IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 38/2023
[2023] NZSC 82

BETWEEN	ESTATE OF ERIC JOHN TUPAI RURU First Applicant
	ALAN PAREKURA TOROHINA HARONGA Second Applicant
AND	ATTORNEY-GENERAL First Respondent
	WAITANGI TRIBUNAL Second Respondent
	TANYA ROGERS AND DAVID BROWN Third Respondents
	OWEN LLOYD Fourth Respondent
	DAVID THOMAS HAWEA Fifth Respondent
	ANTHONY TAPP Sixth Respondent

Court:	Glazebrook, Ellen France and Williams JJ
Counsel:	K S Feint KC, M S Smith and D T Haradasa for Applicants C R W Linkhorn, C D Tyson and J B Watson for First Respondent B R Arapere and W I Gucake for Second Respondent B R Lyall and T H Bennion for Third and Fourth Respondents B S Carruthers KC and D C F Naden for Fifth Respondent J P Kahukiwa for Sixth Respondent
Judgment:	5 July 2023

JUDGMENT OF THE COURT

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

B The applicants must pay the first respondent one set of costs of $2,500.

REASONS

Introduction

[1] The first and second applicants (the Estate of Eric John Tupai Ruru — claimant in Wai 274 and Wai 283, and Alan Parekura Torohina Haronga — claimant in Wai 1489) apply for leave to appeal out of time directly to this Court from a decision of the High Court.[1] They have also filed an appeal in the Court of Appeal. Tanya Rogers and David Brown (claimants in Wai 499 and Wai 874) and Owen Lloyd (claimant in Wai 507), the third and fourth respondents, support the application for leave to appeal directly.[2]

[2] In the High Court, Grice J dismissed three of the four grounds on which the first respondent, the Attorney-General, had sought judicial review of the decision of Te Rōpū Whakamana i te Tiriti o Waitangi | the Waitangi Tribunal recommending resumption to a collective trust to hold the land on behalf of three Māori claimant groups of 7,676.8 hectares of the Mangatū Crown Forest licensed lands.[3] The Judge also dismissed a counterclaim brought by the fifth respondent, David Thomas Hawea on behalf of Te Whānau a Kai, in respect of the merits of the Tribunal findings and the allocation of the forest land between the claimants.

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1 *Attorney General v Waitangi Tribunal* [2023] NZHC 132 (Grice J) [HC judgment].

2 Anthony Tapp (claimant in Wai 995), the sixth respondent, has not filed any submissions.

3 Waitangi Tribunal *The Mangatū Remedies Report 2021* (Wai 814, 2021) at 305–306. The Tribunal, the second respondent, abides the decision of the Court on the application for leave to appeal.

Background

[3] The application for leave to appeal would raise issues about aspects of sch 1 to the Crown Forests Assets Act 1989 which deals with the calculation of compensation payable on the return to Māori of Crown Forest licence land. In particular, the proposed appeal would focus on the interplay between sch 1 cls 3(c), 5(b) and 6(b) and, broadly speaking, whether the Crown was entitled to some relief in terms of the interest component of the compensation payments payable. For the purposes of calculating the compensation, the Tribunal had found that, apart from two brief periods in 2020 and 2021 (Covid-related), the Crown was not "prevented, by reasons beyond its control, from carrying out any relevant obligation".[4] The Tribunal accordingly declined to extend the "real value" CPI-only period provided for in sch 1 beyond the statutory four-year period, except for the two brief periods mentioned.

[4] The applicants wish to challenge the finding of the High Court that the Crown was entitled to a declaration that the Tribunal acted unlawfully in declining to extend the real value period under cl 6(b) except for those brief periods. The Tribunal was directed to reconsider this aspect consistent with the High Court judgment.

[5] In finding for the Crown on this ground of review, the High Court concluded that the Tribunal did not consider the context and wider counter-effects of attempts by the Crown to speed up resolution of the claims. Rather, the Judge said, the Tribunal "appears to have carried out its analysis on the basis that the Crown alone carried the obligation to take *all* steps possible to resolve the claim" and did not take "into account the context of the claims and the actions of other parties or of the Tribunal directions or of whether those steps would enable the Tribunal to deliver the recommendations in the shortest *reasonable* time".[5]

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4 Crown Forest Assets Act 1989, sch 1 cl 6(b). See Waitangi Tribunal *The Mangatū Remedies Report 2021*, above n 3, at 344–345 for the Tribunal's findings.

