I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O WAIKATO MANIAPOTO
In the Māori Appellate Court of New Zealand
Waikato Maniapoto District

A20180009431
APPEAL 2018/24

WĀHANGA *Under*	Section 58 Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Ngāti Pāoa – an appeal of an application for review of a determination made pursuant to s 30(1)(b), Te Ture whenua Māori Act 1993 at 173 Waikato Maniapoto MB 51-74 on 12 December 2018
I WAENGA I A *Between*	NGĀTI PĀOA TRUST BOARD Ngā kaitono *Appellants*
ME *And*	NGĀTI PĀOA IWI TRUST Ngā kaiurupare *Respondents*

Nohoanga: *Hearing*	19 February 2020 (Heard at Hamilton)
Kooti: *Court*	Judge S F Reeves (Presiding) Judge M J Doogan Judge T M Wara
Kanohi kitea: *Appearances*	J Gardner-Hopkins for the appellants M Mahuika for the respondents
Whakataunga: *Judgment date*	10 December 2020

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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Hei tīmatanga kōrero - Introduction

[1] For a number of years Ngāti Pāoa has been embroiled in a leadership struggle that has played out in multiple jurisdictions, including the Māori Land Court, the Environment Court, the High Court and the Waitangi Tribunal. On one side is the Ngāti Pāoa Trust Board (the 'Trust Board'), which was constituted to represent the interests of Ngāti Pāoa and mandated to negotiate Treaty settlements, and on the other is the Ngāti Pāoa Iwi Trust (the 'Iwi Trust') which in 2013 was ratified as the post-settlement governance entity for Ngāti Pāoa. In accordance with their legal structures both entities have, or will have, representative roles and both have support from some iwi members.

[2] This appeal concerns a dispute between the Trust Board and the Iwi Trust as to who can represent Ngāti Pāoa in resource management and local government matters. In 2009, the Māori Land Court made an order pursuant to s 30 Te Ture Whenua Māori Act 1993 declaring that the Trust Board is the representative body for Ngāti Pāoa in relation to the Resource Management Act 1993 ('RMA') and Local Government Act 2002 ('LGA').[1] In 2018, the Iwi Trust sought a review of that order, and the lower Court determined that due to a change of circumstance and fact it was appropriate to amend the 2009 order by including an end date of Friday 21 December 2018.[2]

[3] The issue in this appeal is whether the s 30 order ought to have been ended.

Kōrero whānui - Background

[4] Representation for Ngāti Pāoa has been an issue for some time. The Court had issued an earlier s 30 order in 1995, naming the Ngāti Pāoa Whānau Trust as the appropriate representative body with local and district councils for resource management matters.[3] This order stipulated an expiry date of 31 March 1998.

[5] On 10 December 2004 the Trust Board was registered. In 2008, several members of Ngāti Pāoa sought a fresh s 30 order recognising the Trust Board as the representative for

[1] 141 Waikato MB 271-291 (141 W 271).
[2] *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Iwi Trust Board* (2018) 173 Waikato Maniapoto MB 51 (173 WMN 51).
[3] *Ngāti Pāoa Whānau Trust v Hauraki Māori Trust Board* (1995) 96A Hauraki MB 155 (96A H 155).

Ngāti Pāoa for certain purposes. The Court found it appropriate to appoint representatives on RMA and LGA matters, and made the following order:[4]

> [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.

[6] Between 13 and 17 March 2011 the Trust Board held a series of hui to seek a mandate to conduct Treaty negotiations with the Crown. Ngāti Pāoa voted in favour, and on 29 June 2011 the Crown recognised the mandate of the Trust Board. The Trust Board adopted a process to allow Ngāti Pāoa to elect and appoint negotiators directly via a hui-a-iwi. A post settlement governance entity ('PSGE') was also required, and the newly established Iwi Trust was ratified by Ngāti Pāoa in 2013 to receive and administer Treaty settlement assets.

[7] Following the ratification of the Iwi Trust as PSGE, a number of trustees of the Trust Board resigned or were removed as trustees. Some took up positions with the Iwi Trust. In 2016 the High Court found that the Trust Board had been not been properly constituted for some time and ordered the establishment of a validation committee to compile an updated register of members and oversee the election of new trustees. New trustees were elected in March 2017.[5]

[8] Between 2013 and 2018, both the Trust Board and the Iwi Trust had asserted themselves as the representatives of Ngāti Pāoa in various local government and resource management matters. There is also ongoing conflict between the two bodies over the Iwi Trust's mandate to negotiate a Treaty settlement with the Crown on behalf of Ngāti Pāoa.

[9] The present dispute over the s 30 order is but another field of battle. Before turning to the particulars of the dispute it is important to highlight the purpose of a s 30 order.

