that as the Crown had not been provided with any information confirming that reconfirmation of the mandate had occurred a fresh mandating process was required.

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[3] Waitangi Tribunal *Taranaki Report Kaupapa Tuatahi* (1996) at 311-316

[11] In early 2007 Ngā Hapū was incorporated under the Incorporated Societies Act 1908.

[12] In its objects clause at 4.1.a reference is made to Ngā Hapū being the voice and representative body for a collection of hapū for the purposes of the Māori Fisheries Act 2004. Hapū members underwent a series of hui and voted to ratify Ngā Hapū as a mandated iwi organisation. Ngā Hapū was subsequently recognised under the Māori Fisheries Act 2004 as the mandated iwi organisation for Ngā Ruahine.

[13] The objects clause also refers at 4.1.iii that Ngā Hapū should be the voice and representative body for the collective hapū for any other purpose authorised at a Ngā Ruahine general meeting. At clause 4.1.e.iii reference is made to Ngā Hapū advancing and securing the economic well-being of the collective hapū including but not limited to holding and managing on behalf of the collective hapū and individual hapū any assets allocated to the hapū as a result of any Treaty of Waitangi settlement.

[14] In 2009 and 2010 Ngā Hapū undertook a series of pre-mandate hui to discuss progression of the Ngā Ruahine Treaty claims. In late 2009 Ngā Hapū began discussing a mandate strategy with the Crown. In early 2010 a series of four information hui were held around the country to present and discuss details around Ngā Hapū seeking a mandate from hapū members to negotiate a settlement of Ngā Ruahine historic claims.

[15] Earlier this year a postal vote took place by Ngā Ruahine descendants, to vote for or against Ngā Hapū being the mandated body to represent Ngā Ruahine in settlement negotiations with the Crown. Ngā Ruahine has 2,517 registered members, 1,365 of whom are aged 18 years or over and were eligible to vote. 503 members voted in the postal vote and 478 (95.22%) voted in favour of the Deed of Mandate.

[16] On 24 August 2010 the Minister for Treaty Negotiations and the Minister of Māori Affairs wrote to the Chair of Ngā Hapū recognising the mandate of Ngā Hapū

to represent the people of Ngā Ruahine in negotiations for the settlement of all their historical Treaty claims.

[17] On or about 1 June 2010 the first applicants filed their first application. An amended application was later filed on or about 30 September 2010.

[18] The second applicants filed their application on or about 9 August 2010.

[19] On 23 June 2010 I was allocated the first application to determine by the Chief Judge of the Māori Land Court.[4]

[20] On 16 August 2010 I addressed the first application by setting the application down for a conference pursuant to s 30C and s 67 of TTWMA.[5]

[21] I indicated that the purpose of the conference would include but was not limited to the following matters:

a) Identifying the parties to the application;

b) Identifying the issues at stake;

c) If a hearing is necessary, setting out the timetable for the filing of any evidence in the lead up to that hearing.

[22] On 2 September 2010, the Chief Judge allocated the second application to me pursuant to s 30C(2) of TTWMA.[6]

[23] Prior to the conference I received a memorandum from Crown Law dated 6 September 2010. The memorandum outlined steps taken by Ngā Hapū to obtain a Deed of Mandate and the fact that the Minister for Treaty Negotiations and the

[4] 2010 Chief Judge's MB 150
[5] 8 Waikato Maniapoto MB 277
[6] 2010 Chief Judge's MB 212

Minister of Māori Affairs had formally recognised the Deed of Mandate. Importantly with respect to s 30H(2) of TTWMA the Crown at paragraph 4.1 said:

> With regard to section 30H(2) of Te Ture Whenua Māori Act 1993, the Crown does not agree to be bound by an order that may be made in this proceeding concerning Treaty settlement negotiations.

[24] A conference was duly held at Hawera on 8 September 2010. During the course of that conference I heard from the first and second applicants, counsel for Ngā Hapū and others.

[25] In so far as the applications sought orders concerning Treaty settlement negotiations there was considerable discussion between myself, the applicants and counsel about the interpretations of s 30C, s 30H(2) and s 33. Directions were made by me to all parties to file written submissions on the interpretation of those sections. I indicated in the direction that the focus of the submissions needed to be on the issue of whether or not the applications should or should not be dismissed in so far as they affect or touch upon ongoing Treaty negotiations with the Crown.[7]

[26] I also directed that the first application be amended. It sought representation orders for matters over and above any Treaty settlement negotiations. I indicated in my directions that my initial view was that the application was painted far too broadly and would be difficult to respond to. I directed the first applicants to be more specific about the matters for which they sought a s 30 order.[8]

[27] Following the conference the Court received the following further materials:

a) On 30 September 2010 an amended application by the first applicants;

b) On 30 September 2010 legal submissions by counsel for the respondents on the jurisdictional and legal issues raised during the course of the conference;

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[7] 255 Aotea MB 134

[8] 255 Aotea MB 135

c) On 22 October 2010 reply submissions by the first applicants;

d) On 21 October 2010 reply submissions by the second applicants;

e) On 22 October 2010 a memorandum of counsel by Ngā Hapū in opposition to the amended application.[9]

Relevant Section 30 Provisions

[28] I set out the relevant provisions of s 30:

