IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 83/2022
[2022] NZSC 144

BETWEEN	THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST First Applicant
	TE MARU O NGĀTI RANGIWEWEHI Second Applicant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

SC 87/2022

BETWEEN	THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST Applicant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	J W Maassen and O J V D Maassen for Applicants M H Hill for Respondents
Judgment:	13 December 2022

JUDGMENT OF THE COURT

A The application for leave to appeal in SC 83/2022 is dismissed.

B The application for leave to appeal in SC 87/2022 is dismissed.

C The applicants must pay the respondent one set of costs of $2,500.

REASONS

Two applications for leave

[1] The applicants, the Trustees of the Motiti Rohe Moana Trust (the Trustees) and Te Maru o Ngāti Rangiwewehi, apply for leave to appeal to this Court against a High Court decision.[1] There are two applications for leave, but both result from the same High Court decision and it is convenient to deal with them in the same judgment.

[2] The case concerns the decision of the Bay of Plenty Regional Council to withdraw a proposed plan change (PC9) to the Bay of Plenty Natural Resources Plan (the NRP). In its judgment, the High Court:

(a) dismissed an appeal by the Trustees against a decision of the Environment Court refusing to grant a statutory declaration that the Council's withdrawal decision was unlawful;[2] and

(b) dismissed the judicial review proceedings brought by the applicants in relation to the Council's withdrawal decision.

[3] The applicants seek leave to appeal directly to this Court in respect of both issues. To justify the grant of leave for such a "leapfrog" appeal, the proposed appeals must satisfy the leave criteria specified in s 74 of the Senior Courts Act 2016 *and* meet the exceptional circumstances test set out in s 75(1) of the Act.

Background

[4] The factual background is set out in the decision of the Environment Court and we do not repeat it here.[3] For present purposes, it is sufficient to note that PC9 would have inserted provisions in the NRP to give effect to the National Policy Statement on Freshwater Management (NPS-FM). The NPS-FM was promulgated in 2010, replaced in 2014 and amended in 2017. The Council had consulted on PC9 in 2015,

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1 *The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846 (Hinton J) [HC judgment].

2 *The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180 (Chief Environment Court Judge D A Kirkpatrick) [EnvC judgment].

3 At [3]–[11].

heard submissions in March 2018 and publicly notified it in October 2018. There were multiple appeals against the notified PC9, including appeals by the applicants.

[5] A draft new NPS-FM was released by the Ministry for the Environment in September 2019. It would substantially change the 2014 version, as amended in 2017. In light of this development, a committee of the Council resolved to withdraw PC9; that resolution was notified in February 2020.

[6] The Trustees sought a declaration in the Environment Court under s 310 of the Resource Management Act 1991 (the RMA) that the Council's decision to withdraw the plan change was unlawful as it failed to comply with s 8 of the RMA and was also irrational.[4] Section 8 requires all persons exercising functions and powers under the RMA to "take account of the principles of the Treaty of Waitangi".

[7] In response, the Environment Court issued a preliminary decision finding that it lacked jurisdiction to make the requested declarations. It said that s 310 of the RMA does not authorise review of a council's decision to withdraw a proposed change to an applicable plan "beyond determining whether the express conditions as to timing and the giving of notice and reasons have been satisfied".[5]

[8] The Trustees appealed to the High Court. They challenged the process followed by the Environment Court and also challenged its finding as to jurisdiction.

High Court decision

[9] The High Court Judge dismissed both challenges. On the first, she found no procedural error in the Environment Court's treatment of the jurisdictional question as one worthy of *preliminary* determination.

[10] On the second point, the High Court Judge agreed the Environment Court lacks jurisdiction to make declarations of illegality beyond those specifically provided for by s 310 of the RMA.[6]

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4 At [12].
5 At [100].
6 HC judgment, above n 1, at [49]–[71].

[11] The Trustees separately brought judicial review proceedings in the High Court, challenging the Council's withdrawal decision on eight grounds. The High Court Judge rejected all grounds of review.

[12] The finding of most significance in the present context is the High Court's finding that the Council did not breach s 8 of the RMA when making the withdrawal decision. In the course of making that finding, the High Court Judge observed that s 8 does not require a Council to consider interests in the nature of customary property rights when making a withdrawal decision.[7]

Proposed appeals to Supreme Court

[13] The applications for leave to this Court are advanced on the basis that the points the applicants wish to argue on appeal give rise to matters of general or public importance.[8]

[14] The applicants acknowledge "exceptional circumstances" are required to bring a leapfrog appeal.[9] In relation to the appeal against the decision to dismiss the appeal to the High Court from the Environment Court (the RMA appeal), the Trustees concede the matters raised by that appeal are unlikely to meet the s 75 threshold. Rather, they submit that there are exceptional circumstances justifying a leapfrog appeal from the judicial review aspect of the High Court judgment and, therefore, the Court should for administrative efficiency take up the RMA appeal concurrently.