The purpose and effect of a s 30 order

[4] *Ngāti Pāoa* (2009) 141 Waikato MB 271 (141 W 271) at [40].
[5] *Roebeck v Ngāti Pāoa Trust Board* (2016) NZ HC 2458.

[10] Section 30 of Te Ture Whenua Māori Act 1993 (the 'Act') states:

> **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.

[11] In *Manuirirangi v Nga Hapu o Nga Ruahine Inc,* Judge Clark cited with approval the following description of the intention of s 30 in its original form by then Chief Judge Durie.[6]

> 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 affect 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…
>
> 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

[6] *Manuirirangi v Ngā Hapu o Nga Ruahine Iwi Inc* [2010] Chief Judge's MB 355 (2010 CJ 355) at [33].

> a range of purposes in the [Runanga Iwi Act 1990], but then repealed that Act [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.

[12] Judge Clark concluded that s 30 was not designed to determine or advise upon appropriate representatives for a wide number of purposes for all time. We concur. There must be a matter of business that is pressing, and which requires determination by way of a representation order.[7]

[13] The Court below cited with approval *Shaw v Ngāti Huarere ki Whangapoua*[8], a decision which in turn relied upon the earlier Ngāti Pāoa s 30 case from 1995. In *Shaw* the Court said:

> [27] In *Ngāti Pāoa Whānau Trust v Hauraki Māori Trust Board*, the Court noted the discretionary nature of the jurisdiction under s 30 and commented that in an "ideal world" representation would depend upon the following factors:
>
> (a) Broad based consent of people or mandate;
>
> (b) Due process of consultation according to tikanga;
>
> (c) Credibility in terms of leadership;
>
> (d) Approval of rangatira and kaumātua;
>
> (e) Provision for accountability to the tribe.

[7] 124 Waikato MB 3-15 (124 W 3).
[8] *Shaw v Ngāti Huarere ki Whangapoua – Ngāti Pu (2015)* 113 Waikato Maniapoto MB 82 (113 WMN 82) at [27]

[28] … if those principles were followed then one would expect the decision by consensus which would be unlikely to require the Court to be involved. The Court went on to find:

> In our view the Court should not lightly make an order under this section. While appointment by the Court is a means of 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.

The purpose of a s 30 order

[14] It is clear from the foregoing that a binding s 30 order is made in limited circumstances in response to an established or pressing need to provide certainty as to representation for particular purposes. The jurisdiction to make (or amend) such an order is fact specific and is not meant to otherwise supplant the inherent right of a Māori collective to choose its own representatives.

[15] Under s 30 the Māori Land Court has both an advisory and determinative jurisdiction. Advisory jurisdiction exists under s 30(1)(a) where the Court can advise other courts, commissions or tribunals as to who is the most appropriate representative. This advice is not binding.

[16] In contrast, a binding jurisdiction exists under s 30(1)(b) where the Māori Land Court can determine who is the most appropriate representative by order. This is binding on everyone except the Crown.[9] Any doubt as to whether a s 30 order was binding was resolved by the 2002 amendments. The fact that only the Crown is specifically exempt reinforces the otherwise binding character of a s 30(1)(b) order which remains legally in force until a new order under s 30 is made or an amended order under 30I is granted.[10]

[9] Te Ture Whenua Māori Act 1994, s 30H(2): concerning Treaty settlement negotiations unless the Crown agrees to be bound.
[10] *Edwards – Whakatōhea* (2018) 183 Waiariki MB 169-194 (183 WAR 169) at [56].

What is the effect of the order in other jurisdictions?

[17] We set out this background context not only because it is central to the issues before us, but also because we have a concern about how this particular s 30 order has been understood and characterised in other jurisdictions. Issues of representation for Ngāti Pāoa were raised in the Environment Court and addressed in *SKP Inc v Auckland Council*.[11] In that case, a consent holder acted on Auckland Council's advice and consulted with the Iwi Trust during the preparation of its resource consent application in 2015, rather than the Trust Board. The Trust Board did not become aware of the application until approximately April 2018, by which time the application had been heard. [12] In August 2018 a rehearing in the Environment Court was sought, on the basis that the Trust Board (amongst other matters) was not consulted. In its decision the Environment Court had this to say about the s 30 order and its interplay with the RMA:[13]

> … Ms Morrison-Shaw proceeded to submit that even if an order under s 30 conferred status on the holder in the general legal sense, it would not be determinative, in particular because there is no provision in the RMA that directs a consent authority to give more weight to the evidence of one person over another based on the fact that one of them holds a s30 order, and that s 104(1)(c), the existence of a s 30 order in favour of one of the parties could be a relative matter to have regard to but is not a factor to be accepted over all others… We find her submissions on these points to be an accurate interpretation of the workings of both Acts.

