IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 111/2022
[2023] NZSC 135

BETWEEN	JOHN HENRY TAMIHERE, LAURIE PORIMA AND RAYMOND PHILLIP HALL ON BEHALF OF CLETUS MAANU PAUL Applicant
AND	ATTORNEY-GENERAL Respondent

Court: O'Regan, Williams and Kós JJ

Counsel: J Mason and N Thrupp for Applicant
G L Melvin and Y Moinfar-Yong for Respondent
K M Anderson and M J Dicken for Maungaharuru-Tangitū Trust
C M Hockly for Rongomaiwahine Iwi Trust

Judgment: 19 October 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The late Mr Paul, a long-standing member of the New Zealand Māori Council and former Chair of the Mataatua District Māori Council, applied to the High Court under s 98 of the Marine and Coastal Area (Takutai Moana) Act 2011[1] for orders recognising customary marine title over all New Zealand's marine and coastal area, "on behalf of all Māori".

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1 Herein, "the Act".

[2] The purpose of the application was said to be protective: to enable Māori groups who had not yet applied to do so after the six-year statutory deadline prescribed in s 100 of the Act:

> **100 Who may apply**
>
> (1) An applicant may apply to the Court–
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> (a) for a recognition order; or
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> (b) to vary or cancel a recognition order.
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> (2) However, the application must be filed not later than 6 years after the commencement of this Act, and the Court must not accept for filing or otherwise consider any application that purports to be filed after that date.

[3] Mr Paul subsequently amended the application. The most recent of these is the second amended application. It incorporates eight named applicants who, collectively, claim approximately 75 per cent of New Zealand's coastal and marine area. It is no longer expressed as made on behalf of all Māori.

[4] The High Court and Court of Appeal struck out Mr Paul's application in both the original (nationwide) and (second) amended forms.[2] The nationwide application failed to comply with the requirements of s 101 of the Act that an application "describe the applicant group", "identify the particular area of the common marine and coastal area to which the application relates", and "name a person to be the holder of the order as the representative of the applicant group".[3] It was held to constitute an abuse of process.[4] As to the second amended application, adding new applicants was held to be a material change to the original application, meaning the amended application was itself time-barred.[5] The legislative provisions were unambiguous: the Treaty of Waitangi could not be used to support an alternative interpretation.[6]

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2 *Re Paul* [2020] NZHC 2039 (Churchman J) [HC judgment]; and *Paul v Attorney-General* [2022] NZCA 443 (Brown, Clifford and Goddard JJ) [CA judgment].

3 HC judgment, above n 2, at [13] and [51]; and CA judgment, above n 2, at [49], [57], [59] and [61].

4 HC judgment, above n 2, at [65]; and CA judgment, above n 2, [75].

5 HC judgment, above n 2, at [64]; and CA judgment, above n 2, [78]–[79].

6 HC judgment, above n 2, at [60]; and CA judgment, above n 2, at [43] and [49].

[5] After the Court of Appeal's judgment was delivered, Mr Paul died. Messrs Tamihere, Porima and Hall wish to continue an appeal from that decision, and seek a new parties order.[7]

Leave application

[6] The applicants challenge the striking out of the application. They raise several points of law in their application for leave to appeal. In essence, they are whether the Court of Appeal erred in determining that:

(a) the nationwide application failed to comply with mandatory requirements in s 101 of the Act;

(b) the nationwide application, having been filed for the improper purpose of circumventing the statutory deadline for making applications under the Act, was an abuse of process; and

(c) the second amended application introduced fresh causes of action and new applicant groups after the statutory deadline for filing applications under the Act and was therefore an abuse of process.[8]

[7] The applicants also contend their proposed appeal raises some more general questions of law. First, should a tikanga-consistent interpretation of the Act have prevailed? Secondly, is the statutory deadline a breach of the Treaty? Thirdly, if the statutory deadline is a breach, is it so egregious that the Court cannot as a matter of law and/or justice allow the provision to extinguish customary propriety rights?

[8] They contend that it is necessary in the interests of justice to allow the appeal because it raises issues about the consistency of the Act with the Treaty and tikanga. The legislation is novel and (it is alleged) may have the effect of permanently

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7 Under r 5(2) of the Supreme Court Rules 2004. The respondent abides the decision of the Court on this matter.

8 The notice of application for leave to appeal also challenged the Court of Appeal's award of costs to the Maungaharuru-Tangitū Trust, an interested party, but the point was not pursued further in written submissions and we would not have found it met the criteria for leave to appeal to this Court in any event.

extinguishing indigenous rights. The applicants argue that a substantial miscarriage of justice may therefore occur if this Court does not grant leave to appeal.