> **[30 Maori Land Court's jurisdiction to advise on or determine representation of Maori groups**
>
> (1) The Maori Land Court may do either of the following things:
>
> (a) advise other courts, commissions, or tribunals as to who are the most appropriate representatives of a class or group of Maori:
>
> (b) determine, by order, who are the most appropriate representatives of a class or group of Maori.
>
> (2) The jurisdiction of the Maori Land Court in subsection (1) applies to representation of a class or group of Maori in or for the purpose of (current or intended) proceedings, negotiations, consultations, allocations of property, or other matters.
>
> (3) A request for advice or an application for an order under subsection (1) is an application within the ordinary jurisdiction of the Maori Land Court, and the Maori Land Court has the power and authority to give advice and make determinations as the Court thinks proper.**]**
>
> **[30A Intent of sections**
>
> The intent of section 30 and sections 30B to 30I is—
>
> (a) to enable and encourage applicants and persons affected by an application under section 30 to resolve their differences concerning representation, without adjudication; and
>
> (b) to enable the Chief Judge to facilitate, as far as possible, successful resolution of differences surrounding an application by the persons affected, without adjudication.**]**
>
> **[30B Powers of Judge in addressing requests for advice**
>
> (1) The jurisdiction in section 30(1)(a) (to advise other courts, commissions, or

[9] I should also add here that during the course of this application both prior to and after the conference the Court has received various letters and "submissions" by marae committees, hapū organisations and individuals either in support of or opposed to the s 30 applications

tribunals) is exercised by written request to the Chief Judge by the court, commission, or tribunal seeking the advice.

[[(2) Within 20 working days of receiving a request under subsection (1), the Chief Judge must allocate the request either to him or herself or to another Judge to address.**]]**

(3) The Judge addressing a request for advice may (but is not obliged to) do 1 or more of the following things, before supplying the advice sought:

(a) exercise the powers in section 67 for the purpose expressed in that section:

(b) consult with the requestor and persons affected by the advice:

(c) refer some or all of the issues arising from the request to a mediator for mediation.**]**

[30C Powers of Judge in addressing applications for determination

(1) The jurisdiction in section 30(1)(b) is exercised on written application to the Chief Judge.

[[(2) Within 20 working days of receiving an application under subsection (1), the Chief Judge must allocate the application either to him or herself or to another Judge to address.**]]**

(3) The Judge addressing an application for a determination may (but is not obliged to) do 1 or more of the following things:

(a) determine the most appropriate representatives of a class or group of Maori, and order accordingly, if subsection (5) applies.

(b) refer the application to the Maori Land Court for hearing and determination:

(c) exercise the powers in section 67 for the purpose expressed in that section:

(d) refer some or all of the issues arising from the application to a mediator for mediation:

(e) dismiss or defer consideration of the application, if subsection (6) applies.

(4) The Judge may choose not to address an application if the Judge is satisfied that the issues it presents are governed by another enactment, or another part of this Act, or are more appropriately addressed in another forum.

(5) The Judge may make a determination under subsection (3)(a) if the Judge is satisfied that—

(a) the applicant has taken reasonable steps to notify those persons affected by the application of the application; and

(b) those persons do not oppose the application.

(6) The Judge may dismiss or defer consideration of an application under subsection (3)(e) if—

(a) it is vexatious, frivolous or an abuse of the Maori Land Court, or fails to satisfy rules of court; or

(b) it does not present serious issues for determination; or

(c) the Judge considers it appropriate to dismiss or defer consideration of the application for another reason.**]**

...

[30H Orders

(1) In making orders under section 30 and sections 30B to 30I, the Judge or the Court, as the case may be, may do 1 or more of the following:

(a) specify the duties and powers of the representatives of a class or group of Maori and impose conditions on the exercise of those powers:

(b) incorporate or restate the terms of an agreement reached by the persons participating in an application.

(c) incorporate the terms that express the outcome of mediation:

(d) specify that the order applies for general or specific purposes:

(e) specify the purpose or purposes for which the order is made:

(f) specify a date after which the order ceases to have effect.

(2) Neither a Judge nor the Court has jurisdiction to make an order that binds the Crown in relation to applications concerning Treaty settlement negotiations unless the Crown agrees to be bound.**]**

...

33 Additional members in relation to matter of representation

[(1) If the Maori Land Court exercises its jurisdiction under section 30(1) or section 30I(1), and unless the Judge determines an application under section 30C(3)(a), the Chief Judge must appoint 2 or more additional members (not being Judges of the Maori Land Court) to the Maori Land Court.**]**

(2) Each person appointed under subsection (1) of this section shall possess knowledge and experience relevant to the subject-matter of the request.

(3) The Chief Judge shall, before appointing any person under subsection (1) of this section for the purpose of any request, consult, as the case may require, with the parties to the proceedings or with persons involved in the negotiations, consultations, allocation, or other matter about the knowledge and experience that any such person should possess.

[29] The sections set out above were inserted into TTWMA on 1 July 2002 by ss 10 and 11 of the Te Ture Whenua Māori Amendment Act 2002. Prior to the amendments being introduced, Te Puni Kōkiri sought advice from the Law Commission on proposed changes to s 30. The Law Commission in a report dated February 2001 suggested a number of extensive amendments representing in their view a shift away from an adjudicative approach previously taken by the Māori Land

Court, to a Court interested in facilitating the resolution of differences by the parties themselves or by mediation.[10]