[18] The 2009 order made by the Court was a binding determination under s 30(1)(b) Te Ture Whenua Māori Act. It was not advice pursuant to s 30(1)(a).

[19] On its terms the order binds a consent authority to recognise the representative capacity of the Trust Board in relation to the Resource Management and Local Government Acts. Any doubts about this were removed by the amendments made to s 30 in 2002. They included repeal of what was formerly s 30(4) which provided that other courts, tribunals or commissions may accept any advice given, and that the Chief Judge and the Chief Executive of Te Puni Kōkiri may accept as conclusive a determination made under 30(1)(b). As

[11] *SKP Inc v Auckland Council* [2019] NZEnvC 199.
[12] See *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [10].
[13] *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [36].

originally enacted it was only the Chief Judge and the Chief Executive who could invoke the jurisdiction under s 30(1)(b) to seek a determination.

[20] It would therefore be, in our respectful opinion incorrect to characterise the determination under s 30(1)(b) in this case as simply one of a number of matters to have regard to, but not a factor to be accepted over all others. In the event of conflict or ambiguity over representative capacity it has a binding effect in its field of operation, in this case representation for RMA and the LSA purposes. That is the function of such an order. If other parties consider it problematic or incorrect as a matter of fact, the remedy is to apply to the Māori Land Court for directions or to review the order.

[21] This was the course adopted by the Iwi Trust in September 2018 when it applied for a review of the s 30 order. We first describe the review power, and then turn to the appeal from its application in this case.

Application for review of s 30 order

[22] Amendments to Te Ture Whenua Māori Act in 2002 gave the Māori Land Court jurisdiction to review a s 30 determination:[14]

> **30I Review of advice or determination**
> (1) The Maori Land Court may review any advice or determination supplied by it under section 30(1) if,—
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> (a) in the case of advice, it is requested to do so by the court, commission, or tribunal at whose request that advice was supplied; and
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> (b) in other cases, the Chief Judge is satisfied, on receipt of a written application, that a review is necessary.
>
> (2) The court may refer some or all of the issues arising on a review of advice or a determination under subsection (1) to a mediator for mediation.
> (3) Sections 30D to 30G apply, with necessary changes, to mediation under subsection (2).
> (4) **The court may, on any review under subsection (1), change any advice supplied by it under section 30(1)(a) or amend an order made by it under section 30(1)(b) to reflect changes of circumstances or fact.**

[14] Te Ture Whenua Māori Act 1994, s 30I.

> (5) A review under subsection (1) must be completed within 3 months of receipt of the request or application for review.
> (6) This section applies to advice given and determinations made under section 30 before Te Ture Whenua Maori Amendment Act 2002 (the Maori Land Amendment Act 2002) was passed.
>
> [emphasis added]

[23] Of particular importance in the present case is s 30(4), whereby the Māori Land Court may, in reviewing a s 30 order, amend the order to reflect changes of circumstance or fact. This discretion is significant as it enables the Māori Land Court to respond to shifts in representation within Māori collectives, a feature that often arises during the Treaty settlement process.

[24] Section 30I was recently considered by Judge Coxhead in *Edwards - Whakatōhea*:[15]

> [41] The Court may only review a s 30 order if the Chief Judge is satisfied that a review is necessary. On a review of an order made per s 30(1)(b) the Court can amend the order to reflect changes of circumstance or fact. **It is implicit in this provision that such changes of circumstance or fact must be of a nature to justify any such amendment.** The necessity for such interpretation can be gleaned from the fact that prior to the substantial amendments in 2002 (and those in 2001) the Court had no ability to amend s 30 orders. What was required was a new s 30 order to supplant the existing one, necessitating a fresh s 30 process and the stringent requirements inherent in that process.
>
> [emphasis added]

[25] In *Edwards - Whakatōhea,* when assessing whether the Court should review the s 30 order, Judge Coxhead considered the following matters:[16]

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

(b) Is the s 30 order still effective?

[15] 183 Waiariki MB 169-194 (183 WAR 169) at [41].
[16] 183 Waiariki MB 169-194 (183 WAR 169) at [51].

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

(d) Should other amendments be made?

[26] We note that the order at issue in that case predated amendments to s 30 enacted in 2002. This appears to be why the court in that case asked whether the order was still in force, and also whether it was still effective. This was also the approach taken by the lower court in this case. For reasons that follow we conclude that a focus on the question of whether the section 30 order is still effective has led the court into error. It is important to stress that the issue on any applications under s 30(I) to review a determination is whether there has been a material change of circumstances or fact to warrant an amendment. Asking whether the order is still effective is not helpful because it tends to combine (and confuse) the question of legally effective with effective as a matter of fact.

