

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 1/2023
[2023] NZSC 35**

BETWEEN SUSTAINABLE OTAKIRI
INCORPORATED
Applicant

AND WHAKATĀNE DISTRICT COUNCIL
First Respondent

CRESWELL NZ LIMITED
Second Respondent

SC 2/2023

BETWEEN TE RŪNANGA O NGĀTI AWA
Applicant

AND BAY OF PLENTY REGIONAL COUNCIL
First Respondent

CRESWELL NZ LIMITED
Second Respondent

Court: Glazebrook and O'Regan JJ

Counsel: D M Salmon KC, D A C Bullock and E J Mills for Applicant
SC 1/2023
H K Irwin-Easthope and K J Tarawhiti for Applicant SC 2/2023
A M B Green for First Respondent SC 1/2023
J B M Smith KC and D G Randal for Second Respondent
SC 1/2023 and SC 2/2023
M H Hill for First Respondent SC 2/2023

Judgment: 17 April 2023

JUDGMENT OF THE COURT

- A** Subject to C, the applications for leave to appeal are granted (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598).
- B** The approved question is whether the Court of Appeal was correct to dismiss the appeals.
- C** The application for leave to appeal on costs is dismissed (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598).
- D** An extension of time to apply for leave to appeal is granted (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388).
- E** The application for leave to appeal is granted (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388).
- F** The approved question is whether the High Court erred in upholding the Environment Court's decision in relation to the negative tikanga effects.
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REASONS

Background

[1] The applications in this case stem from a dispute relating to the proposed expansion of a water bottling plant in the Bay of Plenty.¹ In 2016, Creswell NZ Ltd (Creswell), the second respondent in both applications, entered into a sale and purchase agreement for the land and water distribution/bottling business.² Creswell sought consents from the Bay of Plenty Regional Council to take water for the bottling operation, amongst other activities.³ Creswell also sought consent from Whakatāne District Council to vary conditions which applied to the existing land use

¹ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (Cooper, Goddard and Dobson JJ) [CA judgment] at [7].

² At [9].

³ At [17].

consent to allow the expansion of the water bottling plant and the construction of new facilities.⁴

[2] The consents were granted and subsequently upheld in the Environment Court by majority (subject to conditions).⁵

[3] On appeal to the High Court, amongst other issues, the High Court considered whether the “end use” of the bottles could be considered; whether the majority erred in declining to have recourse to Part 2 of the Resource Management Act 1991; whether the majority erred in determining that the activity status under the Whakatāne District Plan was a discretionary “rural processing activity” rather than a non-complying “industrial activity”; whether negative effects on te mauri o te wai and the ability of Te Rūnanga o Ngāti Awa to exercise kaitiakitanga (the negative tikanga effects) could be considered; and whether it erred in determining that the activity was the expansion of an existing activity rather than a new activity.⁶ The High Court dismissed the appeals.⁷

[4] The Court of Appeal largely considered the same questions as those which had been considered in the High Court.⁸ Relevantly, the Court of Appeal refused to grant leave on the issue of whether the High Court erred in its finding that the Environment Court was correct to exclude consideration of the negative tikanga effects.⁹ The Court of Appeal affirmed the High Court decision on all issues, with the exception of the Court of Appeal’s holding that the Whakatāne District Council should have dealt with the proposal as a new activity (although it held that this was irrelevant to the outcome).¹⁰

⁴ At [20].

⁵ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (Judge Kirkpatrick and Commissioner Buchanan. Commissioner Kernohan dissenting).

⁶ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 (Gault J) at [36] and [106].

⁷ At [266].

⁸ See [3] of this judgment; and CA judgment, above n 1, at [3].

⁹ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 452 (Clifford and Courtney JJ).

¹⁰ CA judgment, above n 1, at [192].

[5] Sustainable Otakiri Inc and Te Rūnanga o Ngāti Awa (the applicants) seek leave to argue that the Court of Appeal erred in dismissing the appeal.

[6] Sustainable Otakiri also seeks leave to appeal on costs, arguing that the Court of Appeal erred in awarding costs against it (the costs issue).

[7] Te Rūnanga o Ngāti Awa also seeks leave to appeal directly to this Court against the High Court's findings on the negative tikanga effects. It seeks an extension of time to bring this application.

Decision

[8] Leave is granted to both applicants to appeal against the Court of Appeal decision.

[9] Leave is also granted to Te Rūnanga o Ngāti Awa to appeal against the High Court decision on the negative tikanga effects. Te Rūnanga o Ngāti Awa's application for an extension of time is granted.

[10] It is not the Court's practice to give reasons for the granting of applications for leave to appeal. With regard to the application for an extension of time, we consider that the respondents will not be disadvantaged by any delay because leave is already being granted to appeal against the Court of Appeal decision, and the arguments about the negative tikanga effects will be heard at the same time as that appeal. As a reminder, leave is granted with regard to points of law only.¹¹

[11] The application for leave to appeal is declined on the costs issue. We accept that the issue of costs for those acting in the public, as against a private, interest may raise questions of public or general importance, but we do not consider that the jurisprudence, including in this Court, has reached a stage where it may be useful for this Court to hear an appeal of this nature.

Solicitors:

¹¹ See Resource Management Act 1991, s 299.

LeeSalmonLong, Auckland for Applicant SC 1/2023
Whāia Legal, Wellington for Applicant SC 2/2023
Brookfields Lawyers, Auckland for First Respondent SC 1/2023
Buddle Findlay, Wellington for Second Respondent SC 1/2023 and SC 2/2023
Cooney Lees Morgan, Tauranga for First Respondent SC 2/2023