IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA256/2022
[2024] NZCA 481

BETWEEN	NGĀTI PAOA TRUST BOARD Appellant
AND	AUCKLAND COUNCIL First Respondent
	ENVIRONMENT COURT Second Respondent
	KENNEDY POINT BOATHARBOUR LIMITED Third Respondent
	NGĀTI PAOA IWI TRUST Intervener

Hearing:	28 and 29 June 2023 (further submissions received 19 January 2024)
Court:	Cooper P, Courtney and Katz JJ
Counsel:	K S Feint KC and R L Pinny for Appellant K Anderson and M C Allan for First Respondent P F Majurey and V N Morrison-Shaw for Third Respondent M K Mahuika and T N Hauraki for Intervener
Judgment:	26 September 2024 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The appeal is allowed in part. We make a declaration that the Council erred in determining in 2013 (and confirming in 2014) that the order made by the Māori Land Court under s 30 of Te Ture Whenua Maori Act 1993 did not require the Council to recognise the Trust Board as the representative of

Ngāti Paoa for the purposes of the Resource Management Act 1991. The appeal is otherwise dismissed.

C The costs orders in the High Court are set aside. We refer the issue of costs back to that Court so that costs can be reassessed in light of this decision.

D We make no order as to costs in relation to the appeal.

REASONS OF THE COURT

(Given by Katz J)

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Introduction

[1] Auckland Council granted resource consents to Kennedy Point Boatharbour Ltd (KPBL) on 17 May 2017, authorising the construction and operation of a marina at Kennedy Point, Pūtiki Bay on Waiheke Island. On 30 May 2018, the Environment Court dismissed two appeals against the granting of the resource consents.[1] The new marina, Waiheke Marina, is now operational and was formally opened on 20 November 2023.

[2] The appellant, the Ngāti Paoa Trust Board (the Trust Board), was not involved in either the original resource consent hearing or the subsequent Environment Court appeals.[2] However, in September 2021, the Trust Board brought judicial review proceedings against the Council, the Environment Court and KPBL, challenging aspects of the resource consent and appeals processes. The grounds of review that are relevant to this appeal alleged, in summary, that:

(a) The Council had erred in not recognising the Trust Board as the authorised representative of Ngāti Paoa for the purposes of the Resource Management Act 1991 (RMA) and the Local Government Act 2002 (LGA). As a result, the Trust Board was not notified of KPBL's resource consent application (Application) and lost the opportunity to participate in the consenting process.

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1 *SKP Inc v Auckland Council* [2018] NZEnvC 81 [Environment Court resource consent decision].

2 We note for completeness that the Trust Board filed an application for leave to be added as a party in a rehearing of the Environment Court decision. The Environment Court declined the application for rehearing; it followed that the joinder application was declined: *SKP Inc v Auckland Council* [2019] NZEnvC 199 [Environment Court rehearing decision].

(b) The Environment Court made mistakes of fact and law in its assessment of the appeals, including that it mistakenly believed that the Ngāti Paoa Iwi Trust (the Iwi Trust), rather than the Trust Board, was the authorised representative of Ngāti Paoa. This, combined with the Trust Board's lack of participation in the consenting process (because of the failure to notify it of the Application), resulted in the Environment Court making material errors in its assessment of the cultural impact of the proposed marina development on mana whenua.[3]

[3] In the High Court, Hinton J found that none of the Trust Board's grounds of review were made out.[4] The Trust Board now appeals.

Ngāti Paoa

[4] Ngāti Paoa is an iwi with customary interests spanning the Hauraki Gulf | Tīkapa Moana and extending into the Waikato. Their rohe spans from Mahurangi, to the western coast of the Hauraki Gulf, including the islands, to the eastern reaches of the Tāmaki isthmus and down to Hunua.

[5] Ngāti Paoa's history has been marked by significant land loss. By the end of the 19th century, Ngāti Paoa was virtually landless.[5] The historical grievances suffered by Ngāti Paoa were recognised by the Waitangi Tribunal in 1987, which recommended that farmland known as Waiheke Station be returned to the iwi.[6] The Crown accepted this recommendation and Waiheke Station was subsequently returned.

[6] Unfortunately, as the Māori Appellate Court recently observed in a related proceeding, Ngāti Paoa has been "embroiled in a leadership struggle" that has played out over a number of years in multiple jurisdictions.[7] Those jurisdictions now include Te Kooti Whenua Māori | the Māori Land Court, the Māori Appellate Court | Te Kooti

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3 Mana whenua is defined in s 2 of the Resource Management Act 1991 as "customary authority exercised by an iwi or hāpu in an identified area" (tohutō (macron) omitted in original).

4 *Ngāti Paoa Trust Board v Auckland Council* [2022] NZHC 893 [High Court judicial review decision].

5 Waitangi Tribunal *Report of the Waitangi Tribunal on the Waiheke Island Claim* (Wai 10, 1987) at 40.

6 At 47.

7 *Ngāti Paoa Trust Board v Ngāti Paoa Iwi Trust* [2020] Māori Appellate Court MB 318 (2018 APPEAL 24) [Māori Appellate Court decision] at [1].

Pīra Māori, the Waitangi Tribunal | Te Rōpu Whakamana i te Tiriti o Waitangi, the Environment Court, the High Court, this Court and the Supreme Court. The competing entities are the Trust Board and the Iwi Trust.

[7] Pūtiki Bay on Waiheke Island holds significance for Ngāti Paoa as the site of pā and wāhi tapu designations. It is the historical centre of Ngāti Paoa on Waiheke Island. The Iwi Trust and the Trust Board have different views regarding the construction and operation of a marina at Kennedy Point, Pūtiki Bay. The Iwi Trust supported KPBL's Application, subject to certain conditions. The Trust Board, however, opposes the marina development.

[8] The Trust Board and the Iwi Trust dispute which of them had the mandate to represent Ngāti Paoa for the purposes of the RMA during 2016 when the Application was filed and publicly notified. The Council recognised the Iwi Trust as the authorised representative of Ngāti Paoa, and that was recorded on its register of iwi and hapū details (Mana Whenua Register) at the time.[8] Accordingly, when the Application was publicly notified, a copy of it was provided to the Iwi Trust, but not to the Trust Board. (As we discuss further below, a further complicating factor is that the Trust Board was legally inoperative in 2016. It did not have a quorum, and arguably had no valid trustees at all).

The Trust Board

[9] The Trust Board was incorporated on 10 December 2004. Of relevance, under the Trust Board's Deed of Trust:

(a) The number of natural persons comprising the Trustees is 10.

(b) The quorum for meetings of the Trustees is seven.

(c) Trustee elections must be held every four years.

[8] As required by s 35A of the Resource Management Act.

(d) No Trustee may hold office for more than four years without their position being subject to a further election process in accordance with the Trust Deed.

[10] On 26 November 2009, the Māori Land Court made an order under s 30(1)(b) of Te Ture Whenua Maori Act 1993 (TTWMA), designating the Trust Board as the representative for Ngāti Paoa for the purposes of the RMA and the LGA (the s 30 order).[9]

[11] Between 13 and 17 March 2011, the Trust Board held a series of hui to seek a mandate from Ngāti Paoa to conduct Treaty settlement negotiations with the Crown. Iwi members voted in favour, and on 29 June 2011, the Crown recognised the mandate of the Trust Board to undertake Treaty settlement negotiations. Morehu Wilson and Howard Hauauru Rawiri were appointed as Ngāti Paoa iwi negotiators.

The Iwi Trust

[12] As a charitable trust, the Trust Board was not able to receive and manage any Treaty settlement assets. A post-settlement governance entity (PSGE) was required for this purpose.