[15] The case for a leapfrog appeal to this Court from the judicial review aspect of the High Court decision is based on these three general propositions:

(a) The delay that would result from following the normal appellate process is not acceptable in this situation.

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7 At [99].
8 Senior Courts Act 2016, s 74(2)(a).
9 Section 75(b).

(b) Presently, there exists a risk of material impairment of or prejudice to the customary interests of tangata whenua as a consequence of the judgment of the High Court.

(c) There is a need for authoritative guidance from the Supreme Court about the place of customary interests in the allocation of freshwater resources.

[16] We address each in turn.

Delay

[17] Delay is not sufficient on its own to grant a leapfrog appeal and deviate from the normal appellate hierarchy. This Court has previously observed that the length of proceedings prior to the application for leave and the possibility of further delay if the case proceeded in the Court of Appeal did not constitute "exceptional circumstances".[10] That observation applies equally here.

Prejudice to tangata whenua / material impact on customary interests

[18] The applicants submit the Council's withdrawal decision—affirmed by the High Court—creates an ongoing risk of material impairment of customary freshwater rights:

(a) By affirming the Council's decision, the High Court permitted a return to the status quo, being the "operative plan". The applicants submit that the operative plan does not recognise customary interests in freshwater. For that reason, customary interests may be materially impaired since water rights will be reallocated for potentially lengthy terms under a regional policy instrument "that does not recognise customary interests".

(b) Additionally, the Council's withdrawal decision stopped tangata whenua from pursuing appeals in the Environment Court about the

[10] *Scott v Williams* [2019] NZSC 80, [2019] NZFLR 140 at [10].

> proposed plan change. Fourteen appeals were afoot when the withdrawal decision was made. The object of some of the appeals was to strengthen the proposed plan change to better safeguard customary freshwater interests.

[19] Having considered these points, we are not persuaded that there is prejudice of such a degree that a leapfrog appeal should be granted.

[20] First, there is nothing raised in the applicants' submissions to suggest that the "prejudice" (to the extent it arises at all) cannot be cured by a successful appeal to the Court of Appeal.

[21] Second, the applicants' argument on prejudice assumes that resurrection of the withdrawn PC9 proposal would successfully protect Māori customary rights. But the premise of the applicants' attempted appeals in the Environment Court against the proposed PC9 was that the proposal failed to protect Māori customary interests adequately. In those circumstances, we do not think there is sufficient force in the argument that the prejudice arising from the unamended NRP continuing to apply (as opposed to the unamended plan with a plan change as proposed in PC9) is such as to justify a leapfrog appeal. Reinstating PC9 so that the fourteen appeals could proceed when the underlying NPS-FM is in a state of flux appears to have an element of futility about it.

Authoritative guidance

[22] Much of the applicants' submissions are directed at the harm said to flow from the High Court Judge's remark at [99] that the Council was not obliged by s 8 of the RMA to consider interests in the nature of customary property rights. The applicants have interpreted this observation as establishing a general principle that customary rights are always irrelevant to the allocation of resources under the RMA. We doubt that such a general principle can fairly be extrapolated from the High Court Judge's remark. It seems rather to address only the decision to withdraw PC9. In any event, it is a matter that can be fully ventilated in the Court of Appeal. We make no comment as to whether the High Court was correct in relation to the withdrawal decision.

[23] In *Port Otago Ltd v Environment Defence Society Inc*, this Court declined leave for a leapfrog appeal, in part because it considered that constitutional issues requiring authoritative determination should still be first dealt with by the Court of Appeal.[11] We make the same observation here.

Result and costs

[24] We decline leave for a leapfrog appeal in relation to the judicial review aspect of the High Court decision. In those circumstances, it is not necessary for us to address separately the application for a leapfrog appeal in relation to the RMA appeal. As the matters may proceed to hearing in the Court of Appeal, we do not make any other comments on the merits of the proposed appeals.

[25] The applications for leave to appeal are dismissed.

[26] The applicants must pay the Council one set of costs of $2,500.

Solicitors:
Kaupare Law and Consultancy, Auckland for Applicants
CooneyLeesMorgan, Tauranga for Respondent

[11] *Port Otago Ltd v Environmental Defence Soc Inc* [2020] NZSC 38.