[30] There have been relatively few reported s 30 decisions prior and subsequent to the 2002 amendments. A brief discussion of them follows:

a) *Tararua District Council* (1994) 138 Napier MB 85 and 104 (138 NA 85, 104) and *Rangitāne o Tamaki nui a Rua Incorporated Society* (1996) 11 Takitimu Appellate Court MB 96 (11 ACTK 96). A request by a District Council to determine the most appropriate representatives of the hapū, iwi or general Māori of the Tararua district;[11]

b) *Ngāti Toa Rangatira* (1995) 21 Nelson MB 1 (21 NE 1). A contest to determine the appropriate representatives of Ngāti Toa for the purpose of fisheries allocations, consultation with the Marlborough District Council and negotiating with the Crown;[12]

c) *Ngāti Pahauwera* (1994) 92 Wairoa MB 66 (92 WR 66). An application to determine the most appropriate representatives for Ngāti Pahauwera for the purposes of discussions with the Crown in relation to the Mohaka River claim, Treaty settlements, liaising with District and Regional Councils and fisheries allocations;[13]

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[10] Law Commission *Study Paper 8 Determining Representation Rights Under Te Ture Whenua Māori Act 1993* (February 2001) at p iv

[11] In that case the representation issue was contested between Tamaki nui a Rua (Kahungunu) and Rangitāne o Tamaki nui a Rua (Rangitāne)

[12] The contest was between Te Runanga o Toa Rangatira Incorporated and Ngāti Toa Rangatira Mana Whenua Kite Tauihu Trust

[13] In that case the contest was between Ngāti Pahauwera Incorporated Society, Ngāti Pahauwera Negotiating Committee and Te Runanganui o Ngāti Pahauwera

d) *Ngāti Pāoa* (1995) 96A Hauraki MB 155 (96A H 155). An application to determine the most appropriate representatives for Ngāti Pāoa for the purpose of receiving railway settlement monies, Waitangi Tribunal claims, dealing with fisheries allocations and liaising with District and Regional Councils;[14]

e) *Te Reo Mana o Whakatohea* (1993) 68 Opotiki MB 328 (68 OPO 328) and (1994) 69 Opotiki MB 11 (69 OPO 11). An application to determine the most appropriate representatives to represent the hapū, iwi and individual Whakatohea members on all matters where consultation is required by law or is otherwise considered desirable between Māori and the Crown or any statutory body. Although that application appeared to be on very broad terms, it was brought when the Whakatohea Māori Trust Board were about to embark upon Treaty settlement negotiations with the Crown;

f) *Ngāti Tama and Ngāti Maru* (2004) 141 Aotea MB 29 (141 AOT 29) and 245 Aotea MB 15 (245 AOT 15). A request of the High Court to the Māori Land Court concerning a representative body for Ngāti Tama and Ngāti Maru in the context of representation on the Te Whare Punanga Kōrero Trust, a pan-tribal Māori health advisory body working with the Taranaki District Board. Ngāti Maru Wharenui Pukehou Trust sought recognition as the interim mandated body for Ngāti Maru. This was challenged by the Ngāti Maru Claims Progression Trust;

g) *Ngāti Pāoa* (2009) 141 Waikato MB 271 (141 W 271). An application by the Ngāti Pāoa Trust Baord, a charitable trust, in relation to the final destination of Treaty settlement monies and to

[14] Representation was contested between the Ngāti Pāoa Whānau Trust, Te Runanga o Ngāti Pāoa, Hauraki Māori Trust Board and others.

determine the appropriate representatives liaising with District and Regional Councils.[15]

[31] Only two cases have been decided post the 2002 amendments. Neither specifically discuss issues which arise in these applications being an interpretation of s 30C, s 30H and s 33.

[32] Before moving to the issues which I need to decide, I intend to comment briefly upon what I consider to be the intent of the provisions I have set out above and how they are to work in practice.

Interpreting Section 30

[33] In its 2001 discussion paper the Law Commission referred to a memorandum by Chief Judge Durie, as he then was, referring to the intention of s 30 of TTWMA in its original form. The memorandum underscores the point that the then Chief Judge considered that the intention of s 30, at least in its original form, was designed to determine actual representation problems as they had arisen. Section 30 was not designed to determine the representation of a group for all time or for a wide ranging number of purposes of no immediate concern. I set the quotation out in full: [16]

> The section may be defined by reference to the malady that the Legislature has sought to cure. The malady in this case would appear to be that persons seeking to effect negotiations, consultations, funding allocations or the like, in respect of Māori groups, are uncertain as to who may have an appropriate mandate to effect such negotiations or consultations or as to who may give a valid receipt. The section is designed to give that certainty so that outside parties may treat or be treated with. Conversely, the section does not appear to be designed to enable the Court to determine the appropriate representatives of a group for all or a wide number of purposes. The purpose must relate to some matter of business that is pressing at the time. It must also be established that the question of representation for the particular purpose described has not and cannot be settled outside of the Court.
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> …
>
> The section may be read in the context of past Legislative history. The legislature empowered the Māori Land Court to determine appropriate tribal representatives for a range of purposes in the [Runanga Iwi Act 1990], but then repealed that Act

[15] In this case the representation contest was between Ngāti Pāoa Whānau Trust and the Ngāti Pāoa Trust Board.

[16] Law Commission *Study Paper 8 Determining Representation Rights Under Te Ture Whenua Māori Act 1993* (February 2001) at p 10

> [Runanga Iwi Act Repeal Act 1991]. This supports the view that the current section limits the Court to determining representation in the light of specific representation problems that arise, and is not a mandate to determine the representation of a group for all or for a wide ranging number of purposes of no immediate concern. The words "or other matter" should be read in the context of the words preceding them. The common denominator for the preceding words is that some outside person wishes to treat with a Māori group, or vice versa.

[34] Section 30 envisages two types of applications. First an application to the Māori Land Court by other Courts, Commissions, or Tribunals seeking advice as to who are the most appropriate representatives of a class or group of Māori – s 30(1)(a), an advisory function.