[13] At its Annual General Meeting (AGM) on 7 September 2013, the Trust Board passed a resolution that "the day to day management, operations and assets of [the Trust Board] be wholly transferred to [the Iwi Trust] once ratified".[10] Later that month, the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs sent a letter to the Ngāti Paoa iwi negotiators concerning ratification results for the Iwi Trust as PGSE. The letter noted that the results demonstrated "sufficient support from the Ngāti Paoa claimant community". The Iwi Trust was accordingly formally established on 4 October 2013. Two initial trustees were appointed pending settlement of Ngāti Paoa's Treaty claim, at which time full elections would take place.

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9 *Ngāti Paoa Whānau Trust* (2009) 141 Waikato MB 271 (141 W 271) [section 30 order decision].
10 The Trust Board disputes the effect of this resolution.

The statutory context

[14] To understand the significance of the mandate dispute between the Trust Board and Iwi Trust during the period 2013 to 2018 it is necessary to briefly summarise the relevant provisions of the RMA.

[15] The RMA makes comprehensive provision for Māori and iwi interests, both procedurally and substantively. Of particular relevance to this appeal:

(a) Section 6(e) specifies that the relationship of Māori with their ancestral lands and waters is a matter of "national importance". It must be recognised and provided for in decision-making under the RMA.

(b) Section 7(a) states "particular regard" must be had to kaitiakitanga, defined as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga [Māori] in relation to natural and physical resources; and includes the ethic of stewardship".[11]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising functions and powers under it in relation to the use, development and protection of natural and physical resources, shall take into account the principles of te Tiriti o Waitangi.

As the Judge acknowledged, these are strong directions to be borne in mind at every stage of the planning process.[12]

[16] Turning to the consultation and notification provisions, s 36A of the RMA states that neither an applicant nor a local authority has a duty to consult any person about a resource consent application unless this is required under other legislation.[13] Nevertheless, the legislation provides for the notification of resource consent applications to various categories of interested persons. First, a local authority must decide whether to give public or limited notification of an application for a resource

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11 Resource Management Act, s 2 definition of "kaitiakitanga".
12 High Court judicial review decision, above n 4, at [76].
13 Resource Management Act, s 36A(1)(a)–(b).

consent.[14] Where an application is publicly notified, as it was here, the local authority must publish on an internet site to which the public has free access a notice that includes all the information that is required to be publicly notified; and also publish a summary of the notice, with details of the internet site where the full information can be accessed, in one or more newspapers circulating in the entire area likely to be affected by the notification matter.[15] A notice of the application must also be served on every "prescribed person".[16] The "prescribed persons" are listed in reg 10(2)(d) of the Resource Management (Forms, Fees and Procedure) Regulations 2003 and include:[17]

> any other iwi authorities, local authorities, persons with a relevant statutory acknowledgement, persons, or bodies that the consent authority considers should have notice of the application or review:

An iwi authority is defined as "the authority which represents an iwi and which is recognised by that iwi as having authority to do so".[18]

[17] The Council's duty to keep records about iwi and hapū is set out in s 35A(1) of the RMA, which relevantly provides:[19]

> **35A Duty to keep records about iwi and hapu**
>
> (1) For the purposes of this Act or regulations under this Act, a local authority must keep and maintain, for each iwi and hapu within its region or district a record of—
>
> (a) the contact details of each iwi authority within the region or district and any groups within the region or district that represent hapu for the purposes of this Act or regulations under this Act; and
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> (b) the planning documents that are recognised by each iwi authority and lodged with the local authority; and
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> (c) any area of the region or district over which 1 or more iwi or hapu exercise kaitiakitanga …

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14 Section 95(1)(a).
15 Section 2AB(1).
16 Section 2AA(2)(c).
17 We note that reg 10(1) is cross-referenced to para (b) of the definition of public notification in s 2AA(2). This appears to be an error. The correct cross-reference should be to para (c) of the definition, which was para (b) when s 2AA(2) was originally enacted. Section 2AA(2)(c) was inserted by s 125 of the Resource Legislation Amendment Act 2017.
18 Resource Management Act, s 2 definition of "iwi authority".
19 Tohutō omitted in original.

[18] Section 35A of the RMA was introduced by way of the Resource Management Amendment Act 2005.[20] One of the express purposes of that Act was to improve the operation of the Act in relation to "consultation with iwi and resource planning by iwi".[21] The explanatory note to the relevant Bill noted that a key measure was "providing certainty for iwi consultation and iwi resource planning".[22] The explanatory note further stated that:[23]

> Some [resource consent] applicants have indicated they have had difficulties with iwi consultation and participation in the approvals process, in particular with identifying which group or persons have a mandate to represent a specific iwi or hapu. In some cases this has led to delays; for example, when agreements reached with one party do not hold with other iwi and hapu members. …
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> … Anecdotal evidence has indicated that iwi groups are concerned that their views are not being incorporated into resource management planning.

[19] Against this background, we accept the Trust Board's submission that the keeping of accurate records under s 35A plays an important role in ensuring that iwi and hapū are able to act as kaitiaki in protecting the mauri of their whenua and moana.

Further background

[20] We now return to the factual narrative.

The reduced role of the Trust Board following the establishment of the Iwi Trust.

[21] Following the establishment of the Iwi Trust in late 2013, the Trust Board appears to have wound down its activities fairly quickly. Gary Thompson, who had been the Chair of the Trust Board, resigned and took up the position of Chair of the Iwi Trust. Other trustees (or former trustees) of the Trust Board also resigned to take up positions with the Iwi Trust, either as trustees or employees. This appears to have reflected an understanding or belief amongst many iwi members that the responsibility for the leadership and representation of Ngāti Paoa had now passed to the Iwi Trust, pending completion of the Treaty settlement process (which was believed to be

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20 Resource Management Amendment Act 2005, s 16.
21 Section 3(a)(v).
22 Resource Management and Electricity Legislation Amendment Bill 2004 (237-1) (explanatory note) at 2.
23 At 16 (tohutō omitted in original).

imminent). Other trustees of the Trust Board who did not take up roles with the Iwi Trust also resigned or were removed for failing to attend meetings. In practical terms, the Iwi Trust seems to have assumed the primary responsibility for representing the interests of Ngāti Paoa in local government and resource management matters. This included making a submission on the Unitary Plan and representing the interests of Ngāti Paoa in relation to an earlier proposed marina in Matiatia Bay, Waiheke Island.

[22] Of note, the resource consent application in relation to the proposed Matiatia marina had been served on the Trust Board on or about 6 June 2013, as it was recognised at that time (which was prior to the establishment of the Iwi Trust) as the authorised mana whenua representative for Ngāti Paoa. The Trust Board did not, however, engage with the resource consent process in relation to the Matiatia application. Rather, this responsibility ultimately fell to the Iwi Trust following its establishment. The Iwi Trust made a belated (and successful) application to join the Matitiatia marina resource consent proceedings. Mr Morehu Wilson, the leading Ngāti Paoa kaumātua who later gave evidence for the Iwi Trust regarding the proposed marina at Kennedy Point, gave evidence for the Iwi Trust regarding the Matiatia proposal. In the course of his evidence, he acknowledged the Chair of the Trust Board as being present in the room.

