IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 75/2020
[2020] NZSC 132

BETWEEN	CLETUS MAANU PAUL Applicant
AND	ATTORNEY-GENERAL Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	J Mason, M J V White and H J S Berger for Applicant G L Melvin and Y Moinfar-Yong for Respondent K M Anderson and M J Dicken for Maungaharuru-Tangitū Trust as Interested Party
Judgment:	24 November 2020

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

C There is no order as to costs.

REASONS

Introduction

[1] This is an application under s 69 of the Senior Courts Act 2016 for leave to appeal directly to this Court from a decision of the High Court under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). The High Court struck out the

application by Mr Paul seeking orders recognising customary marine title and protected customary rights.[1]

Background

[2] Mr Paul's original application was made "on behalf of all Māori" in relation to the entire marine and coastal area of New Zealand. Because of its scope, this application has been described as a "national application".[2] The Act provides that applications must be filed by the prescribed date.[3] Mr Paul said the application was protective in that it provided a way in which potential applicants who had missed the statutory filing deadline could continue to advance their applications.

[3] After various procedural skirmishes Mr Paul filed a further amended application on 21 May 2020, after the expiry of the statutory deadline. In this application, he identified the applicants as himself "in conjunction" with 13 other individuals.[4]

[4] The Attorney-General filed an application to strike out the amended application. The Attorney-General's application was supported by two other applicants for orders under the Act, namely, the Rongomaiwahine Trust[5] and the Maungaharuru-Tangitū Trust. Both Trusts appeared in the High Court at the strike-out hearing.

[5] In striking out the application, the High Court said that in attempting to add, "long after the deadline for the filing of applications had expired, new applicants … whose claims could not possibly have been identified" from the original application was a material change from the original application.[6] This constituted an abuse of process. There was also an abuse of process because the amended application was

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1 *Re Paul* [2020] NZHC 2039 (Churchman J) [HC judgment].

2 At [1]. The High Court also struck out the one other national application: *Re Dargaville* [2020] NZHC 2028.

3 Marine and Coastal Area (Takutai Moana) Act 2011, s 100(2).

4 Mr Paul asks that the intituling reflect that the application is that of Mr Paul and others. We have maintained the intituling as it was in the High Court simply to assist in the accessibility of the decision.

5 The Rongomaiwahine Trust did not file submissions in response to the leave application to this Court.

6 HC judgment, above n 1, at [64].

filed to circumvent the mandatory time limits in the Act. The High Court also found that the amended application did not comply with some of the other mandatory requirements in the Act.[7]

The proposed appeal

[6] Leave to appeal is sought on the basis that the High Court erred in striking out the application. Mr Paul says that the proposed appeal raises a significant issue of general and public importance about the Treaty of Waitangi[8] and tikanga, and the approach to be taken to the interpretation of the Act.[9] These questions arise in a context where, Mr Paul says, the High Court decision has the effect of permanently extinguishing customary rights. The applicant also says that a substantial miscarriage of justice will occur if the appeal is not heard.[10] Finally, Mr Paul submits the Court has jurisdiction to hear the appeal.

[7] The Attorney-General opposes the grant of leave. The Attorney-General says there is no jurisdiction for this Court to hear a direct appeal. The submission is that the proposed appeal relates to an interlocutory decision and s 69(c) of the Senior Courts Act provides that the Court may hear and determine an appeal in a civil proceeding against a High Court decision, unless "the decision is made on an interlocutory application".[11] In any event, it is submitted, the application does not meet the criteria for leave. The Maungaharuru-Tangitū Trust supports the Attorney-General's approach and says Mr Paul's amended application significantly prejudices the Trust and other applicants who filed applications in time and in compliance with the Act's other requirements.

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7 For example, the Court noted that Mr Paul was still described as an applicant "in conjunction with the Second to Ninth Applicants" although no particular area that he was claiming was specified. Further, the "name of the person who is proposed as holder of the order" was not identified as required by s 103(2)(d): HC judgment, above n 1, at [66].

8 Senior Courts Act 2016, s 74(2)(a) and (3).

9 Mr Paul says the High Court erred in law and in tikanga in its interpretation of the Marine and Coastal Area (Takutai Moana) Act and in its approach to various issues.

10 Senior Courts Act, s 74(2)(b).

11 An interlocutory application is defined in s 65.

Our assessment

[8] There is a right of appeal against decisions of fact and law to the Court of Appeal under s 112(1) of the Act. The applicant seeks to bypass that appellate pathway. As s 75(b) of the Senior Courts Act makes clear, this Court must not grant leave for a direct appeal unless satisfied that there are exceptional circumstances that justify this course.

[9] We do not consider the present application meets that threshold. In support of the submission that there are exceptional circumstances here, Mr Paul relies, amongst other things, on the impact of the decision on a number of Māori groups, the need for a robust interpretation of the Act given its novelty, and concerns about delay. His submission is that the latter concerns are exacerbated by funding issues.

[10] None of the factors raised persuade us that this is a case which should be determined by this Court without the benefit of the views of the Court of Appeal. That need not delay matters particularly where the case for urgency is not made out.[12]

[11] The criteria for leave to appeal are not met. We can therefore leave to one side the question of the Court's jurisdiction.[13]

Result

[12] The application for leave to appeal is out of time but the delay is short and there is no objection to our granting an extension of time. We accordingly grant the application for an extension of time to apply for leave to appeal.

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

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[12] We express no view on the merits of the submissions made in relation to funding issues but, in any event, do not see this aspect as making the case for urgency.

[13] The Court in *Ceramalus v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZSC 26, (2018) 24 PRNZ 8 left open the question of whether a decision striking out a proceeding was an interlocutory decision, but said that earlier decisions to the effect that it was should not be treated as resolving the issue definitively: at [8].

[14] In the circumstances, it is appropriate that costs lie where they fall. There is no order as to costs.

Solicitors:
Phoenix Law Ltd, Wellington for Applicant
Crown Law Office, Wellington for the Respondent