

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 10/2023  
[2023] NZSC 95

BETWEEN DANELLA TAPAHINGA ROEBECK  
First Applicant

AND NGĀTI PAOA TRUST BOARD  
Second Applicant

AND ATTORNEY-GENERAL  
First Respondent

AND GLEN ANDREW TUPUHI, TANIA  
AROHĀ ROCHELLE TARAWA,  
HEREAROHĀ FRANCIS SKIPPER,  
MIHINGARANGI FORBES, ANAHERA  
SADLER, LORRAINE RANGITĀHI  
POMPEY AND JAMES RATAHI AS  
TRUSTEES OF THE NGĀTI PĀOA IWI  
TRUST  
Second Respondents

Court: O'Regan, Williams and Kós JJ

Counsel: D A C Bullock and S J Humphrey for First Applicant  
L L Black for Second Applicant  
J R Gough, J B Watson and A H Ou for First Respondent  
M K Mahuika and T N Hauraki for Second Respondents

Judgment: 31 July 2023

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B The applicants must pay the respondents one set of costs of \$2,500.**
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## REASONS

[1] The applicants—Ms Roebeck and the Ngāti Paoa Trust Board (Trust Board)—seek leave to appeal directly to this Court against the dismissal by McQueen J of three separate but closely related judicial review proceedings.<sup>1</sup> The proceedings were brought by certain kuia of Ngāti Kauahi—a hapū of Ngāti Pāoa—and the Trust Board. Ms Roebeck is co-chair of the Trust Board and one of the kuia of Ngāti Kauahi.

[2] The applicants challenge several Crown decisions and one of the Waitangi Tribunal. All challenges relate, either directly or indirectly, to whether it was open to the Crown to accept that Ngāti Pāoa iwi had ratified the terms of a deed entered into between the Crown and Ngāti Pāoa negotiators, purporting to settle the iwi's Treaty claims. A related issue is whether the Ngāti Pāoa Iwi Trust (the Iwi Trust) ought to receive both the assets proposed to be transferred to the iwi in the settlement, and certain land currently vested in the Trust Board as trustee on behalf of the iwi.

[3] Since these proceedings were instituted, a Ngāti Pāoa Treaty settlement has been incorporated into the Ngāti Pāoa Claims Settlement Bill. The Bill was introduced on 13 December 2022, read for the first time on 21 June 2023 and referred to the Māori Affairs Select Committee. The Committee is expected to report back to the House on 21 December 2023. Therefore, leave to bring a direct appeal is sought.

### **Background**

[4] The background to these proceedings may be briefly summarised as follows.

#### *Settlement negotiations*

[5] The Ngāti Paoa Trust Board was established in 2004 to represent the iwi. In 2009, the Māori Land Court made orders under s 30 of Te Ture Whenua Māori Act 1993 confirming the Trust Board's mandate to represent Ngāti Pāoa's interests in

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<sup>1</sup> *Roebeck v The Attorney-General* [2022] NZHC 3341 [HC judgment]. The first proceeding (422) was brought by three kuia of Ngāti Kauahi (one of whom was Ms Roebeck) and challenged Crown decisions in relation to ratification of the Ngāti Pāoa settlement deed. The third proceeding (424) is a mirror challenge brought in the name of the Trust Board. In the second proceeding (423), the Trust Board challenged the Waitangi Tribunal's refusal to grant urgency to its ratification related claim (Waitangi Tribunal *Decision on application for an urgent hearing* (Wai 2982, 2021)).

RMA and local government matters.<sup>2</sup> In 2011, that Court also appointed the Trust Board responsible trustee of the Waiheke Farm Station. The station is situated on Waiheke Island and had been transferred to Ngāti Pāoa in settlement of an earlier specific claim brought on behalf of the iwi.<sup>3</sup>

[6] Ngāti Pāoa joined multiple iwi in regionally-based collective Treaty claims negotiations in Tāmaki and Hauraki. In 2011, following a series of hui, the Trust Board’s mandate to represent the iwi in the negotiations was affirmed by the iwi and subsequently accepted by the Crown. Iwi members also selected Mr Rawiri and Mr Wilson to be negotiators on their behalf. The Iwi Trust was subsequently established. It was intended to take on the role of the iwi’s post-settlement governance entity. The Iwi Trust’s structure and purpose was ratified by iwi vote in 2013.