5 HC judgment, above n 1, at [215] (emphasis in original).

[6] In explaining the need for a contextual analysis, the Judge explained that the Tribunal had:[6]

> … identified the periods of delay by way of chronology but did not explain how those delays were due to the failure of the Crown to exercise its *best* endeavours *jointly* with Māori to enable the Tribunal to deliver in relation to *all* its recommendations "in the shortest *reasonable* period" in the context of the proceedings and with the necessary involvement of the other parties and the Tribunal.

Accordingly, the Tribunal had "asked itself the wrong question and carried out an incorrect analysis".[7]

The proposed appeal

[7] To justify the grant of leave for a direct appeal from the High Court, the proposed appeal must satisfy the leave criteria specified in s 74 of the Senior Courts Act 2016 and meet the exceptional circumstances test set out in s 75(b) of the Act.

[8] The applicants say the application meets that test because of the following three matters: first, in light of this Court's recent decision in *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*,[8] only this Court can determine the correct construction of the relevant provisions in sch 1 to the Crown Forests Assets Act dealing with the rate of return provisions; second, the significance of the subject matter; and, third, the need for urgency. We address each of these matters in turn.

[9] In relation to *Wairarapa Moana*, amongst other matters, the applicants wish to argue that there is a need for reconsideration of aspects of the decision. The applicants would challenge the notion that cl 5(b) is in the nature of a penalty.[9] They say that the proper construction of sch 1 is that the higher rate of return provided for in the schedule is the default position. They also rely on evidence filed in this case in the High Court which is more helpful, on their account, than that which this Court had before it in *Wairarapa Moana*. The applicants also wish to argue that the High Court was wrong

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6 At [230] (emphasis in original).
7 At [230].
8 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.
9 Referring in this context to the observation in *Wairarapa Moana* that the clause has "at least some of the characteristics of a penalty": at [131]. As the applicants note, earlier in the judgment, at [55], this Court also refers to "a minimum four-year interest holiday".

to reject the argument that the "best endeavours" requirement is akin to a force majeure clause as they say is apparent from the negotiating record. The applicants also say this Court has yet to address the approach the Tribunal should take if satisfied that cl 6(b) is made out. The applicants say that the fact the Tribunal "may" extend the initial four-year grace period provides a discretion to do so.

[10] This Court has only very recently addressed aspects of the inter-relationship between the relevant clauses of sch 1. As the first respondent submits, some of the arguments the applicants would advance on the proposed appeal were made in *Wairarapa Moana*. Nothing raised by the applicants is sufficiently compelling to support the submission that it is necessary to depart from the usual appellate pathway in order to determine the proposed appeal. The Court of Appeal can address the extent to which this Court's judgment in *Wairarapa Moana* determines any of these issues.

[11] Further, we do not accept the proposition we should address the question of the approach to "may" in cl 6 of the schedule without the benefit of the views of the Court of Appeal. It is also relevant to the assessment of this aspect of the application that Mr Hawea has filed an appeal in the Court of Appeal against the dismissal of his counterclaim in the High Court. Mr Hawea supports the application for a direct appeal provided there is also the opportunity for his appeal to be heard in this Court. We see no basis for departing from the usual appellate pathway in relation to that appeal.

[12] These issues can all be properly ventilated in the Court of Appeal.

[13] The proposed appeal does raise significant issues. That said, we are not satisfied that this aspect on its own constitutes exceptional circumstances in terms of the threshold in s 75. Rather, we accept the submission for the first respondent that if the matter were to proceed to an appeal in this Court, the Court would be assisted by the benefit of the views of the Court of Appeal. That would also assist in refining the issues needing any further determination.

[14] Finally, while further delay is regrettable, as the first respondent submits the compensation provisions applicable to the return of licensed land continue to apply and the monetary impact is a means of at least preserving the real value of the available

compensation. In any event, as the Crown has appealed to the Court of Appeal on the other three grounds on which its application for review was unsuccessful, dealing with this proposed appeal separately from the Crown's appeal may not ultimately result in the speedier resolution of the claims the applicants seek.

[15] For these reasons, we are not satisfied that the criteria for leave to appeal is met. In these circumstances there is no point in granting an extension of time.

Result

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

[17] The applicants must pay the first respondent one set of costs of $2,500.

Solicitors:
Gibson Sheat, Wellington for Applicants
Crown Law Office, Wellington for First Respondent
R E Lawrie, Ministry of Justice, Wellington for Second Respondent
Te Aro Law, Wellington for Third Respondents
Bennion Law, Wellington for Fourth Respondent
Tamaki Legal, Auckland for Fifth Respondent
Corban Revell, Auckland for Sixth Respondent