



**Supreme Court of New Zealand
Te Kōti Mana Nui**

14 DECEMBER 2018

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**NGĀI TAI KI TĀMAKI TRIBAL TRUST v MINISTER OF
CONSERVATION AND FULLERS GROUP LTD AND MOTUTAPU
ISLAND RESTORATION TRUST**

(SC 11/2018) [2018] NZSC 122

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Ngāi Tai ki Tāmaki Tribal Trust (the Ngāi Tai Trust) applied for judicial review of a decision granting concessions to Fullers Group Ltd (Fullers) and the Motutapu Island Restoration Trust (MRT) for commercial tour operations on Rangitoto and Motutapu (collectively, the Motu). The Ngāi Tai Trust represents the iwi, Ngāi Tai ki Tāmaki.

The decision to grant the concessions was made by a senior official of the Department of Conservation (DoC) under delegated authority of the Minister of Conservation, who is first respondent in this appeal. DoC is responsible for issuing concessions under Part 3B of the Conservation Act 1987, which applies to land held as reserves under the Reserves Act 1977, as most of the land on the Motu is.

The Ngāi Tai Trust argued that the DoC official who made the decisions granting the concessions had made errors of law in the application of s 4 of the Conservation Act 1987. Section 4 requires the Act to be interpreted and administered as to give effect to the principles of the Treaty of Waitangi. The alleged errors of law were contained in internal reports provided to the decision-maker. The advice contained in these reports was to the effect that “there is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents” and that “economic benefit that could potentially be accrued as a result of a concession ... is not something that can be taken into account”.

The Ngāi Tai Trust argued that, as Ngāi Tai ki Tāmaki has mana whenua in relation to the Motu, it has the right and responsibility to exercise manaakitanga and kaitiakitanga in its traditional rohe. It argued that the Treaty principles of partnership, active protection, right to development, and redress meant that it was neither appropriate nor in accordance with tikanga for other groups to be providing guided tours on the Motu. The respondents' position was that the Ngāi Tai Trust's argument was in effect, a claim to have a veto over the granting of concessions and was an overstatement of the content of the s 4 obligation.

The High Court found that the decision-maker had made errors of law in the reasoning supporting the decisions – a conclusion that was not overturned by the Court of Appeal. However, both Courts found that these errors had not affected the outcome and declined to grant the relief sought by the Ngāi Tai Trust. The primary issue on appeal was whether relief ought to have been granted.

The Supreme Court has, by majority, allowed the appeal. The Court directed that the Fullers concession be reconsidered in light of its decision. The Fullers concession will remain in force until the reconsideration has occurred. The Court quashed the MRT concession and directed that MRT's application also be reconsidered.

The majority, comprising Elias CJ, Glazebrook, O'Regan and Ellen France JJ, concurred with the High Court's finding that the reasoning supporting the concession decisions misstated the law relating to s 4. The statement contained in the internal DoC report that there is no basis for preferential entitlement to iwi in relation to concessions was in error. Similarly, the statement that economic benefit to an iwi with mana whenua cannot be taken into account, failed to recognise the active protection principle of the Treaty. The decision-maker's dismissal of the possibility of preference being accorded to an iwi meant she did not give proper consideration to that possibility as s 4 required her to do.

The majority disagreed with the conclusion in the Courts below that the errors identified had no impact on the decisions. They considered that, if the decision-maker had correctly understood that s 4 potentially required a degree of preference to be given to Māori and that Māori economic interests be taken into account, she may have reached a different conclusion on the application of s 4.

The majority did not make a finding that the decisions relating to the applications for concessions by Fullers and MRT were wrong. Nor did the Court make a finding on the Ngāi Tai Trust's argument that only those with mana whenua should be granted concessions on the Motu, at least for a period of years. Rather, the majority considered the errors made by the decision-maker meant the decisions were flawed, justifying the granting of the relief sought by the Ngāi Tai Trust, which would ensure that the decisions were reconsidered in a manner that involved a proper application of s 4.

William Young J dissented. He held there was no basis for concluding that the decisions were influenced by a mistake of law. This was because the decision-maker did consider whether the duty of active protection might require that the concession applications be declined, but ultimately concluded that this was not required in the circumstances of the concessions at issue.

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