[23] By 2015, the Trust Board appears to have become almost entirely inoperative. In that year, Danella Roebeck (a member of Ngāti Paoa and the current chair of the Trust Board) successfully applied to the High Court for orders putting the Trust Board back on a proper legal footing.[24] The relevant background is summarised in Woodhouse J's judgment as follows:

> [14] Section 16(1) of the deed requires ten trustees. Ten trustees were appointed following an election in June 2011, but for two reasons there has been no properly constituted board for a considerable period of time.
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> [15] The first reason is that there are now only three trustees. Four of the remaining seven trustees resigned (one in 2012 and three in 2013) and three others were removed, apparently by other trustees for failure to attend meetings. Four replacement trustees were appointed by the remaining trustees. Under s 19 of the deed there is power "to fill any vacant office of Trustee by invitation". However, under s 19(2), the original vacancy must be

[24] *Roebeck v The Ngati Paoa Trust Board* [2016] NZHC 2458.

> filled by appointment in accordance with s 17(1) "as soon as reasonably practicable after the occurrence of the vacancy". That has not occurred and three years or more have passed since vacancies occurred.
>
> [16] The second reason there is no properly constituted board is that new elections should have been held in 2015. This is because s 17(2) of the deed provides that no trustee may hold office for more than four years without that trustee's position being subject to a further election.

[24] Woodhouse J ordered the establishment of a validation committee to update Ngāti Paoa's iwi membership register and to conduct elections for the Trust Board.[25] Those elections took place in March 2017. The Trust Board took no steps in the High Court proceeding from when it was filed in 2015 until the election of new trustees in March 2017, presumably reflecting that the Trust Board was unable to act during the relevant period as from some time in 2013 (when the fourth trustee resigned) until March 2017, it lacked a quorum. By June 2015 (when further trustee elections should have been held), only three trustees were still in office — Miria Andrews, Lorna Dixon-Rikihana and George Kahi. After that date it appears likely that the Trust Board had no valid trustees at all. In the absence of a quorum, the Trust Board was unable to hold trustee meetings or make trustee decisions.

[25] Following the election of new trustees on 11 March 2017, it took some time for the new trustees to regularise the affairs of the Trust Board. For example, the Trust Board was deregistered from the Charities Register on 15 June 2017 for failing to file annual returns, before being subsequently re-registered as a charity on 27 February 2018.

[26] The Trust Board's lack of activity or profile during the relevant period is also apparent from the evidence of Kathryn Ngapo, a member of Ngāti Paoa who gave evidence in opposition to the Application on behalf of Piritahi Marae (a ngā hau e wha or "four winds" marae based on Waiheke, for the local community). Ms Ngapo says that during the resource consent process she was "aware that previously there had been a Ngāti Paoa Trust Board" and she therefore decided to track it down, but "could not find any reference to the Trust Board in the places where you would think to look". Ms Ngapo therefore "assumed that the Trust Board had evolved into the … Iwi Trust".

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[25] At [19].

The Council's 2013 decision to recognise the Iwi Trust for RMA and LGA purposes

[27] The chair of the Iwi Trust sent documentation to the Council on 26 November 2013 which was described as "substantiating the mandate and status of the [Iwi Trust], as the mandated iwi authority and [PGSE] of Ngāti Paoa". The documentation comprised the ministerial letter, voting results, and the minutes of the September 2013 AGM "where a resolution was passed transferring the operations, management and assets of the [Trust Board] to the [Iwi Trust]".

[28] Following receipt of this documentation, the Council decided to recognise the Iwi Trust, rather than the Trust Board, as the mandated representative of Ngāti Paoa for the purposes of the RMA and LGA. On 2 December 2013, the Council confirmed to the Iwi Trust that all operational matters would be communicated to Gary Thompson and initiated a transfer of the Ngāti Paoa master service contract and capacity funding agreement to the Iwi Trust. From that point onwards, the Council recognised the Iwi Trust as the mandated entity of Ngāti Paoa for RMA and LGA matters and updated its Mana Whenua Register accordingly (the 2013 decision).

The Council confirms its decision to recognise the Iwi Trust in 2014

[29] On 12 March 2014, Miria Andrews (purportedly the chair of the Trust Board, despite its lack of quorum) wrote to the Council asserting that the Trust Board, not the Iwi Trust, was the mandated representative of Ngāti Paoa. Ms Andrews advised the Council of the existence of the s 30 order and its continuing application. She explained that the Iwi Trust was "to ultimately take over all our responsibilities, but this process will take some time". In the interim, Ms Andrews advised, the Trust Board remained the iwi authority for Ngāti Paoa for the purposes of the RMA.

[30] Further email exchanges followed as well as a meeting with the Council on 24 April 2014 to discuss the Trust Board's mandate concerns. Ultimately, however, on 29 July 2014, the Council wrote to Ms Andrews confirming its decision to recognise the Iwi Trust as the representative entity for Ngāti Paoa. Ms Andrews was unable to persuade the Council to change its mind, and on 13 October 2014, the Council reaffirmed its decision to recognise the Iwi Trust as the mandated representative of Ngāti Paoa (the 2014 decision). From November 2014 onwards, the

Trust Board was no longer notified of publicly notified applications for resource consent.

Engagement between KPBL and the Iwi Trust

[31] In December 2015, representatives for KPBL began engaging with Iwi Trust members concerning KPBL's wish to build a marina at Kennedy Point. After a period of dialogue, the Iwi Trust agreed to support the proposed marina, subject to certain conditions and KPBL entered into an agreement with the Iwi Trust's investment company regarding construction of the marina.

The Application and resource consent hearing

[32] On 19 September 2016, KPBL lodged the Application. It was publicly notified on 17 and 18 November 2016. The public submission period closed on 16 December 2016. The Iwi Trust appears to have finalised its cultural values assessment by 23 February 2017. The Council hearing of the Application (before independent Commissioners) took place on 3 April 2017, with the decision to grant resource consent issued on 17 May 2017.

[33] The Trust Board wrote to the Council on 3 July 2017, advising of the recent trustee elections and again asserting its representative status. By this time the Trust Board was again legally operative, following the trustee elections in March 2017.

Environment Court proceedings

[34] The Environment Court heard two appeals (including one by SKP Inc — an abbreviation of "Save Kennedy Point") against the granting of resource consent for the Waiheke Marina, during February and March 2018. On 30 May 2018, the Environment Court dismissed those appeals and confirmed the grant of resource consent for the Waiheke Marina (with some modifications).[26]

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[26] Environment Court resource consent decision, above n 1.

[35] SKP was declined an extension of time to appeal the decision,[27] and unsuccessfully applied for a rehearing.[28] The High Court, on appeal, affirmed the decision to decline an application for rehearing.[29] Both this Court and the Supreme Court declined applications for leave to appeal.[30]

[36] Waiheke Marina was formally opened on 20 November 2023, following receipt by KPBL of full Council compliance sign-off.[31]

Māori Land Court and Māori Appellate Court proceedings

[37] As noted at [10] above, the Māori Land Court had made a s 30 order in favour of the Trust Board in 2009. Section 30 of TTWMA provides:[32]

> **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

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27 *SKP Inc v Auckland Council* [2019] NZHC 900.

28 Environment Court rehearing decision, above n 2.

29 *SKP Inc v Auckland Council* [2020] NZHC 1390, [2021] 2 NZLR 94 [High Court rehearing appeal].

30 *SKP Inc v Auckland Council* [2020] NZCA 610 [Court of Appeal decision]; and *SKP Inc v Auckland Council* [2021] NZSC 35 [Supreme Court decision]. We note the Supreme Court also dismissed an application for recall of their decision: *SKP Inc v Auckland Council* [2021] NZSC 44.