[7] Meanwhile, the Tāmaki collective settlement was initialled by the iwi negotiators, ratified by the Ngāti Pāoa members and implemented by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. And in 2017, iwi negotiators initialled both the Hauraki collective settlement and the separate standalone Ngāti Pāoa settlement.<sup>4</sup>

#### *Mandate challenges in the Māori Land Court and Waitangi Tribunal*

[8] Differences developed within the iwi about who or what entity should take Ngāti Pāoa to resolution of its Treaty claims and what the role of the Trust Board should be going forward. In early 2018, the Trust Board filed a further s 30 application to determine mandate in relation to the Ngāti Pāoa settlement and its trusteeship of Waiheke Station. Court supported mediation was attempted but failed. In September 2018, those associated with the Iwi Trust cross applied, asking the Māori Land Court to review the original 2009 order that had affirmed the Trust Board’s mandate. The Court decided that the 2009 order would expire in

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<sup>2</sup> *Re Ngāti Paoa* (2009) 141 Waikato MB 271 (141 WMN 271).

<sup>3</sup> See HC judgment, above n 1, at [12].

<sup>4</sup> There is also a Marutūāhu Collective Deed which Messrs Wilson and Rawiri have not initialled.

December 2018.<sup>5</sup> The Trust Board appealed that decision to the Māori Appellate Court which heard the appeal in February 2020.<sup>6</sup>

[9] Meanwhile in July 2020, Ms Roebeck (for the Trust Board) filed a Waitangi Tribunal claim in relation to mandate and sought an urgent hearing. After receiving submissions, the Tribunal decided to await the decision of the Māori Appellate Court. In December 2020, the Māori Appellate Court dismissed the Trust Board's appeal and affirmed the Māori Land Court's imposition of a sunset on the Court's support of the Trust Board's mandate.<sup>7</sup> In January 2021, the Tribunal refused urgency essentially on the ground of insufficient arguability.<sup>8</sup>

### *Ratification*

[10] The backdrop to the litigation discussed above is that in March 2020 the Iwi Trust and one negotiator, Mr Wilson, ran separate, overlapping, but not identical, ratification processes. Both separately sought ratification of the Ngāti Pāoa settlement deed and invited the iwi to advise whether trusteeship of Waiheke Station should be transferred from the Trust Board to the Iwi Trust. The Iwi Trust also sought re-confirmation of its proposed role as Ngati Pāoa's post-settlement governance entity.

[11] Mr Wilson and the Iwi Trust created separate voter rolls.<sup>9</sup> Those rolls were not identical and they were not consolidated. There were, in effect, two referendums of overlapping but distinct voter bases. As trustee of Waiheke Station, the Trust Board had long maintained its own beneficiary roll, but would not make it available to either Mr Wilson or the Iwi Trust.<sup>10</sup> Voting was independently administered by Electionz, a firm that specialises in the management of electoral events, using the rolls the Iwi Trust and Mr Wilson provided. The ratification process was advertised in the

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<sup>5</sup> *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* (2018) 173 Waikato Maniapoto MB 51 (173 WMN 51).

<sup>6</sup> *Ngāti Pāoa Trust Board v Ngāti Pāoa Iwi Trust* [2020] Māori Appellate Court MB 318 (2020 APPEAL 318).

<sup>7</sup> *Ngāti Pāoa Trust Board v Ngāti Pāoa Iwi Trust* [2020], above n 6.

<sup>8</sup> Waitangi Tribunal *Decision on application for an urgent hearing*, above n 1.

<sup>9</sup> There were 550 people registered on Mr Wilson's roll and 907 on the Iwi Trust's roll. There were 165 shared names.

<sup>10</sup> The Trust Board did not participate directly in the processes, but, according to its evidence, the Trust Board's register of beneficiaries contained 869 names that were not on either of the two rolls.

public notices sections of various newspapers and on Iwi Trust related websites and social media.