[35] Secondly the Māori Land Court, may by order, determine who are the most appropriate representatives of a class or group of Māori – s 30(1)(b), an adjudicative function.

[36] Although the 2002 amendments introduced a number of new provisions, ss 30A-30J for example, the current s 30(1)(a) and (b) continue to reflect the two distinct types of applications available under s 30, one an application invoking an advisory function, the other an application invoking an adjudicative function.

[37] Regardless of the type of application made, I consider that s 30 was not designed to determine or advise upon appropriate representatives for a wide number of purposes for all time. I agree with the sentiments expressed by the former Chief Judge that there must be a matter of business that is pressing at the time, a matter of immediate concern that requires advice or determination. Section 30 in my opinion is not designed for parties to seek a wide ranging declaration by the Māori Land Court on matters of representation.

[38] In its study paper the Law Commission agreed with the sentiments expressed by the then Chief Judge Durie in relation to the way in which s 30 was intended to work in practice.

[39] In the s 30 cases I have referred to earlier the majority involved an actual dispute between two or more competing parties which a third party required advice on or a matter needed to be determined. What can also be said is that in none of

those cases has the Court advised or determined a single group of representatives for an iwi or hapū on all matters for all time. This is a matter to which I will return to later in this decision.

Intention of Section 30

[40] The new s 30 provisions, ss 30A-30J mark an intentional departure away from the previously adjudicative approach of the Māori Land Court. This is underpinned by s 30A which refers to the intent of the new provisions being to enable and encourage applicants and persons affected by an application to resolve their differences concerning representation, without adjudication.

[41] There are now express provisions enabling the Chief Judge and/or a Judge to whom an application is referred, to refer some or all of the issues arising from s 30 applications to mediation.[17]

[42] In my opinion both the advisory and adjudicative jurisdictions of the Māori Land Court under s 30 should be regarded as remedies of last resort. As the Māori Land Court said in *re Ngāti Pāoa Trust*:[18]

> In our view the Court should not lightly make an order under this section. While appointment by the Court is a means to settling disputes it transgresses the right of the tribe to appoint its representatives. It will invariably place the appointee in a position of strength. We believe that a Court imposed solution will not be as acceptable as one reached by the tribe and that the tribe should be encouraged to resolve any disputes over representation through traditional means.

Discretionary Jurisdiction

[43] As can be seen by the opening words of s 30(1), TTWMA confers a discretionary jurisdiction upon the Māori Land Court. The new provisions, for example s 30C, were introduced in order to provide some guidance as to the procedure to be adopted by a Judge in addressing an application for determination.

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[17] See for example s 30B(3)(c) and s 30C(3)(d), s 30D, s 30E, s 30F and s 30G

[18] (1995) 96A Hauraki MB 155 at 160

When one examines s 30, s 30C and the type of orders that may be made pursuant to s 30H it is clear that the jurisdiction to provide advice or to make any determination is discretionary in nature.

Application to determine, by order, who are the most appropriate representatives of a Class or Group of Māori – Section 30(1)(b)

[44] Jurisdiction pursuant to s 30(1)(a) and (b) is exercised on written application to the Chief Judge of the Māori Land Court – see ss 30B(1) and 30C(1).

[45] Within 20 days of receiving a request under s 30(1)(a) or an application for determination under s 30(1)(b) the Chief Judge must allocate the application either to himself or herself or to another Judge to address – see ss 30B(2) and 30C(2).

[46] The coversheets for the applications in their original form and in the case of the first applicants' amended application, all refer to the applications being pursuant to s 30 and seeking a "determination of the most appropriate representatives of Ngā Ruahine". In the body of both original applications, although not specifically referring to s 30(1)(a) or (b), can be read as being applications seeking to invoke both the advisory and adjudicative jurisdictions.

[47] In this case the Chief Judge, after receiving the applications, issued minutes allocating them to me. In two separate minutes, the Chief Judge referred to the applications as being brought pursuant to s 30(1)(b) of TTWMA. Importantly in so far as my role is concerned he allocated the applications to me for determination pursuant to s 30C(2).[19]

[48] What has been allocated to me pursuant to s 30C(2) are the applications in so far as they seek a determination. I cannot confer any jurisdiction upon myself to consider the matters as if they were a written request for advice pursuant to s 30(1)(a).

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[19] 2010 Chief Judge's MB 150 and 2010 Chief Judge's MB 212

[49] Thus I have proceeded on the basis that I am exercising the adjudicative function pursuant to ss 30(1)(b) and 30C.

The role of the Judge addressing an application for determination – s 30C

[50] Following allocation from the Chief Judge, a Judge may address the application for determination – s 30C(3), not address an application if the Judge is satisfied that the issues it presents are governed by another enactment, or another part of TTWMA, or are more appropriately addressed in another forum – s 30C(4), decide the matter substantively – s 30C(5), or dismiss or defer the application – s 30C(6).

[51] There was no similar provision prior to the 2002 amendments. It is clear that s 30C was designed to allow a Judge sitting alone, to have considerable discretion in dealing with s 30 applications.

[52] If a Judge chooses to address an application he or she has a wide discretion to deal with an application both procedurally and substantively pursuant to s 30C(3)(a)-(e) inclusive. This section provides that a Judge in addressing an application for determination may do one or more of the following things:

a) Sitting alone, where appropriate, substantively determine an application – s 30C(3)(a) and (5);

b) Refer the application to be substantively dealt with by the Māori Land Court – s 30C(3)(b);

c) Set the application down for a s 67 conference – s 30C(3)(c);

d) Refer some or all of the issues to mediation – s 30C(3)(d);

e) Dismiss or defer the application – s 30C(3)(e) and (6).