Approach on appeal

[27] This is an appeal from the exercise of a discretion. The appeal criteria are different from that of a general right of appeal. The Supreme Court in *Kacem v Bashir* said:[17]

> [32] In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[28] These criteria were applied by the Court in *Faulkner v Hoete,* which determined that the appellant must show that the Court below:[18]

(a) Erred in law or principle;

(b) Took into account an irrelevant matter;

(c) Failed to take into account a relevant matter; or

[17] [2010] NZSC 112 at [32].
[18] *Faulkner v Hoete - Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17) at [11].

(d) Was plainly wrong.

[29] Mr Gardner-Hopkins submitted that an additional principle should apply, that the appellate court should intervene where injustice may be done. The Court of Appeal recently considered the role of the appellate court in *Inia v Julian*.[19] The Court of Appeal affirmed that the interests of justice underpin the statutory role of the appellate court and it is not necessary in our view to extend the criteria confirmed in *Faulkner v Hoete.* The interests of justice are the implicit foundation of our appellate function. It would be wrong to characterise "injustice" as an additional limb to the criteria for an appeal from the exercise of a discretion.[20]

The Appeal

[30] The appellant relied on nine grounds of appeal which are broad in scope.[21] For the reasons that follow we conclude that one ground has some merit, though this does not ultimately effect the outcome of the appeal. We address this matter first.

[31] The lower Court made the following findings:

> [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.
>
> …
>
> [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.

[19] *Inia v Julian* [2020] NZCA 423 at [14].
[20] *Faulkner v Hoete - Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17).
[21] Notice of Appeal by the Ngāti Pāoa Trust Board dated 21 December 2018.

[32] Mr Gardner-Hopkins claimed, that the lower Court wrongly found that the purpose of the s 30(1)(b) order would not be defeated if the 2009 order was ended. He submitted that the purpose of a s 30(1)(b) order, or at least some of its consequences as identified by the Court include providing clarity for groups seeking to enter discussions with that group of Māori and resolving a dispute and placing one party in a position of strength by way of a court order. He reasoned that while any Ngāti Pāoa entity could participate in a resource management process even if the 2009 order was maintained, the Environment Court would be entitled to give greater weight to the views of an entity taking the benefit of the order.

[33] Mr Mahuika did not make any specific submissions for the Iwi Trust on this point of appeal.

[34] The 2009 order determined that, the Trust Board represented Ngāti Pāoa in relation to the Resource Management Act and Land Government Act. In October 2013 the Iwi Trust also asserted itself to the Auckland Council as the mandated representative of Ngāti Pāoa. From this time the Iwi Trust actively participated in local government and resource management issues with the endorsement of the Auckland Council as if it were the representative of the iwi.[22] As a matter of law, we think the Auckland Council was wrong to engage with the Iwi Trust as if it were the representative of the iwi in the knowledge that there was an extant s 30 order.

[35] The appropriate course in the face of uncertainty or change of circumstance is to apply to the Māori Land Court for directions or a review of the s 30 order.

[36] The lower Court found that these changes of circumstance rendered the 2009 s 30 order nugatory or ineffective. It concluded that the Iwi Trust had by incremental means, largely due to the legal abeyance of the Trust Board between 2014 and 2017, become the effective representative for Ngāti Pāoa.[23]

[37] In our view the lower Court has wrongly found that the purpose of the original order would not be defeated if amended, because both the Iwi Trust and the Trust Board are actively participating in RMA and LGA matters The finding appears to conflate two issues.

[22] See *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [10].
[23] (2018) 173 Waikato Maniapoto MB 51 (173 WMN 51) at [60].

The first is satisfaction of the factual grounds that may warrant an amendment to a s 30(1)(b) order where a specific purpose may no longer be relevant or applicable because of changes of circumstances or fact (s 30 (I)(4)). The second is the fact that the s 30 order remains legally in force until it is either replaced or amended.[24]

[38] For reasons which follow, we are of the view the lower Court was correct in concluding that there had been changes of circumstances or fact which would warrant amendment to the s 30 order. We cannot however agree that these factors of themselves rendered the order nugatory or legally ineffective, absent a further order of the Court.

[39] The correct inquiry is not whether the original purpose of the order would be defeated, but whether facts and circumstances have changed such that amendment is now required. The lower Court then makes various findings as to changes of circumstances and fact and concludes that these have rendered the order ineffective. This approach (which is similar to that followed in the *Edwards* case) implies that this is a threshold question when it is simply a relevant factor to have regard to when assessing whether or not there has been a change of circumstance or fact that requires the order be amended.

[40] We stress that the issue to determine on an application for review of a s 30(1)(b) order is whether there has been a change of circumstances or fact that would require an amendment to the order to reflect the change. The original purpose of the order and its contemporary effectiveness as a matter of fact will be relevant matters, but they are no more than that.