31 On 19 June 2023, KPBL applied for leave to adduce further evidence in the form of a further affidavit from Mr Kitt Littlejohn updating the Court on the progress of the marina's construction. The Trust Board opposed admission of this evidence. Subsequently, on 19 January 2024, counsel for KPBL filed a filed an updating memorandum advising the Waiheke Marina had been formally opened on 20 November 2023. The Trust Board neither opposed nor consented to the admission of this evidence. We admit both documents as updating evidence, although ultimately little turns on either of them.

32 Tohutō omitted in original and emphasis added.

> Court, and the Maori Land Court has the power and authority to give advice and make determinations as the court thinks proper.

[38] Under TTWMA, the Māori Land Court has the power to review a s 30 order,[33] including where it is necessary to reflect changes of circumstance or fact.[34] As the Māori Appellate Court has observed:[35]

> 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.

[39] Given the ongoing mandate dispute, on 12 September 2018, the Iwi Trust filed an application in the Māori Land Court to review the s 30 order and be recognised as the appropriate representative body for Ngāti Paoa. The Māori Land Court noted that both the Iwi Trust and Trust Board were actively participating in RMA and LGA matters.[36] The Court also noted the political conflict and confusion within Ngāti Paoa, affecting the clarity and effectiveness of representation.[37] The Court found that the Iwi Trust had become the effective representative of Ngāti Paoa, a change of circumstances sufficient to render the s 30 order ineffective.[38] The Court declined to make a new s 30 order in favour of the Iwi Trust, however, due to the lack of submissions on the matter.[39] It did, however, amend the existing s 30 order in favour of the Trust Board to impose an expiry date of 21 December 2018, seven days after the release of the judgment. It also directed mediation between the Iwi Trust and Trust Board to try and resolve representation issues.[40]

[40] The Trust Board appealed to the Māori Appellate Court. The Māori Appellate Court affirmed the Māori Land Court's conclusion that there had been a change of circumstances or fact that would warrant revoking the s 30 order in favour of the Trust Board.[41] It also noted that the Trust Board was not legally constituted and only

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33 Te Ture Whenua Maori Act 1993, s 30I.
34 Section 30I(4).
35 Māori Appellate Court decision, above n 7, at [23].
36 *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* (2018) 173 Waikato Maniapoto MB 51 (173 WMN 51) [section 30 order amendment decision] at [56].
37 At [57].
38 At [60].
39 At [74].
40 At [79].
41 Māori Appellate Court decision, above n 7, at [38].

partially active during the period between 2014 and 2017.[42] The Māori Appellate Court disagreed with the Māori Land Court, however, that these factors of themselves rendered the s 30 order ineffective, absent a further order of the Court.[43] Rather, the appropriate course where there was a change of circumstances was to apply to the Māori Land Court for directions to review the s 30 order.[44] The Council had therefore been wrong to recognise the Iwi Trust as the appropriate representative of Ngāti Paoa. The Māori Appellate Court explained its reasoning as follows:[45]

> [19] On its terms the order binds a consent authority to recognise the representative capacity of the Trust Board in relation to the [RMA] and [LGA]. …
>
> [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 [LGA] 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.
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> …
>
> [34] The [s 30 order] determined that, the Trust Board represented Ngāti Pāoa in relation to the [RMA] and [LGA]. In October 2013 the Iwi Trust also asserted itself to the [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 [Council] as if it were the representative of the iwi. As a matter of law, we think the [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.

[41] The Māori Appellate Court agreed with the Māori Land Court that the change of circumstances, including that from 2014 to 2017 the Trust Board had not been legally constituted and was only partially active,[46] meant it was appropriate to bring the s 30 order in favour of the Trust Board to an end and the appeal was accordingly dismissed.[47]

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42 At [66].
43 At [38].
44 At [35].
45 Footnote omitted.
46 At [66].
47 At [74].

Did the Council err in 2013 and 2014 by not recognising the Trust Board as the authorised representative of Ngāti Paoa for RMA purposes?

The issue

[42] Against this background, we now turn to consider the first issue raised by this appeal, which is whether the Council erred in 2013 and 2014 by not recognising the Trust Board as the appropriate representative of Ngāti Paoa for the purposes of the RMA. Determination of the issue turns on:

(a) whether the holder of a s 30 order under TTWMA is entitled to transfer or assign its status as the authorised representative of an iwi to another person or entity, without the Māori Land Court having first amended or replaced the s 30 order (as the Auckland Council argued had happened in this case); and

(b) if the holder of a s 30 order is so entitled, whether that is what happened here.

The High Court decision

[43] The Judge found that the existence of a s 30 order does not preclude an authorised entity of an iwi for RMA purposes from formally transferring or assigning that role by resolution. That is what the Council understood had happened in late 2013, based on the documentation it was provided with.[48] In the Judge's view, the Council was entitled to take "at face value" the documents provided to it by the Iwi Trust showing that the Trust Board had "transferred day to day management and operations" to the Iwi Trust.[49] Although there was now a dispute about the validity of part of that documentation (the resolution from the Trust Board's AGM in September 2013), there was nothing to suggest that the Council was aware of any disputes about the validity of that resolution at the time of the 2013 decision.[50]

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48 High Court judicial review decision, above n 4, at [108].
49 At [103]–[104].
50 At [104].

[44] The Judge acknowledged that the 2014 decision was made in different circumstances (namely that the existence of the s 30 order had been specifically drawn to the attention of Council by that time).[51] Nevertheless, while the Council "could have been more prudent" in 2014, it was neither unreasonable nor unlawful for it to continue to recognise the Iwi Trust as the appropriate representative of Ngāti Paoa.[52]

Our view

[45] The Trust Board was recognised by the Māori Land Court as the appropriate representative entity for Ngāti Paoa in relation to RMA and LGA matters in 2009, and this is reflected in the s 30 order.[53] Hinton J summarised the purpose and effect of a s 30 order:[54]

> (a) The section is intended to address the situation where 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. The section is designed to give that certainty so that outside parties may treat or be treated with.
>
> (b) Such an order will not be made lightly, because it supplants the inherent right of iwi to choose their own representatives, but it will be made in response to an established need to provide certainty as to representation for particular purposes.
>
> (c) The Māori Land Court has both an advisory jurisdiction under subs (a) and a determinative jurisdiction under subs (b). An order under subs (1)(b) is binding on everyone except the Crown.

We endorse that summary.

[46] Given that a s 30 order is intended to provide certainty as to the appropriate iwi representative and is binding, except on the Crown, it is our view that the

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51 At [112].
52 At [121].
53 Section 30 order decision, above n 9.
54 High Court judicial review decision, above n 4, at [96]. The summary was drawn in large from the Māori Appellate Court decision, above n 7, at [11] and [14]–[15], quoting *Manuirirangi v Ngā Hapū o Ngā Ruahine Iwi Inc* [2010] Chief Judge's MB 355 (2010 CJ 355) at [33] (footnote omitted).

Māori Appellate Court was correct to find that:[55]

> In the event of conflict or ambiguity over representative capacity [a s 30 order] has a binding effect in its field of operation, in this case representation for RMA and the [LGA] 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.

[47] The s 30 order required the Council to recognise the Trust Board as the appropriate representative of Ngāti Paoa in relation to LGA and RMA matters unless and until the order was amended or replaced, for the reasons set out by the Māori Appellate Court in the quote at [40] above, which we endorse. It was not appropriate for the Council to itself decide that a change in circumstances had rendered the s 30 order nugatory or ineffective and that, as a result, the order was no longer binding on it. Rather, the Council should have informed the Iwi Trust that the s 30 order remained operative and binding on the Council unless and until the order was revoked or varied by the Māori Land Court. The onus would then have been on the Iwi Trust to apply to the Māori Land Court for a review of the s 30 order (as it belatedly did in 2018), pursuant to s 30I of TTWMA.

