

**ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 77/2019  
[2019] NZSC 96**

BETWEEN ANTHONY MILTON MAWHINNEY  
Applicant  
AND AUCKLAND COUNCIL  
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: M J English for Applicant  
M L Wong for Respondent

Judgment: 10 September 2019

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.**
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**REASONS**

**Introduction**

[1] In mid-2017 a search warrant was executed on land in the Muriwai Valley, Auckland (the Property). As a result of evidence obtained during the search, the

Auckland Council laid a number of charges under the Resource Management Act 1991 (RMA) against the applicant, Anthony Mawhinney, who is the occupier of part of the land.

[2] Mr Mawhinney challenged the admissibility of this evidence in the District Court on the basis it was improperly obtained. Judge Kirkpatrick found that the evidence was admissible on the basis that none of the grounds advanced by Mr Mawhinney made either the issuing of the warrant or its execution unlawful.<sup>1</sup> Mr Mawhinney appealed unsuccessfully against this decision to the Court of Appeal.<sup>2</sup> That Court found that the search warrant was invalid and the evidence therefore improperly obtained. The Court concluded that the evidence was nonetheless admissible under s 30 of the Evidence Act 2006 on the basis that the exclusion of the evidence would be disproportionate to the impropriety. Mr Mawhinney seeks leave to appeal from that decision to this Court.

## **Background**

[3] The application for a search warrant was made after the Council received photographs of the Property taken from a drone. Council officers considered there was sufficient evidence of non-compliance with the RMA. A search warrant was sought on the basis a search of the Property was necessary to “quantify” the extent of the breach of the RMA.<sup>3</sup> The application for the search warrant referred to the relevant planning provisions in the Auckland Unitary Plan (AUP)<sup>4</sup> and noted no consents had been granted by the Council in relation to the structures shown in the photographs which were attached to the application.

[4] In concluding the search warrant was invalid, the Court of Appeal considered the application for the warrant was deficient in three respects. First, the Court said that the application should have included an independent appraisal of the

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<sup>1</sup> *Auckland Council v Mawhinney* [2019] NZDC 2004.

<sup>2</sup> *Mawhinney v Auckland Council* [2019] NZCA 313 (Wild, Thomas and Muir JJ) [CA judgment].

<sup>3</sup> The search warrant was to investigate the number of the buildings and their use and any other breaching activities.

<sup>4</sup> The Court of Appeal noted that the relevant Standard in the AUP provided that “there must not be more than one dwelling (not including a minor dwelling) on a site”: CA judgment, above n 2, at [7].

photographs.<sup>5</sup> Second, the Court took the view that reference should have been made in the application to proceedings in the Environment Court which could ultimately affect the Property and the structures that could be erected on it as of right.<sup>6</sup> Finally, the Court considered that the warrant was too broad.<sup>7</sup>

[5] In concluding the evidence was nonetheless admissible, the Court took into account a number of factors including the following: the right involved was an important one involving a search of residential accommodation;<sup>8</sup> in the circumstances the impropriety was “at the lower end of the scale”;<sup>9</sup> the non-disclosure of the other proceedings was immaterial because those proceedings involved contentions about the use that could be made on the Property, not entitlements to use the Property;<sup>10</sup> the failures in the application were “careless”;<sup>11</sup> the allegations were “relatively serious in the context of RMA offending”;<sup>12</sup> and real evidence of significance to the prosecution was obtained in a situation where there were “no alternative investigative options”.<sup>13</sup>

### **The proposed appeal**

[6] On appeal, Mr Mawhinney wishes to raise various matters about the application of s 30. In addition, the application is brought on the basis that a miscarriage of justice may occur particularly where, if convicted, it is said that the Court of Appeal is “unlikely” to revisit its earlier decision.

[7] We are not satisfied it is necessary in the interests of justice to hear the proposed appeal prior to trial.<sup>14</sup> Mr Mawhinney can raise these matters in any post-conviction appeal if he is convicted. Accordingly, the application for leave to appeal is dismissed.

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<sup>5</sup> The Court said there should have been an independent appraisal of the photographs and detail as to why, as a result, an offence was suspected to have been committed: at [36].

<sup>6</sup> It was accepted by Mr Mawhinney’s counsel in the Court of Appeal that these proceedings “sought declarations as to certain principles which could apply to [structures on the Property]”: at [43].

<sup>7</sup> The warrant provided for “receipts, invoices, business accounts and bookkeeping records” to be located: at [54].

<sup>8</sup> CA judgment, above n 2, at [60].

<sup>9</sup> At [62].

<sup>10</sup> At [63].

<sup>11</sup> At [64].

<sup>12</sup> At [65].

<sup>13</sup> At [66].

<sup>14</sup> Senior Courts Act 2016, s 74(4); and *Hamed v R* [2011] NZSC 27, [2011] 3 NZLR 725 at [12]–[13].

[8] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:  
Public Defence Service, Waitakere for Applicant  
Crown Law Office, Wellington for Respondent