[41] We now turn to consider in more detail how the lower Court approached the question of whether there had been a change of circumstance or fact that warranted amendment of the s 30 order.

Was there a material change of circumstances or fact?

[42] Mr Mahuika submitted that the significant changes in circumstance which render the 2009 order ineffective are as follows:

[24] *Edwards – Whakatōhea* (2018) 183 Waiariki MB 169-194 (183 WAR 169) at [55]-[56].

(a) The establishment of the Iwi Trust, which was ratified as the PSGE for Ngāti Pāoa in 2013, and which was intended by Ngāti Pāoa to succeed the Trust Board as Ngāti Pāoa's representative entity. The ratification of the Iwi Trust not only created it as a representative body, but it was also the clear intention that it would assume the representative functions of the Trust Board.

(b) The lack of activity from the Trust Board between 2014 and 2017. The Trust Board was legally inactive and therefore not representative between (at least) 2015 and 2017 as elections were required to fill vacant trustee roles.

(c) The Trust Board did not, in that same period, undertake its representative role including its role in supporting Treaty settlement negotiations. Instead the role was undertaken by the Iwi Trust.

(d) Ngāti Pāoa is at an advanced stage for its remaining Treaty settlements, meaning that even the role of the Trust Board as the mandated entity from the Ngāti Pāoa settlement negotiations is largely at an end.

[43] Mr Gardner-Hopkins submitted that the facts or circumstances have not changed sufficiently to require the termination of the 2009 order. In addition, to the extent that any circumstances have changed that might otherwise have weighed in favour of terminating the 2009 order, they have arisen through the wrongful (if not unlawful) conduct of the Iwi Trust and should not therefore be relied on to terminate the 2009 order.

[44] In considering whether the lower Court was correct to conclude that there had been a change of circumstance or fact sufficient to warrant amendment and termination of the s 30 order, we have found it helpful to break down the issues and sub-issues arising in the following way:

(a) Was the Iwi Trust ratified to carry out all representative functions for Ngāti Pāoa?

(i) What was effect of the ratification process?

(ii) Was the resolution at the 2013 Annual General Meeting ('AGM') valid?

(b) Was the Trust Board legally inoperative?

(i) Could the Trust Board carry out its representative functions?

(c) Is the Trust Board's role largely at an end?

(d) What is the effect of the political conflict within Ngāti Pāoa?

Was the Iwi Trust ratified to carry out all representative functions for Ngāti Pāoa?

[45] There is no dispute that at the time the 2009 order was granted, the Trust Board was the appropriate representative for Ngāti Pāoa. It was intended to receive assets[25] and to be a vehicle to represent the interests of Ngāti Pāoa. It was supported by its members and on this basis a s 30 order was granted, recognising the Trust Board as the appropriate representative of Ngāti Pāoa with regard to the RMA and the LGA.[26]

[46] Following the establishment of the Iwi Trust in 2013, and its ratification to receive post settlement assets, the representation of Ngāti Pāoa quickly became contentious.

[47] Mr Mahuika submitted that the Iwi Trust was intended to assume the representative function that had been carried out by the Trust Board between 2009 and 2013. He says that a PSGE was required for Ngāti Pāoa, and a ratification process was undertaken with seven hui held between 17 August and 24 August 2013 to discuss the proposed PSGE. The voting period ran for six weeks from 5 August 2013, and eligible voters (being the registered adult members aged 18 years and over of Ngāti Pāoa) were asked to vote on three resolutions. The third resolution is relevant to the current proceedings, being: "I, as a member of Ngāti Pāoa, agree that the Ngāti Pāoa Iwi Trust will be the Post Governance Settlement Entity and the recipient of Ngāti Pāoa Treaty settlement redress." The results declared on 13 September 2013 confirmed that 96.19% of valid votes casted on the third resolution voted in favour of the Iwi Trust being the PSGE.

[25] Under the Explanatory Note of the Deed of Trust, reference was made the intended compliance with the legislation that may be passed by Parliament relating to the distribution of Māori fisheries settlement assets.

[26] *Ngāti Pāoa* (2009) 141 Waikato MB 271 (141 W 271).

[48] Mr Gardner-Hopkins submitted that the resolution put to Ngāti Pāoa's members was limited to accepting the Iwi Trust as a PSGE and made no mention of transferring the day-to-day functions of the Trust Board. He also argued that the Iwi Trust's Trust Deed does not state that it was to take over the day-to-day operations, nor does it provide for it to take over representative functions in respect of RMA and LGA matters. In addition, Mr Gardner-Hopkins stated that as the Iwi Trust only had interim initial trustees as opposed to a full complement of establishment trustees, this was evidence of the Iwi Trust's limited representative status.