[48] If there is no dispute within an iwi that changes in factual circumstances warrant a change of authorised representative, then it will likely be straightforward, and relatively quick, to apply for and obtain a discharge or variation of an existing s 30 order, by consent. If there is disagreement, however, as to whether a s 30 order should be varied or discharged, the appropriate forum for resolving that dispute is clearly the Māori Land Court. It is not appropriate for local authorities (or other entities) to take it upon themselves to decide, in effect, that a s 30 order is no longer binding on them due to changed circumstances.

[49] We acknowledge that difficult issues may arise if the entity that holds a s 30 order is dysfunctional or legally inoperative, as was the case here. However, if the Council had concerns about the legal status of the Trust Board, the appropriate course would have been to raise those concerns with both the Trust Board and the Iwi Trust, rather than simply disregard the s 30 order. The onus would then have been

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55 Māori Appellate Court decision, above n 7, at [20].

on one or both of those entities to address such issues either through the Māori Land Court or the High Court, or both, as subsequently occurred. Pending the resolution of such issues there was nothing to prevent the Council from deciding to notify the Iwi Trust, as well as the Trust Board, of any relevant RMA applications within Ngāti Paoa's rohe. Unless and until the s 30 order was replaced or amended, however, the Trust Board remained the authorised representative of Ngāti Paoa for RMA issues. Whether, due to its dysfunctionality and lack of quorum, the Trust Board was in a position to effectively discharge that role is a separate issue which we address further at [79]–[82] below.

[50] Given our conclusion on this legal issue, it is not necessary for us to consider whether, as a matter of fact, the Trust Board intended to assign its representative status to the Iwi Trust at the Trust Board's September 2013 AGM (an issue on which the Trust Board and Iwi Trust have diametrically opposed views).

What is the appropriate relief against the Council?

[51] The Trust Board seeks a declaration that the Council:

> Was wrong to decide that the [s 30 order] did not require it to recognise the Trust Board as the representative of Ngāti Pāoa for the purposes of RMA and LGA issues[.]

[52] Additional declarations are sought, relating to the Council's: removal of the Trust Board from its Mana Whenua Register; failure to notify the Trust Board of the Application; and failure to actively protect the Trust Board's rights and interests under the Treaty of Waitangi.

[53] As we have outlined above, the Council's fundamental error was recognising the Iwi Trust rather than the Trust Board as the authorised representative of Ngāti Paoa for RMA purposes. The declaration set out at [51] above appropriately addresses that error. The other "errors" referred to by the Trust Board are simply the consequences of, or are inextricably linked to, the Council's error in failing to recognise the validity of the s 30 order. Those matters are therefore adequately addressed by the declaration and do not, in our view, require the making of additional declarations.

The claims against the Environment Court

[54] We now turn to consider whether the Judge erred in dismissing the Trust Board's judicial review claims against the Environment Court.

The alleged errors

[55] The Trust Board pleaded that the Environment Court erred in finding that:

(a) the Iwi Trust was the representative body of Ngāti Paoa for RMA purposes;

(b) the Iwi Trust's support for the Application should be relied on as representing the position of Ngāti Paoa as mana whenua; and

(c) the cultural values assessment favoured the Application.

[56] The Trust Board further pleaded that a miscarriage of justice had occurred because, if the Trust Board had been heard in opposition to the Application, the Environment Court would have assessed all of the (competing) evidence concerning the impact of the cultural values on Ngāti Paoa as mana whenua. In that event, it may have reached a different decision on whether to grant the resource consents. As a result, it says, the marina consents should be quashed.

[57] The Council and KPBL submitted that the Environment Court did not err in the ways alleged.[56] They also raised the affirmative defence of res judicata/issue estoppel in relation to the alleged error that the cultural values assessment favoured the Application.

The Council and KPBL's res judicata/issue estoppel defences

[58] The Iwi Trust and KPBL argued that SKP and the Trust Board (through SKP) had previously raised the alleged cultural values assessment error in SKP's rehearing application and subsequent appeal processes in the High Court, Court of Appeal and

[56] The second respondent, the Environment Court, abides the decision of this Court.

Supreme Court. This had resulted in a final determination of the issue that the Trust Board was now estopped from challenging.

Relevant law

[59] The doctrine of res judicata prevents a party from re-litigation where the claim or cause of action has been decided by a final judgment.[57] Res judicata may apply where there has been a determination of a fundamental issue in an earlier decision, between the same parties or their privies, known as issue estoppel.[58] The issue must be an essential step in the reasoning of the judgment, without which the judgment could not stand.[59] The issue may be one of fact or law.[60] To be estopped, a party must have been a party to the prior proceedings or a privy of such a party. A party is a privy of another if they had such a union or nexus, community or mutuality of interest, that to estop would produce a fair and just result.[61] The policy rationales for issue estoppel are that litigants should not be vexed twice on the same point and the public interest in the finality of litigation.[62] The object of the law is to achieve a result consonant with justice.[63]

The rehearing decisions

[60] After the Environment Court dismissed the appeals against the Application, SKP applied for a rehearing. It relied on s 294 of the RMA, which relevantly confers jurisdiction on the Environment Court to order a rehearing where, after it has given a decision, "new and important evidence becomes available … that … might have affected the decision".[64] The "new and important" evidence relied on by SKP included, in summary: that the Trust Board (rather than the Iwi Trust) was the authorised representative of Ngāti Paoa; that the Trust Board had had not been heard at the Environment Court hearing; and that the Trust Board opposed the marina

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57 Patrick Keane *Spencer Bower and Handley: Res Judicata* (6th ed, LexisNexis, London, 2024) at [1.03].
58 *Craig v Stringer* [2020] NZCA 260, (2020) 25 PRNZ 367 at [16].
59 At [16], citing *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266.
60 Keane, above n 57, at [8.04].
61 *Shiels v Blakeley*, above n 59, at 268.
62 *Craig v Stringer*, above n 58, at [16].
63 *Shiels v Blakely*, above n 59, at 268.
64 Resource Management Act, s 294(1); and Environment Court rehearing decision, above n 2, at [3].

development.[65] The rehearing application was supported by evidence from the Trust Board to this effect. The Trust Board (which was represented by the same lawyer as SKP) also applied for leave to be added as a party. That application, however, was held over until the rehearing application had been determined.

[61] While the Environment Court accepted that the matters raised were new, it found that it failed to meet the "importance" threshold in s 294 of the RMA in circumstances where:[66]

> … we find that we have been offered no evidence, let alone probative evidence about the position of the Trust Board, with reasons. Leaving aside that in any event no person has a right of veto over an application under the RMA, decision-making under the RMA must be evidence-based. We consider it important in a case like this that the reasons for the attitudes of those presenting them should be discernible.

[62] Mr Roebeck, the Principal Officer of the Trust Board, had provided evidence on behalf of the Trust Board in support of SKP's rehearing application. The Environment Court found, however, that Mr Roebeck was not appropriately qualified to give cultural evidence on behalf of Ngāti Paoa.[67] Further, in cross-examination, Mr Roebeck had found no fault with the cultural evidence Mr Morehu Wilson had given to the Environment Court, and which the Court had relied on in upholding the granting of resource consent.[68] As the Trust Board had not provided any appropriately qualified witness, such as a kaumātua of Ngāti Paoa, or at the least someone with whakapapa to Ngāti Paoa, the new evidence did not justify a rehearing.[69] The Environment Court concluded that:[70]

> [60] … on the evidence before us on this application SKP has not even got onto first base concerning alleged potential effects on Maori cultural values. Phrased in terms of the first criterion under [s 294 of the] RMA, while there might be "new" evidence (to us), it has not been demonstrated there is "important" evidence. It therefore follows that we perceive no new and important evidence that might have affected the outcome in this case.
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> …

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65 Environment Court rehearing decision, above n 2, at [15]–[16].
66 At [50] (footnote omitted).
67 At [51].
68 At [53].
69 At [58].
70 Tohutō omitted and emphasis in original.