[53] A Judge may dismiss or defer consideration of the application if:

a) It is vexatious, frivolous or an abuse of the Māori Land Court, or fails to satisfy the rules of the Court – s 30C(6)(a); or

b) It does not present serious issues for determination – s 30C(6)(b); or

c) It is appropriate to dismiss or defer for another reason – s 30C(6)(c).

[54] I opine that a Judge would not ordinarily refer an application to a full panel of the Māori Land Court constituted under s 33, until such time that he or she has considered all of the possible powers available under s 30C and only then considered that the application warrants being referred to a full panel for hearing and determination.

The role of the Māori Land Court – s 33

[55] A Judge in considering an application for determination may refer that application to the Māori Land Court for hearing and determination – s 30C(3)(b).

[56] In this context the "Māori Land Court" does not mean a Judge sitting alone. It means a Judge of the Māori Land Court and two additional lay members, not being Judges of the Māori Land Court – s 33.

[57] As one can see from the above discussion, applications for s 30(1)(b) orders contemplate the "Chief Judge", a "Judge to whom the application is allocated" and the "Māori Land Court" playing quite separate roles. The Chief Judge receives an application and then determines whether to allocate it to himself or herself or to another Judge. If the applications are referred to another Judge, that Judge has a wide discretion to do a number of things pursuant to s 30C, including the power to dismiss or defer the application. A Judge may also refer the application to the "Māori Land Court" meaning in this context a panel of three persons being a Judge and two lay members.

First Issue – What is the correct interpretation of s 30H(2)?

> **[30H Orders**
>
> …
>
> (2) Neither a Judge nor the Court has jurisdiction to make an order that binds the Crown in relation to applications concerning Treaty settlement negotiations unless the Crown agrees to be bound.**]**

[58] During the course of the conference on 8 September 2010 I asked all parties what their interpretation of s 30H(2) was. The issue is relevant as in this case Ngā Hapū's mandate to negotiate a Treaty settlement has been recently recognised by the Crown. Furthermore the Crown in its memorandum of 6 September 2010 stated that it does not agreed to be bound by any order made in these proceedings.

[59] At the conference, I directed the parties to file written submissions on their interpretation of s 30H(2) in order to assist me in making my decision.

[60] Initially I was attracted to a submission made by Professor Boast during the course of the conference held at Hawera on 8 September 2010. During that conference Professor Boast submitted that the reference to "jurisdiction" in this sense meant that a Court should not embark upon the substantive process of hearing and determining the applications. He did not support a view that the Court could hear an application, make an order and then it is up to the Crown whether or not it chooses to negotiate with the body so appointed or not, but rather that the Court cannot even embark upon that process. He submitted that that was the most natural meaning of the provision. Alternatively he submitted that even if that was reading too much into the language of the provision, unless the Crown agreed to be bound by any such order it would be pointless to embark on such an exercise.

[61] In written submissions of 30 September 2010 Professor Boast submitted that unless the Crown agrees to be bound by the outcome of any s 30 process, the applications under s 30 in so far as they relate to negotiations and settlement have no purpose and could be dismissed by a Judge pursuant to ss 30C(3)(e) and 30C(6).

[62] On 9 September 2010 I was allocated a further three s 30 applications arising from a decision of the Crown to recognise the mandate of Te Runanga o Ngāti Porou to enter into Treaty settlement negotiations with the Crown.[20]

[63] In those proceedings I held a conference at Gisborne on 11 November 2010. Prior to that conference Crown Law filed a memorandum dated 5 November 2010. In that memorandum Crown Law accepts that where it does not agree to be bound by an order that a Judge or the Māori Land Court may make, nevertheless the Judge or the Māori Land Court has jurisdiction to entertain and make an order.

[64] At paragraph 8 of their memorandum they said:

> It is axiomatic that clear and unequivocal statutory language is needed in order to remove a jurisdiction that a court would otherwise have. There is no such language in this case; rather s 30H(2) of TTWMA contemplates an order concerning Treaty settlement negotiations being made but not one that binds the Crown.

[65] I accept that in order for the jurisdiction of the Court to be completely ousted requires clear unequivocal language in the relevant statute. I accept that s 30H does not completely oust the jurisdiction of the Court when the Crown does not agree to be bound. I prefer the interpretation that a Judge or the Māori Land Court can embark upon an exercise to determine who the most appropriate representatives of a class or group of Māori are for the purpose of Treaty negotiations but the Court cannot make an order in those proceedings that binds the Crown, unless the Crown agrees to be bound.

[66] The question for me to determine now is whether the Court should embark upon that exercise or not or invoke any of the other powers set out in s 30C(3).

Second Issue – Treaty Settlement Negotiations – s 30C

[67] During the course of the conference on 8 September 2010 I questioned the representatives for both applications in an effort to better understand what was at the

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[20] 2010 Chief Judge's MB 224. Those applications are by Ngāti Uepohatu – A20100010183, Ruawaipu – A20100010184 and Te Aitanga A Hauiti – A20100010185

heart of their applications. Mrs Katene for Muru me te Raupatu candidly accepted that the second application was in reality a challenge to the ongoing Treaty negotiations to be conducted by Ngā Hapū. In essence Mrs Katene submitted that Muru me te Raupatu had previously been mandated to negotiate Treaty settlement negotiations and as far as she was concerned that mandate continued to exist.