[49] We agree with Mr Gardner-Hopkins that the resolution only went to the acceptability of the Iwi Trust as the PSGE for Ngāti Pāoa and made no mention of the transfer of functions and assets from the Trust Board. Intention to transfer functions from the Trust Board to the Iwi Trust cannot be inferred from the resolution passed during the PSGE ratification process. The only reference to a transfer of powers, functions and duties is in the 2013 Ratification Information Booklet, where, under the heading of "Initial Trustees" the following is set out:[27]

> Pending election and appointment of the Establishment Trustees in accordance with the Second Schedule of the Ngāti Pāoa Iwi Trust deed, the initial two Trustees shall be:
>
> - Gary Thompson
> - Bryce Herron
>
> The 2 initial trustees will hold office for an interim until the Ngāti Pāoa historical claims are comprehensively settled and an election date for the establishment trustees has been set. All powers, functions and duties of the current Ngāti Pāoa Trust will transfer to the Ngāti Pāoa Iwi Trust upon its ratification.

[50] During a Treaty settlement process, ratification occurs at two stages. First, an entity is ratified by those it represents to receive settlement redress and second, the content of the settlement itself is ratified by those to whom it is provided to settle their Treaty grievances. In our view the reference in the 2013 Ratification Information to ratification refers to the comprehensive settlement, not to the entity.

[27] Ngāti Pāoa, Post-Settlement Governance Entity, 2013 Ratification – Information Booklet <https://www.ngatipaoaiwi.co.nz/uploads/8/4/5/7/84576074/governance-psge_ratification_booklet_ngati_paoa.pdf> at page 5.

[51] In addition, we agree with Mr Gardner-Hopkins, that interim trustees only have limited functions. The Iwi Trust's Trust Deed refers to three types of trustees: initial trustees, establishment trustees and trustees. Initial trustees are defined in the Trust Deed as Bryce Herron and Gary Thompson who hold office until the appointment of establishment trustees.[28] Seven establishment trustees are elected at the first AGM following the settlement date, and commence a rotation process where two establishment trustees retire each year.[29] Trustees are then elected following the retirement of the establishment trustees.[30] Many of the powers set out in the Iwi Trust's Trust Deed do not apply to the initial trustees because those powers and obligations only take effect after the settlement date. This includes powers and obligations: to prepare Annual Plans;[31] Five Year Plans;[32] Annual Reports;[33] audit the accounts;[34] appoint an auditor;[35] hold an AGM and SGM by extension;[36] and review the deed of trust.[37] These powers and responsibilities, by their nature, are to ensure accountability to those the Iwi Trust represents. The lack of accountability measures afforded to the initial trustees supports the position that their role is limited and does not extend to the representation of the iwi.

[52] For these reasons, we conclude that the Iwi Trust was ratified on a more limited basis than argued by Mr Mahuika and was not intended to receive the day-to-day management operations and assets of the Ngāti Pāoa in 2013. This is not therefore a change of circumstance or fact that would of itself warrant amending the s 30 order.

Was the resolution passed at the 2013 Annual General Meeting transferring the day-to-day management operations and assets of the Trust Board to the Iwi Trust valid?

[53] On 7 September 2013 the Trust Board held an AGM at Wharekawa Marae. The outcome of the AGM is disputed. Mr Mahuika argues that a resolution was passed with unanimous support of the Ngāti Pāoa members in attendance, transferring the management

[28] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 3.1.
[29] Deed of Trust of Ngāti Pāoa Iwi Trust, sch, 2 cl 4.2.
[30] Deed of Trust of Ngāti Pāoa Iwi Trust, sch 2, cl 3.1.
[31] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 8.1.
[32] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 8.2.
[33] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 9.1.
[34] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 9.2.
[35] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 9.3.
[36] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 13.1.
[37] Deed of Trust of Ngāti Pāoa Iwi Trust, cl 31.1.

and assets from the Trust Board to the Iwi Trust. Further, Mr Mahuika stated that the intention of Ngāti Pāoa was not to wait until settlement before the Iwi Trust began to undertake a broad representative function. He argued that this was evidenced by the resolution, and the fact that the Trust Board effectively ceased to operate upon the establishment and ratification of the Iwi Trust.

[54] The resolution relied on by the Iwi Trust is as follows: "That the day-to-day management operations and assets of the Ngāti Pāoa Trust be wholly transferred to the Ngāti Pāoa Iwi Trust (PSGE) once ratified."[38]

[55] Mr Gardner Hopkins challenged the validity of the resolution on a number of grounds. Amongst those, he states that the resolution was purportedly passed after the AGM had been adjourned to another date, and that, as a result of the AGM being adjourned (and a lunch break), most members of the Trust Board had left the meeting.