> [62] … We have found that the mandate dispute is not a determining factor in the present case. What is of importance is that the cultural matters set out in the [cultural values assessment] by the Iwi Trust, accepted in principle by the Trust Board, and the evidence of kaumatua [Mr Morehu Wilson] for the Iwi Trust, have not been successfully challenged by SKP's rehearing application, even *prima facie*.

[63] The rehearing application was accordingly declined. SKP appealed that decision to the High Court, which dismissed the appeal on 19 June 2020.[71] This Court subsequently declined an application for leave to appeal, expressing the view that:[72]

> [29] The essential difficulty with SKP's argument is that from the point in time that the application was publicly notified the Trust Board had the opportunity to make submissions in opposition to the marina. Similarly, SKP has always had the opportunity to call evidence as to any claimed harmful cultural effects of the proposal. They did not do so. We do not consider that this is one of those rare cases where there has been an error of such substantial character that it would be repugnant to justice to allow it to go uncorrected. Consequently, there is no basis for the grant of leave for a second appeal on the grounds of a miscarriage of justice.

[64] Similarly, the Supreme Court observed, in declining leave to appeal, that:[73]

> [14] In arguing that a miscarriage of justice has occurred, SKP emphasises that the Environment Court determined cultural effects on the basis the consent application was supported by an entity (the Iwi Trust) which did not have representative status in terms of the [RMA]. Thus, the Court's conclusion that the iwi supported the marina proposal was wrong in fact and in law. SKP also submits that there was a "paucity of cultural effects evidence" presented by the Iwi Trust to the Court. Failing to order a rehearing deprived the Trust Board of the right to fill that evidential gap.
>
> [15] This argument faces the difficulty, as the Court of Appeal said, that "from the point in time that the application was publicly notified the Trust Board had the opportunity to make submissions in opposition to the marina". SKP maintains that the Board only became aware of the consent application three months after the conclusion of the original Environment Court hearing. Even so, as the Court of Appeal also says, "SKP has always had the opportunity to call evidence as to any claimed harmful cultural effects of the proposal. They did not do so." In these circumstances, we do not consider the assessment of the Courts below gives rise to a miscarriage of justice. Certainly, the heightened threshold for leave to appeal applicable in this case is not met in these circumstances.

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71 High Court rehearing appeal, above n 29.
72 Court of Appeal decision, above n 30.
73 Supreme Court decision, above n 30 (footnotes omitted).

The High Court analysis of issue estoppel

[65] Returning to the decision under appeal, the Trust Board's contention that it was not a privy of SKP for the purposes of the rehearing application was rejected by the Judge.[74] She found that the Trust Board's interests were represented by SKP, and both parties had mutual interests in opposing the marina development.[75] The Judge noted that the evidence put before the Environment Court by SKP during the hearing of the rehearing application was the Trust Board's evidence, and the same lawyer represented both parties, indicating a significant nexus. The Judge therefore concluded that the Trust Board was a privy of SKP for the purposes of the latter's rehearing application.[76]

[66] The Judge noted that the Environment Court had before it, in the context of the rehearing application, the new evidence that the Trust Board proposed to give at a rehearing. The Environment Court had determined, however, that that evidence would not have affected the outcome of the original hearing.[77] As a privy of SKP, the Trust Board was estopped from advancing the same argument in the context of the present judicial review proceeding.[78] The Judge also considered that this ground of review was arguably an abuse of process.[79]

[67] On appeal, the Trust Board advanced two key arguments:

(a) that the Trust Board was not a privy of SKP in the rehearing proceeding; and

(b) (if it was a privy) the issue before this Court is not identical to the issue that was before the Courts in the rehearing proceeding.

Our view

[68] The respondents submitted that the Trust Board was clearly a privy of SKP in the rehearing proceeding — the two entities worked together very closely to try and

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74 High Court judicial review decision, above n 4, at [173].
75 At [172].
76 At [173].
77 At [165].
78 At [177].
79 At [178].

secure a rehearing, even sharing the same legal representation. Although the Trust Board was not formally a party to that proceeding, this was somewhat of a technicality, as its application for joinder had been formally deferred pending the outcome of the rehearing application. Further, the rehearing application focussed solely on mandate issues and Ngāti Paoa's cultural impact concerns, rather than any of SKP's broader environmental, ecological or social impact issues.

[69] The respondents submitted that the basis on which a rehearing was sought was ultimately very limited in scope — namely that the Trust Board, as the authorised Ngāti Paoa representative for RMA purposes, should have an opportunity to be heard by the Environment Court on the cultural effects of the Application. That is also the outcome the Trust Board seeks in this proceeding. The only evidence SKP filed in support of the rehearing application was two lengthy affidavits from Mr Roebeck, which addressed, in significant detail, the mandate and representation issues within Ngāti Paoa. In such circumstances, the respondents submitted, any suggestion that there may have been any real divergence of views between SKP and the Trust Board regarding the scope of the Trust Board's evidence in support of the rehearing application is implausible.

[70] While there is some force in the respondents' submissions, we have not been persuaded that there is "such a union or nexus, such a community or mutuality of interest, [or] such an identity" between SKP and the Trust Board that it would be fair and just for the Trust Board to be estopped from pursuing this aspect of its claim.[80] SKP and the Trust Board undoubtedly shared a strong common interest in opposing the granting of resource consents for the Waiheke Marina. However, while the two entities may have been working towards a common goal, they had different constituents, roles and responsibilities. The Trust Board was a representative of mana whenua, although by the time of the rehearing application it was no longer the *sole* representative of mana whenua, as the s 30 order had come to an end. As counsel for the Trust Board noted, however, iwi and hapū have a special status and role as tangata whenua, and rights guaranteed by te Tiriti: "It ought to be axiomatic that no-one else can exercise the right of kaitiakitanga on behalf of tangata whenua, or

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[80] *Shiels v Blakeley*, above n 59, at 268. See also *Wire Supplies Ltd v Commissioner of Inland Revenue* [2007] NZCA 244, [2007] 3 NZLR 458 at [22]–[31].

speak for them." SKP, on the other hand, was described by the Trust Board as "a (Pākehā) Waiheke Island-based community organisation" formed for the sole purpose of opposing the marina. Counsel for the Trust Board submitted that, although the two groups may have both opposed the marina, they had different reasons for doing so, based on different world views:[81]

> Ngāti Paoa view their relationship with Pūtiki Bay through the lens of tikanga, and the governing principles of mana, whanaungatanga and kaitiakitanga. They conceptualise the impact of the marina primarily in terms of the spiritual and cultural effects it will have on the mauri of the moana and those who whakapapa to it. By contrast, SKP's concerns relate to environment and social impacts.

[71] The Trust Board acknowledged before us that the evidence it provided in support of SKP's rehearing application was somewhat limited in scope and failed to address the cultural effects of the Application in any detail (a matter which was the subject of considerable criticism by the Environment Court). The Trust Board asserted, however, that it was SKP's strategic decision not to submit more comprehensive evidence on issues relating to cultural effects and instead focus on mandate issues. The possibility, therefore, that the Trust Board would have submitted more comprehensive evidence on cultural effects to the Environment Court, given the opportunity, cannot be excluded.