[68] Mr Pue on behalf of the first applicants indicated that their application was broader than simply seeking a determination in relation to Treaty settlement negotiations. Having said that he accepted that a major focus of the first application was also focused on Treaty settlement negotiations. He candidly indicated that notwithstanding the fact that the Court could not make an order binding the Crown, any favourable comments by the Māori Land Court would be of assistance to groups he represents in other proceedings. Mr Pue indicated that proceedings had been filed in the High Court seeking an injunction to prevent Ngā Hapū from continuing with Treaty settlement negotiations. I understand that those proceedings are set down for hearing in the High Court on 13 December 2010.

[69] In written submissions dated 20 October 2010 the first applicants again called upon me to set the matter down for a substantive hearing before the Māori Land Court. The applicants refer to reasons why they seek a substantive hearing which are inter alia to obtain opinions expressed by the Māori Land Court favourable to their interests and critical of Ngā Hapū. They believe that would assist them obtaining the injunction sought in the High Court.

[70] Treaty settlement negotiations take place within a political context – see *Attorney-General v Mair* [2009] NZCA 625 at [5].

[71] Case law in the Superior Courts has indicated that those Courts do not lightly inquire into decision making which is within the realm of policy making: see *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, *Milroy v Attorney-General* [2005] NZAR 562 (CA) and *New Zealand Māori Council v Attorney General* [2008] 1 NZLR 318 (CA).

[72] In this case Ngā Hapū have undertaken a series of pre-mandate and mandate hui. They have gone through a postal vote, which was overwhelmingly in favour of them continuing to negotiate a Treaty settlement with the Crown. Importantly that Deed of Mandate has been recognised by the Crown in a letter dated 24 August 2010 signed by the Minister for Treaty Negotiations and the Minister of Māori Affairs. In that letter both Ministers stated:

> We are therefore pleased to recognise the mandate of Ngā Hapū to represent the people of Ngāruahine in negotiations for the settlement of all their historical Treaty claims.

[73] The first applicants are highly critical of the mandating process undertaken by Ngā Hapū. They submit it was flawed and Ngā Hapū are unrepresentative of Ngā Ruahine. In essence what they are asking the Māori Land Court to do is undertake a form of judicial review of the mandating process undertaken by Ngā Hapū.

[74] Both applicants candidly say that Ngā Hapū are not the correct entity to carry out Treaty settlement negotiations with the Crown. Muru me te Raupatu say that they are the correct entity to carry out such negotiations. The first applicants say that Ngā Hapū has lost support and the majority of Ngā Ruahine descendants support their collective of individuals and hapū.

[75] The applicants recognise that the Court cannot make an order binding upon the Crown but they want the Māori Land Court to embark upon what would be a substantial exercise which they hope will result in a positive result for them. They see a positive result being that the Māori Land Court is critical of the mandating process undertaken by Ngā Hapū, critical of the fact that the Crown have recognised the mandate of Ngā Hapū and make a form of "declaratory order" that the Crown negotiate with either Muru me te Raupatu or the collective of individuals and hapū represented in the first application.

[76] I see little purpose in embarking upon such an exercise for the following reasons:

a) The mandate of Muru me te Raupatu lapsed in 2004;

b) Ngā Hapū have undertaken a pre-mandate and mandating process;

c) A postal vote overwhelmingly supported Ngā Hapū to embark upon Treaty settlement negotiations;

d) The Crown have recognised the mandate of Ngā Hapū;

e) The Crown has not agreed to be bound by any s 30 order;

f) Any hearing would amount to little more than an exercise in allowing the applicants to outline their concerns. There is very little that the Māori Land Court could do to assist the applicants other than listening. No order binding the Crown can be made;

g) At the heart of these applications is the underlying assertion that the Crown are negotiating with the wrong entity and should desist from doing so. If the Crown cannot be bound by any such order and has not agreed to be so bound, there appears to be little point in embarking upon that exercise.

[77] Section 30H(2) was not part of the original TTWMA Amendment Bill 2002. It was introduced by supplementary order paper after the second reading and after the Select Committee report. The Hansard debates during the passage of the amendments indicate that there was some debate about the late introduction of s 30H(2). The Hon. Georgina Te Heuheu, then in opposition, asked a number of questions to the then Minister of Māori Affairs. She was concerned that the amendment was introduced late, after the Select Committee process, and that the Crown would not be bound by any such order. She requested that the clause be referred back to the Select Committee. Despite repeated requests to the then Minister of Māori Affairs to discuss why the changes were made, the Minister did not do so. Rather he referred to an emphasis in the new provisions upon mediation.[21]

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[21] New Zealand Hansard Search, New Zealand Parliamentary Debates, Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill: In Committee per Hon. Georgina Te Heuheu<www.vdig.net>

[78] At the time of the introduction of the new amendments, momentum for the settlement of Treaty claims by iwi and hapū was gathering pace. Whilst Crown policy on negotiation of Treaty settlements has changed from time to time, as a general proposition what can be said is that obtaining a deed of mandate recognised by the Crown is a time consuming, complex and expensive process which takes place within a political context.

[79] I infer that s 30H(2) was introduced into TTWMA to cover a situation such as that present in this case. That being that the Crown does not wish to be bound by a s 30 representation order in the context of Treaty settlement negotiations, when a mandating exercise has already been undertaken and the Crown have recognised a deed of mandate. Within the context of Treaty settlement negotiations, the Crown prefer to rely upon their own representation process, rather than be bound by any order of the Māori Land Court.