[56] The Iwi Trust relied on this resolution as being a material change of fact or circumstance and had the burden of proof in establishing the validity of the resolution. The minutes of the AGM on their face raise a question as to whether the resolution was properly passed as part of the AGM. We can therefore place little weight on the resolution when assessing whether there was a material change of circumstance or fact.

Was the Trust Board legally inoperative (2015-2017)?

[57] The lower Court found that at least for the period 2015-2017 the Trust Board was legally inoperative.[39]

[58] Mr Mahuika submitted that the Trust Board effectively ceased to operate in 2013, including as a representative for Ngāti Pāoa. He said that this remained the case until late 2016 when the current trustees of the Trust Board and their supporters revived it in late 2016. Amongst the steps required to revive the Trust Board was the election of new trustees, as prior to the elections there were no valid trustees.

[38] Ngāti Pāoa Iwi Trust, 7 September 2013 Annual General Meeting minutes.
[39] *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board – Ngāti Pāoa* (2018) 173 Waikato Maniapoto MB 51 (173 WMN 51) at [62]

[59] Mr Mahuika argued that the Trust Board's deponent, Mr David Roebeck, conceded in cross examination in the lower court that the Trust Board was not functional. He said that in any event, little weight should be given to Mr Roebeck's evidence as he was not an officer of the Trust Board prior to 2017 and much of his evidence about what occurred in the period between 2013 and his appointment is conjecture. Finally, Mr Mahuika referred to the High Court decision of *Roebeck v The Ngāti Pāoa Trust Board*[40] and the Environment Court decision of *SKP Incorporated v Auckland Council*,[41] where comments were made as to the Trust Board's lack of activity during the period of 2013 to 2016.

[60] Mr Gardner-Hopkins submitted in response that the Trust Board continued to operate throughout the relevant period, and that the activities of the trustees who remained in office were valid acts in accordance with s 20 of the Charitable Trusts Act 1957. He submitted that a shortcoming in the number of trustees does not invalidate every action of a trust while that shortcoming exists, and that while an action may be able to be set aside, it remains valid until it is set aside.

[61] Mr Gardner-Hopkins also submitted that the following activities illustrate that the Trust Board continued to operate, and while not exhaustive, they are sufficient to dispel the assertion the Trust Board effectively ceased to operate:

(a) The Trust Board seeking advice in early 2014 with regard to the Stony Ridge quarrying consent;

(b) The Trust Board calling an AGM for 14 April 2014 to reconfirm its mandate;

(c) The Trust Board asserting its representative capacity in respect of RMA and LGA matters to the Auckland Council in March and April 2014;

(d) The Trust Board raising concerns about Iwi Trust finances in November 2015;

(e) The Trust Board and the Iwi Trust giving joint notice of a hui-a-iwi for February 2016;

[40] [2016] NZHC 2458.
[41] [2019] NZEnvC 199.

(f) The High Court in October 2016 ordering the establishment of a validation committee to compile an updated register of the Trust Boards members and oversee the election of new trustees to the Trust Board; and

(g) New trustees of the Trust Board elected in March 2017.

[62] While some trustees of the Trust Board may have acted on behalf of the Trust Board, we must have regard to the finding of the High Court in *Roebeck v The Ngāti Pāoa Trust Board* that the trust had not properly been constituted for some time.[42] Section 16(1) of the Trust Deed requires ten trustees. Ten trustees were appointed following an election in June 2011, however by May 2016 when the application was heard by Justice Woodhouse, there were only three trustees in office.

[63] Justice Woodhouse identifies two reasons why the Trust Board had not been properly constituted. First, there were only three trustees in office because four of the previous seven trustees resigned (one in 2012 and three in 2013) and three others were removed, apparently by the other trustees for failure to attend meetings. Second, elections should have been held in 2015, because s 17(2) of the Trust Deed provides that no trustee may hold office for more than four years without that trustee's position being subject to a further election.[43]

[64] In a different proceeding the High Court noted the following:[44]

> The Trust Board acknowledges that, for a period between 2014 and 2017, it was legally inoperative. Following a process directed by the High Court in October 2016, elections were held in March 2017.

[65] While Mr Gardiner-Hopkins points to s 20 of the Charitable Trusts Act 1957 this is not a complete answer to the matters identified by the High Court. In our view, the relevant question is not so much whether intermittent acts by a minority of remaining trustees can be regarded as technically legal, but why were there so few trustees for an extended period?

[42] [2016] NZHC 2458 at [14].
[43] *Roebeck v The Ngāti Pāoa Trust Board* [2016] NZHC 2458 at [15].
[44] *SKP Inc v Auckland City Council* [2019] NZHC 900 at [21].