Our assessment

[9] This Court must decline leave to appeal unless it is necessary in the interests of justice for it to hear and determine the appeal.[9] In this instance we consider the applicants have insufficient prospect of success on appeal to meet that criterion.[10]

[10] We consider the applicants' prospects of success in persuading us that the nationwide application complied with the s 101 requirements are insufficient to warrant leave. While a collective application may be made under the Act, it would still be necessary to show Mr Paul had been appointed on behalf of all iwi, hapū or whānau groups having or claiming interests in New Zealand's marine and coastal area.[11] It is not suggested by the applicants that Mr Paul did in fact represent all such iwi, hapū, or whānau groups. Finally, given the time bar in s 100(2), we see no appearance of error in the Court of Appeal's conclusion that the substitution of the eight new applicants in the amended application constituted new applications in breach of that provision.

[11] As to the role tikanga and the Treaty might play in construing the Act, we note the respondent's advice that, even if national applications such as Mr Paul's were excluded, the entire marine and coastal area of New Zealand is subject to applications filed in time by purported representatives of iwi, hapū and whānau. It would hardly advance the principles of the Treaty or tikanga if the statutory deadline could be circumvented in order to facilitate intergroup conflict. In any event, while the applicants can no longer advance their own applications, the Act contains provision for interested parties to be heard on the applications of others.[12]

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9 Senior Courts Act 2016, s 74(1).

10 *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; and *Hookway v R* [2008] NZSC 21 at [4].

11 Marine and Coastal Area (Takutai Moana) Act 2011, ss 101(c) and 9(1) definition of "applicant group".

12 Section 104.

[12] Accordingly, while the arguments advanced by the applicants are ones of general importance, it is not necessary in the interests of justice for this Court to hear and determine the appeal.[13]

Further matters

[13] We note that the context is one in which parallel pathways are established under the Act for recognition of customary marine title and protected customary rights. Those pathways are: (1) recognition by agreement (the Crown engagement pathway) and (2) recognition by an order of the High Court (the High Court pathway). We record that, in response to questions raised by the Court, the respondent has confirmed:

(a) the legislation does not affect the High Court's inherent jurisdiction to permit later notices of appearance by an interested party to join proceedings in the High Court pathway after the s 100(2) date (and, thus far, the High Court has exercised its discretion to do so on each occasion it has been sought);

(b) there is a possibility that Crown engagement pathway applicants may not have seen a public notice of an overlapping High Court pathway application;[14] and

(c) that risk is mitigated by (1) publicly available sources of information, including the High Court's own database[15] and Te Arawhiti's online geospatial tool, *Kōrero Takutai*, which includes the mapping of all applications under the Act,[16] (2) steps taken in proceedings to direct that overlapping Crown engagement pathway applicants are served and given an opportunity to participate, and (3) steps taken by Te Arawhiti

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13 *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262 at [20]–[21]; and *Terranova Homes and Care Ltd v Service and Foodworkers Union Nga Ringa Tota Inc* [2014] NZSC 196, [2015] 2 NZLR 437 at [16].

14 Section 103 of the Act requires an applicant group applying for a recognition order to give public notice of the application no later than 20 working days after filing the application.

15 Ngā Kōti o Aotearoa | Courts of New Zealand "MACA Spreadsheet" (2023) <www.courtsofnz.govt.nz>.

16 Te Arawhiti | The Office for Māori Crown Relations "Kōrero Takutai (maps)" www.tearawhiti.govt.nz; and Te Arawhiti | The Office for Māori Crown Relations "Te Kete Kōrero a Te Takutai Moana Information Hub" <maca-nds.maps.arcgis.com>.

to provide Crown engagement pathway applicants with information about relevant activity in the High Court pathway.

[14] The applicants say that despite these protections, some potential claimants have failed to meet the statutory deadline, and are disadvantaged accordingly. As we see it, however, if this is the case, it is the consequence of the statutory language and any solution to that issue must lie with Parliament.

Result

[15] The application for leave to appeal is dismissed.

[16] It is unnecessary therefore for us to deal with the new parties order sought.[17]

[17] The respondent did not seek costs, and we take the view that this is not a case in which costs should be awarded to interested parties in this Court.

Solicitors:
Phoenix Law Ltd, Wellington for Applicant
Crown Law Office, Wellington for Respondent
DLA Piper, Wellington for Maungaharuru-Tangitū Trust
Hockly Legal, Auckland for Rongomaiwahine Iwi Trust

[17] See above at [5].