[80] This decision should not be read as supporting the proposition that the Māori Land Court should never proceed to hear and determine a s 30(1)(b) application when the Crown have recognised the mandate of a negotiating group. Each application will be fact specific. There may well be situations in which the mandate of a group has been in place for some time and is under serious challenge from its members. There may be situations in which the Crown itself, without necessarily wishing to be bound, might wish to avail itself of the benefit of a Māori Land Court s 30 determination when it becomes apparent that there is a serious mandate dispute.

[81] A Judge in addressing an application for determination may do a number of things pursuant to s 30C(3).

[82] This is not a circumstance in which there is no opposition to the application therefore I cannot of my own accord determine the most appropriate representatives for Ngā Ruahine – s 30C(3)(a) and (5). I had initially set the applications down for a s 67 conference pursuant to s 30C(3)(c). It was made clear during the course of that conference and in the directions I made that I wanted further submissions on whether

or not as a Judge sitting alone I could dismiss the application.[22] Having received those further submissions from all concerned, there is no point in referring the matter back to a further s 67 conference.

[83] Section 30C(3)(d) allows me to refer all or some of the issues to mediation. I take into account the general intent of the s 30 provisions as expressed in s 30A. In this situation however the first applicants and Ngā Hapū have referred to previous attempts to mediate. Both sides, whilst blaming the other, are of the opinion that mediation has not been successful. No parties requested that the applications be referred to mediation.

[84] Thus the only realistic pathways available to me are to either refer the application to the Māori Land Court for hearing and determination or dismiss or defer the application – s 30C(3)(a) or s 30C(3)(e) and (6).

[85] In this case I propose to dismiss the applications in so far as they relate to Treaty settlement negotiations.

[86] In doing so I do not consider that the applications were vexatious, frivolous or an abuse of the Māori Land Court. Nor do I consider that they did not present serious issues for determination.

[87] However I rest my decision on another reason to dismiss the applications. I consider that little purpose would be achieved in embarking upon an exercise aimed at preventing Ngā Hapū from concluding Treaty settlement negotiations with the Crown, unless the Crown agrees to be bound. As the Crown has not agreed to be bound the Court has no jurisdiction to make the type of order that the applicants seek. For those reasons it is appropriate to dismiss the applications.

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[22] 255 Aotea MB 134

Third Issue – The Balance of the First Application – s 30C

[88] During the course of the conference on 8 September 2010 I queried the first applicants as to the nature and scope of the first application. Mr Pue for the applicants indicated that the s 30(1)(b) order sought was for a broad range of matters. By way of example he referred to representation before the Waitangi Tribunal, on RMA matters, before the Office of Treaty Settlements, and before all non-Māori or government bodies.

[89] It was apparent to me in hearing the submissions from Ngā Hapū that they had considered the application by the first applicants to be limited solely to issues concerning Treaty settlement negotiations. With that in mind I gave the first applicants an opportunity to amend their application and directed that it be filed by 30 September 2010.

[90] I directed the first applicants to be specific as to the matters in which they sought a s 30 order. I indicated during the conference that my initial view was the application was painted too broadly and would be difficult for Ngā Hapu to respond.

[91] The amended application was subsequently received. It is lengthy, broad in scope and nature and it must be said difficult to understand.

[92] As an example I set out at paragraph 17 of the amended application:

> 17. As you can see, we also seek a determination , by order, as to who is the most appropriate representatives of Nga Tangata, Nga Whanau, Nga Hapu and Nga Ruahine Iwi,
>
> for the purpose of (current or intended) Whakamaru (protecting), and Whakatau (promoting):
>
> This includes defending, reaffirming and advancing, upholding, supporting, encouraging, endorsing, developing, reaffirming all our rights whatsoever, past rights present rights, and future rights that are. And arising rights, from, and including:
>
> 1. Te Mana o Nga A-Tu-A (natures life forces) Whenua/Moana, (ki runga ki raro, ki roto, ki waho) land/air/water/sea including Taonga, and sub surface and above whenua/, submerged lands, all petroleum and all minerals, all waters,
>
> Te Mana o Tangata, Whanau, Kainga, Hapu and Nga Ruahine Iwi

2. Whäia, Kia Honoa Te Rongo, Kia Hohou Te Rongo, Securing the inalienable rights to peace, justice, freedom and the abundance that flows from that. Ending fundamental Human Rights breaches, eg: colonialism, oppression, racism, apartheid, inequality.

3. Te Tino Rangatiratanga o Nga Hapu and Nga Ruahine Iwi.

   The social, economical and political system of the Hapu and Nga Ruahine nation.

4. Tino Rangatiratanga o Nga Kainga, Whenua, me Nga Taonga Katoa,

   The social, economical and political organs and systems of our communities, lands, resources and all responsibilities.

5. Whaimana Nga Tangata,Te Mana Motuhake Whenua, The empowerment of the people, the free and inter-dependent nation.

6. Ruahine Ihi, (incoming energy) Ruahine Wehi (awesome energy), Ruahine Mana (clear energy), Mauriora ki te Ao (clear life energy of the world),

7. Matauranga Ruahine (clear knowledge), Whakanohotanga (occupation), Kaitiakitanga (agency and process of maintaining pure energy), Whakamahitanga (process of clear action), Whakahaeretanga (process of moving forward, development), Reo Ruahine (communication systems), Kaupapa Ruahine (objectives),Whakawhanaungatanga (inter-relationships, inter-connections, inter-dependence), Whakapapa Ruahine (layers of life), Manaakitanga (process of empowerment), Wananga (strengthening), Maramatanga (process to enlighten), Mautanga (process to reaffirming right), Kotahitanga (process of uniting), Awhinatanga (process of supporting), Arohatanga (process of supporting balanced life), Hauora (healthy life), Nga Ruahine ki Uta (Nga Ruahine inland), Nga Ruahine ki Tai Nga Ruahine offshore),

8. Whakamaru Nga Ruahine (gather together, effectively strengthen and develop Nga Ruahine Iwi (nation), Nga Ruahine Taketake (embedded), Te Kotahitanga (the process of uniting) the practical and proven Tikanga Nga Ruahine (rule of law, accepted principles of order, Nga Ruahine Law) and Kawa (Processes) Hautikanga Justice system.

