

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 36/2023
[2023] NZSC 77

BETWEEN TE WHĀNAU A KAI TRUST
 Applicant

AND GISBORNE DISTRICT COUNCIL
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: M S Smith and D C F Naden for Applicant
 P T Beverley and T J Ryan for Respondent

Judgment: 29 June 2023

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

Introduction

[1] On 23 June 2022, the High Court¹ dismissed Te Whānau a Kai Trust's appeal against the decision of the Environment Court relating to a dispute about the Gisborne Regional Freshwater Plan.²

[2] On 13 March 2023, the Court of Appeal dismissed the Trust's application for leave to appeal to that Court.³

¹ *Te Whānau a Kai Trust v Gisborne District Council* [2022] NZHC 1462 (Grice J).

² *Te Whānau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115, [2022] NZRMA 372 (Judge Dickey, Judge Doogan and Commissioner R M Bartlett).

³ *Te Whānau a Kai Trust v Gisborne District Council* [2023] NZCA 55 (French and Katz JJ).

[3] The Trust now seeks leave to appeal against the decision of the High Court directly to this Court and also seeks an extension of time to make the leave application.

Proposed grounds of appeal

[4] The matters the Trust seeks to argue are largely the same as in the Courts below. These are:

- (a) **Question one:** As a matter of statutory jurisdiction, can a Resource Management Act 1991 (RMA) regional freshwater plan recognise and provide for tikanga-based proprietary rights, interests and responsibilities in freshwater?
- (b) **Question two:** If question one is answered “yes”, what is the correct formulation of the evidential test to establish tikanga-based proprietary rights, interests and responsibilities in freshwater?
- (c) **Question three:** Can and should the RMA and the Local Government Act 2002 (LGA) be read together to enable and require plans to commit a council to fund the discharge of tikanga-based proprietary rights, interests and responsibilities that the plan recognises, with quantum and conditions of that funding to be set under the LGA?
- (d) **Question four:** Should the definition of “tikanga wai Māori” in an RMA regional plan expressly state that Māori customary “laws” fall within its scope, in addition to “Māori customary values and practices”?

Court of Appeal leave decision

[5] With regard to the first, jurisdictional, question, the Court of Appeal in its leave decision held that it was not seriously arguable that the High Court erred in its analysis of this issue. The RMA is concerned with management and not the underlying ownership of resources.⁴

⁴ At [19]–[21].

[6] On the issue of evidence, the Court of Appeal accepted that the correct formulation of the evidence test for the existence of tikanga-based proprietary rights is a question of law of general or public importance. But this did not justify the grant of leave to appeal where it was not seriously arguable that the jurisdictional finding was in error.⁵

[7] On the third question, the Court of Appeal held that it was not seriously arguable that the RMA and the LGA prescribe a particular funding outcome.⁶

[8] On the fourth question, the Court of Appeal said that, while the definition advocated by the Trust may have much to recommend it, this does not raise an arguable error of law of general or public importance justifying a third appeal.⁷

Our assessment

[9] There are no extraordinary and compelling circumstances that would justify a direct appeal when the Court of Appeal has already declined leave in a fully reasoned judgment.⁸ In any event, the arguments sought to be raised essentially repeat the arguments made in the Courts below and nothing raised suggests that the Court of Appeal may have been wrong in its assessment of the proposed leave grounds, given the way the Trust pitched its case.

Result

[10] The application for an extension of time to apply for leave to appeal is dismissed.

[11] The applicant must pay the respondent costs of \$2,500.

Solicitors:
Tamaki Legal Ltd, Auckland for Applicant
Buddle Findlay, Wellington for Respondent

⁵ At [27].

⁶ At [32].

⁷ At [39].

⁸ Senior Courts Act 2016, s 75; and *Burke v Western Bay of Plenty District Council* [2005] NZSC 46, (2005) 18 PRNZ 560 at [4].