[12] The settlement deed was well supported by those on both rolls whose votes were accepted as valid, as was the proposed transfer of trusteeship of Waiheke Station to the Iwi Trust. The Iwi Trust's post-settlement role was also supported.<sup>11</sup>

### **High Court decision**

[13] In the High Court the applicants' challenges included that the Crown's acceptance of the ratification process breached its published policies (Te Arawhiti's 'Red Book'); contradicted its written advice to Ngāti Pāoa; and that, in any event, the ratification processes were so fundamentally flawed as to be incapable of acceptance by a rational Crown. Flaws included: that Mr Wilson's mandate as a negotiator had been withdrawn by the Trust Board in 2019; an unacceptable number of Ngāti Pāoa members were not on either roll; and 160 special votes had been wrongly rejected by Electionz. The Trust Board argued that the Crown had created further Treaty grievances by supporting the result of the ratification process. As to its trusteeship of Waiheke Station, the Trust Board argued that the attempt, through the ratification process, to transfer trusteeship to the Iwi Trust was an unlawful interference in its property rights; and wrongly treated the station as if it was an asset to be dealt with in the settlement. Finally, the Trust Board argued the Waitangi Tribunal's refusal to grant urgency was peremptory and failed to engage with the substance of its challenges.

[14] The High Court held that the proceeding breached the comity principle, so the issues raised were no longer for the courts.<sup>12</sup> This was because the challenge to the efficacy of the ratification process was, in substance, a challenge to the legislation prepared to implement the settlement.

[15] The High Court then turned to the substance of the claims and rejected all grounds, for the most part, on the facts. For example, the Judge held that the Crown's

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<sup>11</sup> 65 per cent of votes on the Iwi Trust's roll accepted by Electionz as valid favoured the Iwi Trust's post settlement mandate: HC judgment, above n 1, at [48].

<sup>12</sup> HC judgment, above n 1, at [105]. The Bill was introduced the day after the High Court judgment was issued.

settlement policies and communications with Ngāti Pāoa did not create the legitimate expectations argued for; and while the ratification processes were not perfect, and never are, they were not so fundamentally flawed as to render irrational the Crown’s decision to accept them.<sup>13</sup> As to the challenge to the Waitangi Tribunal’s urgency decision, the Judge considered that the Tribunal had sufficiently, if briefly, addressed the applicants’ arguments, and, as an expert body, was entitled to a “degree of latitude”.<sup>14</sup> On the trusteeship of Waiheke Station, the Judge found that, since the beneficiaries of the settlement and the station were identical, the distinction sought to be drawn lacked substantive merit.

### **Analysis**

[16] Applications for leave to bring a direct appeal must meet the exceptional circumstances test in s 75(b) of the Senior Courts Act 2016 as well as the usual leave criteria in s 74. In this case, two exceptional circumstances are argued for: first that the parameter of the comity principle is an important constitutional issue that ought to be resolved by this Court; and second, because legislation currently before the House would, if enacted, render the “rights of the appellants and hundreds of other members of Ngāti Pāoa to have their say on the proposed settlement with the Crown, nugatory”.

[17] Where proceedings seek the vindication of substantive rights, collateral legislative developments may in some circumstances be relevant to decisions under s 75(b).<sup>15</sup> And the prospect that, at some undefined future point, implementing legislation may be enacted, need not necessarily exclude the courts for reasons of comity.<sup>16</sup>

[18] Here, the applicant’s own submission demonstrates first, that this proceeding does not seek to vindicate extant substantive rights whose existence is not bound up

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<sup>13</sup> HC judgment, above n 1, at [223]. In addition to the advertisements of the ratification process four tribal hui were held, attended by supporters of and objectors to the Iwi Trust and the settlement. In short, the nature of the controversy and the planned ratification process appeared to be well known to most active members of the iwi: at [192].

<sup>14</sup> At [252].

<sup>15</sup> See generally *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.

<sup>16</sup> See generally *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

in the settlement process. Rather it is a direct challenge to the proposed legislation itself. Second, implementing legislation is not a mere future possibility in this case; rather it is in concrete form and under active consideration by a Select Committee. At this stage, the forum before which the applicants must express their views is the Māori Affairs Select Committee.

[19] In light of the foregoing, there are no exceptional circumstances sufficient to meet the threshold in s 75(b).

### **Result**

[20] The application for leave to appeal is dismissed.

[21] The applicants must pay the respondents one set of costs of \$2,500.

Solicitors:  
LeeSalmonLong, Auckland for Applicants  
Crown Law Office, Wellington for First Respondent  
Kāhui Legal, Wellington for Second Respondents