IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 31/2021
[2021] NZSC 87

BETWEEN	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Applicants
AND	TARANAKI REGIONAL COUNCIL First Respondent
	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
	NEW ZEALAND TRANSPORT AGENCY Third Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	S J Grey for Applicants J G A Winchester and H P Harwood for First and Second Respondents P T Beverley, D G Allen and T J Ryan for Third Respondent P F Majurey and V N Morrison-Shaw for Te Rūnanga o Ngāti Tama Trust as Interested Party
Judgment:	15 July 2021
Reissued:	23 September 2021
Effective date of Judgment:	15 July 2021

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

C The applicants must pay three sets of costs: $500 jointly to the first and second respondents, $2,500 to the third respondent and $1,500 to the interested party.

REASONS

[1] This application for leave to appeal concerns an interim decision of the Environment Court as to the re-routing of State Highway 3 through the Mangapēpeke forest and wetlands near Mt Messenger and north of New Plymouth.[1] An appeal against that decision was dismissed by the High Court,[2] and the applicants, Mr and Mrs Pascoe (whose land is affected by the proposal) and Poutama Kaitiaki Charitable Trust, seek leave to appeal to this Court from the High Court decision.

[2] In the course of its judgment, the Environment Court held that Ngāti Tama are tangata whenua exercising mana whenua and kaitiakitanga over the project area.[3] By contrast, it held that these terms as used in the Resource Management Act 1991 do not apply to Poutama or Mr and Mrs Pascoe in respect of the land.[4] Mr Pascoe is not Māori, and although Mrs Pascoe is, there was no reliable evidence before the Court linking her Māori ancestry to the Pascoe land.[5] Likewise, the Court considered that there was no reliable evidence before it that the Poutama collective was an iwi or iwi authority exercising mana whenua in the project area.[6] It therefore concluded that there was no relevant error in the approach taken by the respondents.[7]

[3] On appeal, the High Court found that these conclusions were primarily of fact and for this reason, not susceptible to direct challenge on appeal confined to points of law and that there were no associated errors of law in the way the issues were addressed by the Environment Court.[8]

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1 *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 (Judges Dwyer, Doogan and Dickey and Commissioners Bunting and Bartlett) [EnvC judgment].
2 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202 (Grice J) [HC judgment].
3 EnvC judgment, above n 1, at [333]. This was relevant by reason of ss 6(e) and 7(a) of the Resource Management Act 1991.
4 At [339].
5 At [319] and [330].
6 At [350].
7 At [358], [463]–[464] and [467].
8 HC judgment, above n 2, at [252]–[254]. An appeal of an Environment Court decision to the High Court may only be on a question of law: Resource Management Act, s 299.

[4] The application for leave to appeal is out of time. The delay in seeking leave seems to have been because the applicants initially pursued a recall application in the High Court.[9]

[5] Waka Kotahi | New Zealand Transport Agency (the third respondent), in submissions adopted by Taranaki Regional Council and New Plymouth District Council (the first and second respondents), and Te Rūnanga o Ngāti Tama Trust (an interested party) oppose the application for leave to appeal. Their position is that the applicants are seeking to relitigate findings of fact and that, in any event:

(a) the usual criteria for leave are not satisfied;[10] and

(b) the criteria for granting leave for a direct appeal from the High Court are not made out.[11]

[6] They also oppose the extension of time which is sought.

[7] As the High Court held and the respondents and interested party maintain, the findings of the Environment Court are largely factual.

[8] Even if the Environment Court had applied an incorrect understanding of the principle of mana whenua (a proposition the applicants do not advance in express terms), the factual findings of that Court leave no room for argument that any such error could have been material:

(a) The Court found that there was insufficient evidence of a Pascoe ancestral connection to the Pascoe land, or to the wider project area.[12]

(b) In relation to the project area the Court recorded its preference for the report commissioned by Te Rūnanga o Ngāti Tama Trust over the report

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9 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZHC 326 (Grice J).
10 Senior Courts Act 2016, s 74.
11 Senior Courts Act, s 75.
12 EnvC judgment, above n 1, at [318]–[320], [330] and [339].

commissioned by Poutama.[13] The preferred report included evidence as follows (at [323]):

> The crux of my evidence is that land rights in the Mokau-Poutama area during the nineteenth century were complex, disputed and subject to change. But one constant was that there are no historical records, at least as far as I am aware, that refer to a tribal group known as Nga Hapu o Poutama.

This and associated factual findings show that there was also insufficient evidence of an ancestral connection between Poutama as a collective and the land in question.[14]

[9] These factual findings also meet the claimed error in relation to s 6(e) of the Resource Management Act, which requires decision makers to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands. Insufficient evidence of an ancestral connection means that the Pascoes and the Poutama collective could not have a relevant interest under s 6(e), regardless of whether that section applies to iwi, hapū or Māori more generally.[15]

[10] We therefore see no substantial prospect of the High Court decision on these issues being reversed. This is sufficient to dispose of the application for leave to appeal.[16]

[11] For the sake of completeness, we note that there is nothing in the proposed appeal which comes close to satisfying the requirements of s 75 of the Senior Courts Act 2016 for a leapfrog appeal direct to this Court from a High Court judgment.

[12] Against the conclusions just reached, nothing of significance turns on the fate of the application for an extension of time. The reasons for the delay – to allow time for an application to the High Court to recall its judgment – are not particularly

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13 At [324]–[325].

14 At [320] and [339].

15 The Environment Court acknowledged that some individuals with ancestral links to the project area chose to be represented by Poutama (at [325]), but this does not in turn mean that their ancestral links derive from their association with Poutama nor does it mean that Poutama as a collective have an ancestral connection to the project area.

16 *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; and *Nicholls v Nicholls* [2021] NZSC 8 at [13].

compelling. That said, given the limited period of delay and the lack of any prejudice associated with it, we grant an extension of time. We do, however, dismiss the application for leave to appeal.

[13] The respondents and interested party are entitled to costs. The applicants must pay three sets of costs: $500 jointly to the first and second respondents, $2,500 to the third respondent and $1,500 to the interested party.

Solicitors:
Simpson Grierson, Wellington for First and Second Respondents
Buddle Findlay, Wellington for Third Respondent
Atkins Holm Majurey, Auckland for Te Rūnanga o Ngāti Tama Trust