[72] On balance, taking these various matters into account, it is our view that the Judge erred in finding that the Trust Board was a privy of SKP. It necessarily follows that no estoppel arises in respect of the Trust Board's judicial review cause of action against the Environment Court. It is not therefore necessary for us to determine the extent of similarity between the issues raised at the rehearing application and those raised in the Trust Board's current claim against the Environment Court. Rather, we will consider this aspect of the appeal on its merits.

The representative status of the Iwi Trust

[73] The first two alleged errors by the Environment Court (those set out at [55(a)] and [55(b)] above) relate to the representative status of the Iwi Trust. We have already found that the Council *did* err in recognising the Iwi Trust rather than the Trust Board

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81 Footnote omitted.

as the authorised representative of Ngāti Paoa during the relevant period. It necessarily follows that the Environment Court was also mistaken in its understanding that:

(a) the Iwi Trust was the representative body of Ngāti Paoa for RMA purposes; and

(b) the Iwi Trust's support for the Application could be relied on as representing the position of Ngāti Paoa as mana whenua.

[74] That is not the end of the matter, however. While representative status is clearly important, it is not an end in itself.[82] Rather, this aspect of the appeal turns on whether the Environment Court's mistaken belief that Iwi Trust was the representative body of Ngāti Paoa for RMA purposes arguably resulted in (or contributed to) the Court making material errors in its cultural values assessment of the Application.

Did the Environment Court make material errors in its assessment of the cultural effects of the Application?

[75] The Trust Board's argument on this aspect of the appeal is underpinned by the following key propositions:

(a) The Trust Board was denied an opportunity to oppose the Application due to the Council's failure to recognise its status as the authorised Ngāti Paoa representative, which resulted in the Council failing to notify the Trust Board of the Application.

(b) If the Trust Board had been notified of the Application it would have filed evidence and/or made submissions in opposition to the Application, and subsequently (if necessary) in support of any appeal to the Environment Court if the Application was granted.

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82 High Court rehearing appeal, above n 29, at [55].

(c) The Trust Board's evidence and submissions would have carried more weight than those of the Iwi Trust, given that the Trust Board was the authorised representative of Ngāti Paoa, pursuant to the s 30 order.

(d) As a result, the outcome of the Application, or the subsequent appeals to the Environment Court, may well have been different.

[76] First, we will briefly reiterate some of the key background facts that are relevant to our assessment of these propositions:

(a) In 2013, the Trust Board (in its capacity as the authorised representative of Ngāti Paoa on the Council's Mana Whenua Register) was served with an earlier application to establish a marina in Matiatia Bay, Waiheke Island (see [21] and [22] above). It elected, however, not to participate in the resource consent process in relation to that application. A year or so later, the Iwi Trust (after it had been incorporated in late 2013) made a belated and successful application to join the proceedings relating to the Matiatia marina proposal, at which it gave evidence on behalf of Ngāti Paoa, with the knowledge of the Trust Board.

(b) The application to establish a marina at Kennedy Point was lodged by KPBL on 19 September 2016 and was publicly notified on 17 and 18 November 2016. The Council also provided a copy to the Iwi Trust at that time (but not the Trust Board).

(c) From some time in 2013 until March 2017 the Trust Board was dysfunctional and legally inoperative. By late 2016 it had no quorum and quite possibly had no valid trustees at all (as we have explained at [24] above). At best, there were only three remaining trustees (Ms Andrews, Ms Dixon-Rikihana and Mr Kahi). Consequently, the Trust Board was unable to hold trustee meetings or make decisions as a Trust Board.

(d) Trustee elections to put the Trust Board back on a proper legal footing did not take place until 11 March 2017, after the public submission period in respect of the Application closed in December 2016 and only three weeks before the resource consent hearing. Ten new trustees were elected at that time, including Ms Roebeck. The new trustees did not include Ms Andrews, Ms Dixon-Rikihana or Mr Kahi.

(e) The Application had a high public profile, and a "well-publicised" Council hearing took place on Waiheke Island during 3 to 7 April 2017. On 17 May 2017, the Independent Commissioners released their decision granting the Application.

(f) The Environment Court appeal hearing took place from 26 February 2018 to 2 March 2018. Again, this was well-publicised.

(g) There is no evidence as to when Ms Andrews, Ms Dixon-Rikihana and Mr Kahi, the only possible trustees at the time the Application was publicly notified, became aware of it. Ms Roebeck and Mr Peters (who subsequently became trustees), say they did not become aware of the Application until after the Environment Court hearing. Mr Rawiri's evidence appears to be of similar effect. There is no evidence from the seven other trustees who were elected in March 2017 as to when they became aware of the Application.

[77] As noted at [63] above, the argument that the Trust Board was denied the opportunity to oppose the Application due to the Council's failure to individually notify it was rejected by this Court in its rehearing decision. Rather, the view taken by this Court was that, from the time that the Application was publicly notified, both the Trust Board and SKP had the opportunity to make submissions or submit evidence in opposition to the marina, including in relation to any alleged harmful cultural effects

of the proposal.[83] The Supreme Court took a similar view when declining leave to appeal.[84] In this proceeding, Hinton J reached the same view.[85]

[78] We see no reason to take a different view. Although the Trust Board should have been provided with a copy of the Application, in its capacity as the authorised representative of Ngāti Paoa pursuant to the s 30 order, it seems unlikely that this oversight was causative of the Trust Board's failure to make a submission on the Application, for several reasons. The first is that previously referred to by both this Court and the Supreme Court in the rehearing context. The Application was publicly notified and widely publicised, as were the subsequent appeals to the Environment Court. The Trust Board therefore had the opportunity to make a submission on the Application if it had been willing and able to do so.

[79] The second reason is that the Council's failure to individually notify the Trust Board of the Application cannot have been a material cause of the Trust Board's failure to make a submission in circumstances where the Trust Board was legally inoperative and therefore incapable of making a submission at the relevant time. As outlined above at [24], it lacked a quorum and quite probably had no valid trustees at all. It was not in a position to hold a Trust Board meeting or reach an agreed position on the appropriate response to the Application. We note that this was during the period when legal proceedings were on foot to try and restore the Trust Board to a proper legal footing. The Trust Board took no part in those proceedings, presumably because it was not legally able to do so.[86] We further note that there is simply no basis for us to infer what response the Trust Board might have made to the Application in late 2016, had the Trust Board been in a position to make a submission.

[80] Finally, when the Trust Board had previously been served (in its capacity as the authorised representative of Ngāti Paoa) with an application relating to another proposed marina development on Waiheke Island (the Matiatia proposal) the Trust Board had elected not to participate in the resource consent process. It cannot

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83 Court of Appeal decision, above n 30, at [29].
84 Supreme Court decision, above n 30, at [15].
85 High Court judicial review decision, above n 4, at [184].
86 *Roebeck v Ngāti Paoa Trust Board*, above n 24.

therefore be assumed that serving the Application on the Trust Board would have resulted in its participation, even if it had been legally operative at the relevant time.

[81] New trustee elections took place in March 2017, but it was not until 3 July 2017 that the Trust Board wrote to the Council advising of the recent trustee elections and re-asserting its representative status. Prior to that, the newly elected Trust Board was presumably focussed on more pressing matters, including addressing its deregistration by Charities Services in June 2017 for failing to file annual returns.