[66] We conclude that a reasonable inference can be drawn that there was a material change of circumstance within Ngāti Pāoa during the period between 2014 – 2017 when the Trust Board was not legally constituted and only partially active. That inference being that there had been a shift in the politics within Ngāti Pāoa concerning how the iwi wished to organise and represent itself going forward. While that shift may not have been tidy or complete, we do not see error in the way the lower Court weighed these factors and concluded that grounds for a review of the s 30 order were made out and that the order should be amended to expire within seven days.

Is the Trust Board's role largely at an end?

[67] Finally, the Iwi Trust argued that, as Ngāti Pāoa is at an advanced stage of Treaty settlement negotiations, the role of the Trust Board as the mandated entity for Ngāti Pāoa is largely at an end. The Pare Hauraki Collective Redress Deed has been ratified. The Marutūahu Collective Redress Deed has been initialled by the Crown and the Ngāti Pāoa Deed of Settlement has been initialled by both the Crown and Ngāti Pāoa, with steps being taken to ratify the Deed. Mr Mahuika submitted that once the settlements are complete, there is no role envisaged for the Trust Board in the post-settlement era.

[68] While this may be the case, Mr Mahuika's argument that the Trust Board's role is largely at an end is in effect a concession that its role has not yet ended. This is supported by the 2013 Ratification Information Booklet, which says that the Trust Board's work is not intended to conclude until ratification of the settlement.

What is the effect of the political conflict within Ngāti Pāoa?

[69] There has been significant political turmoil within Ngāti Pāoa for some time. The argument over the s 30 order is symptomatic of wider problems.

[70] In the letter dated 13 November 2018, the Minister for Treaty Negotiations said:

> I am concerned matters have reached a point where the environment is not conducive to negotiations. In my view the Crown is unable to continue with discussions on negotiation matters until Ngāti Pāoa representation issues are resolved…

> Until the Crown is assured internal issues have been sufficiently addressed it is best the Crown temporarily take a step back from negotiations.

[71] Following the lower Court determination in December 2018, the division within Ngāti Pāoa has become more entrenched. The supplementary submissions of Mr Gardner-Hopkins confirmed that two separate Ngāti Pāoa ratification processes had commenced, one led by mandated negotiator Morehu Wilson, and the other led by the Iwi Trust. Concerns about this dual process were addressed by the Director of Te Arawhiti in a letter dated 29 January 2020:

> A mandate is not static and the Crown's recognition of a mandate is not permanent. Support for a mandated entity can change over time and the Crown's recognition of a mandate can also change.
>
> Given the recent activity outlined in the third paragraph, the Crown cannot be confident the Ngāti Pāoa Trust Board, and by consequence the negotiators appointed under that Board's mandate, continue to have the support of the settling group to negotiate on its behalf.
>
> Therefore I think it is imperative to clarify who the Ngāti Pāoa people wish to represent them in any remaining negotiations. I also think the current situation of two parallel proposed ratification processes will continue to cause significant confusion to Ngāti Pāoa and could result in the Crown being unable to recognise the results of either process. Ratifying the deed at the same time as a mandate process may also confuse the ratification results.

[72] Confusion around issues of representation are such that the Crown is no longer confident that the Trust Board continues to have the support of Ngāti Pāoa.

[73] The absence of cohesive leadership is preventing the shared aspirations of Ngāti Pāoa for settlement and the iwi will continue to suffer until the leadership works to resolve the political divisions. What is clear, is that the degree of unified leadership that existed in 2009 when the s 30 order was granted, is no longer present. The present absence of cohesive leadership is itself compelling evidence that there has been a material change of circumstances or fact such that the lower Court was right to bring the 2009 order to an end.

Kupu Whakatau - Decision

[74] The appeal has been partially successful in that the lower Court wrongly found that the purpose of the original order would not be defeated if amended, because both the Iwi Trust and the Trust Board were actively participating in RMA and LGA matters. However, for the reasons outlined, this finding does not effect the overall decision. We agree with the lower Court that, due to a change of circumstance and fact it was appropriate to amend the 2009 order by including an end date of Friday 21 December 2018. Therefore the order amending the 2009 order is affirmed pursuant to s 56(1)(a) Te Ture Whenua Māori Act 1993.

[75] The balance of the appeal is dismissed pursuant to s 56(1)(g) Te Ture Whenua Māori Act 1993.

Costs

[76] As the appellant succeeded to this limited extent, we consider that costs should lie where they fall. If counsel disagree, counsel for the appellant may submit a memorandum within 15 working days of the date of this decision and counsel for the respondent may respond with 15 working days of receipt of the appellant's submissions.

I whakapuaki i te 12:00pm o te rā i Rāpare te 10th o ngā rā o Hakihea i te tau 2020

S F Reeves (Presiding)	M J Doogan	T M Wara
JUDGE	**JUDGE**	**JUDGE**