9. Te Mana Tangata o Nga Ruahine (the sovereignty/ and inalienable rights and responsibilities of Nga Ruahine people, Nga Honohono o Nga Ruahine. Te Whakputanga o Te Rangatiratanga, Te Tiriti o Waitangi.

10. to hold, protect, manage, administer, occupy, effectively use, develop, work and retain Nga Ruahine Whenua (lands), Nga Ruahine Awa(waterways), Nga Ruahine Moana (maritime territory), Nga Ruahine Taonga Tuku Iho (responsibilities), Te Pūtea Nga Ruahine (resources, reserves) and assets, together with such other Taonga (responsibilities) that it may from time to time acquire or receive under Kaitiakitanga and upon trust.

11. establish and operate economic operations by combining our Tangata with our Whenua (resource base).

12. Representing the collective interests of Nga Ruahine Whanau, Hapu and Nga Ruahine Iwi (nation) on all matters, Nga Ruahine ki Uta, Nga

> Ruahine ki Tai, Ruahine ki roto, Ruahine ki waho, Ruahine ki runga, Ruahine ki Raro.
>
> These interests and matters include being the most appropriate representative for Nga Ruahine Iwi for all and any relations with other Iwi, Manene (Non Maori) and the Kawanatanga, (colonial regime)Office of Treaty Settlement, and include all Acts including but not limited to the following Acts. Resource Management Act, Local Government Act, Treaty o Waitangi Act, CYPA, Crown Minerals Act , Conservation Act, Maritime Act, The Public Works Act, Transit Act, Taranaki Maori Trust Board Act, Maori Fisheries Act, Continental Shelf Act. Te Ture Whenua Act, Maori Aquaculture Act and any other purpose as determined by a notified Hui-a- Hapu, Hui-a-Iwi.

[93] In their written submissions of 21 October 2010 counsel for Ngā Hapū submit that the amended application broadens further the scope of the original application, that it seeks matters which are beyond the scope and jurisdiction of the Māori Land Court to determine and that there is no indication that there is any dispute that requires the investigation by the Māori Land Court.

[94] I propose to dismiss the balance of the first application, as amended on the basis that it does not present serious issues for determination. I say that for the following reasons.

[95] The jurisdiction of the Māori Land Court in relation to subsection 30(1)(b) applies to representation in or for the purpose of current or intended proceedings, negotiations, consultations, allocations of property, or other matters. Putting aside the ongoing Treaty settlement negotiations referred to earlier, there are no current or intended proceedings, negotiations, consultations, or allocations of property which involve a dispute requiring the intervention of this Court.

[96] I do not consider that reference to the words *"or other matters"* as providing an open ended ability for applicants to invoke the jurisdiction of the Māori Land Court. Those words must be read within the context of what s 30 is designed to do and coloured by the words which immediately precede it. Section 30 was designed to determine actual representation disputes and problems. It was not designed to determine the representation of a group for a wide ranging number of purposes of no immediate concern.

[97] I return to my view expressed earlier that s 30 in its original form and as amended provides a procedure to determine who are appropriate representatives of Māori groups when that fact is uncertain. The section is not designed to enable the Court to determine, in a vacuum, appropriate representatives of a group for a number of purposes and for all time. That is what the first applicants are seeking.

[98] In this context there are no matters of dispute or contest between the parties which require the intervention of the Court to settle the dispute. It is not the business of this Court to provide a subsidised opinion to the applicants. It is not the purpose of this Court to provide a wide sweeping declaratory order where the decision will have no utility – see *Simpson v Whakatane District Court* [2006] NZAR 247 at [22]-[30].

[99] In so far as the balance of the application is concerned there are no proceedings, negotiations, consultation, allocations of property or other matters which require the intervention of the Court. Even if there were, the application is so broad that it cannot be realistically entertained. The application seeks an order determining the representation of a group for a wide ranging number of purposes, of no immediate or urgent concern and for all time. It is not appropriate to refer such an application to the Māori Land Court for hearing.

Decision

[100] Both applications in so far as they relate to Treaty settlement negotiations are dismissed pursuant to ss 30C(3)(e) and 30C(6)(c).

[101] The balance of the first application is dismissed pursuant to ss 30C(3)(e) and 30C(6)(b).

Costs

[102] I do not necessarily encourage an application for costs as the respondent is ironically enough a mandated body which represents the first and second applicants.

Notwithstanding the current dispute and a previous history of mandate disputes, the parties will need to have an ongoing relationship. Fundamentally of course the representatives of both the applicants and the respondent are also bound by whakapapa. Notwithstanding those comments, counsel for the respondent may file an application for costs if they so wish. They should do so by filing a memorandum within 14 working days upon receipt of this judgment. I direct that a copy of any such memorandum is to be served upon the first and second applicants within the same timeframe.

Pronounced in open Court at 3.15 pm in Hamilton on this 8th day of December 2010.

S R Clark
JUDGE