[82] Having failed to (and/or been unable to) make any submissions in respect of the Application when it was publicly notified, the Trust Board had no right of appeal to the Environment Court. We accept, however, that the (newly elected) Trust Board could nevertheless have applied for leave to be heard at the Environment Court appeal hearing which took place in February and March 2018. It did not, however, do so, despite the hearing being well-publicised.

[83] In conclusion, we accept that the Environment Court was mistaken in its understanding that the Iwi Trust was the representative body of Ngāti Paoa for RMA purposes. However, the application to build a marina at Kennedy Point, and the subsequent appeals process, was high profile and well-publicised. Although the Trust Board was not in a position to file a submission on the Application prior to the closing date of submissions, following the election of 10 new trustees in March 2017, it could have sought to become involved in the resource consent process and hearings. For the reasons outlined, we are not persuaded that its failure to do so can be attributed to the Council.

[84] In such circumstances it is not necessary for us to engage in any depth with the Trust Board's submission that the evidence it *could* have given to the Environment Court would likely have affected the outcome of the appeals. As Hinton J observed, however:[87]

> … it is important to remember that contrary to the way the case was argued, Ngāti Paoa was not shut out of the decision-making surrounding the Kennedy Point marina.

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87 High Court judicial review decision, above n 4, at [194].

[85] As we have noted previously, Mr Morehu Wilson gave evidence before the Environment Court on cultural effects, on behalf of the Iwi Trust. At the time, Mr Wilson (who has since passed away) had been a Treaty settlement negotiator for Ngāti Paoa since 2011, with the mandate of the iwi. On the issue of engagement with Ngāti Paoa, Mr Wilson's evidence before the Environment Court was that KPBL representatives held various consultative meetings with Ngāti Paoa rangatira, kaitiaki and members of the Board of Trustees of the Iwi Trust. It is common ground that Mr Wilson was widely respected for his great knowledge of Ngāti Paoa mātauranga. Indeed, when giving evidence on behalf of the Trust Board before the Environment Court during the rehearing application, Mr Roebeck confirmed that:[88]

> … he [knew] Mr [Wilson] and that Mr Wilson [was] a kaumatua of Ngati Paoa and fluent in Te Reo Maori; that Mr Wilson [had] a great knowledge of the mātauranga or knowledge of Ngati Paoa; that he [was] a widely respected representative of Ngati Paoa; that Mr Wilson had been one of the mandated treaty settlement negotiators for Ngati Paoa including for the Tamaki Collective settlement, the Pare Hauraki Collective settlement, the Marutuahu Collective settlement and the Ngati Paoa settlement. … [H]e had read the evidence of Mr Wilson …; he conceded that he agreed with it in principle; and having said "in principle", conceded that there were no matters of culture and spiritual and mauri that he wished to bring to the Court's attention.

[86] There was, accordingly, little challenge to Mr Wilson's evidence in the context of the rehearing application. Hence, even though the Environment Court was mistaken about the representative status of the Iwi Trust, it had credible cultural evidence from a leading Ngāti Paoa kaumātua before it and considered this evidence in the course of its decision. In the overall circumstances, it was not an error for the Environment Court to place significant weight on the evidence of Mr Wilson when assessing the cultural impacts of the Application. We further note that the Environment Court was not persuaded when it determined SKP's rehearing application that the Trust Board's proposed new evidence (as presented at that time) would have impacted the Environment Court's decision on the appeals.[89]

[87] In conclusion, we have found that the core propositions underpinning this aspect of the appeal (as summarised at [75] above) are not supported by the evidence.

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88 Environment Court rehearing decision, above n 2, at [53] (tohutō omitted in original).
89 At [60].

The Trust Board was not denied an opportunity to oppose the Application due to the Council's failure to notify it of the Application. Although the Council should have sent a copy of the Application to the Trust Board's registered office (due to the existence of the s 30 order), its failure to do so was not materially causative of the Trust Board's subsequent lack of involvement in the resource consent process. Further, given that the Trust Board was legally inoperative at the relevant time, it is not possible to infer what position it would have taken in respect of the Application, if it had had a quorum of trustees.

[88] The Environment Court could only assess the cultural effects of the Application on the basis of the evidence before it, which included cultural evidence from Mr Morehu Wilson. Based on that evidence, it was open to the Environment Court to reach the conclusion it did regarding the cultural effects of the Application.

[89] Although our reasoning differs from the Judge's in some respects, her conclusion that the judicial review claims against the Environment Court have not been made out was clearly correct. This aspect of the appeal must accordingly be dismissed.

Relief issues

[90] For completeness, we note that even if we had allowed the appeal in respect of the cause of action against the Environment Court, we would have been very reluctant to set aside the resource consents for a range of reasons, including that:

(a) Although the Trust Board had the benefit of a s 30 order in its favour at the time the Application was notified, it was legally inoperative and unable to discharge its role as authorised representative at that time.

(b) This is not a situation where Ngāti Paoa was not heard at all on the Application. Mr Morehu Wilson gave evidence before the Environment Court. The Trust Board does not dispute Mr Wilson's expertise in relation to Ngāti Paoa mātauranga.

(c) The Trust Board has known about the marina consent since at least May 2018. It did not file its judicial review proceeding until 3 September 2021. No interim orders or stays of the consent were sought by the Trust Board.

(d) This lengthy delay has been highly prejudicial to KPBL. We note that KPBL did not confirm the project as unconditional until July 2020, after all of the "as of right" appeals against the resource consent had been dismissed. The construction of Waiheke Marina has since been completed, and the marina is now operational.

(e) The s 30 order in favour of the Trust Board was revoked almost six years ago. If the resource consents were quashed and this matter was remitted to the Environment Court for a further hearing, both the Iwi Trust and the Trust Board would be entitled to make submissions, with neither entity being the sole authorised representative of Ngāti Paoa. Rather, the necessary focus would be on the cogency and probative value of any cultural evidence presented. Although it is not possible to speculate on the outcome of such an exercise, it is of note that the Environment Court, in the context of the rehearing application, was not persuaded that the further evidence the Trust Board wished to submit (as at that time) would have impacted the outcome.

Costs

[91] The intervener does not seek costs.

[92] The Trust Board's appeal has succeeded in part, in that we have found that the Council erred in determining (in 2013 and 2014) that that order made by the Māori Land Court under s 30 of TTWMA did not require it to recognise the Trust Board as the representative of Ngāti Paoa for the purposes of the RMA. While our finding on this issue has clarified the law in this area, it is of little practical consequence in the particular circumstances of this case, for the reasons outlined above at [77] to [83]. The Trust Board has failed in relation to its other grounds of appeal and, overall, has failed to achieve its key objective of obtaining an order that the

resource consents be set aside. Nevertheless, given that the parties have each had some measure of success, it is our view that the most appropriate outcome is that the costs of this appeal lie where they fall.

[93] Whether the costs orders made in the High Court require adjustment in light of the Trust Board's partial success on appeal is a matter appropriately determined by the High Court. We will accordingly remit the issue to that Court.

Result

[94] The application for leave to adduce further evidence is granted.

[95] The appeal is allowed in part. We make a declaration that the Council erred in determining (in 2013 and 2014) that the order made by the Māori Land Court under s 30 of Te Ture Whenua Maori Act 1993 did not require it to recognise the Trust Board as the representative of Ngāti Paoa for the purposes of the Resource Management Act 1991. The appeal is otherwise dismissed.

[96] The costs orders in the High Court are set aside. We refer the issue of costs back to that Court so that costs can be reassessed in light of this decision.

[97] We make no order as to costs in relation to the appeal.

Solicitors:
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Kāhui Legal, Wellington for Intervener