Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

SUSTAINABLE ŌTĀKIRI INC v WHAKATĀNE DISTRICT COUNCIL

(SC 1/2023) [2025] NZSC 158

TE RŪNANGA O NGĀTI AWA v BAY OF PLENTY REGIONAL COUNCIL

(SC 2/2023) [2025] NZSC 158

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.

Background

This judgment relates to a proposed expansion to a spring water extraction and bottling operation run by Ōtākiri Springs Ltd (Ōtākiri Springs) on a rural property near Whakatāne. The existing operation bottles about 1.9 million litres of water a year from the Ōtākiri aquifer. The proposed expansion would increase capacity to 580 million litres a year.

The proposal would increase the existing plant's capacity and add a second, much larger plant. The proposal would also add a "blow-moulding" step to production: a machine would blow pressurised air into small, test tube-like "pre-forms" to create plastic bottles on site.

Consents were sought from the Bay of Plenty Regional Council (to draw an increased volume of water from the Ōtākiri aquifer) and the Whakatāne District Council (to build and operate the expanded bottling plant). The consents were granted.

Lower courts

Multiple parties brought appeals to the Environment Court, challenging the consents. Among them were Sustainable Ōtākiri Inc (Sustainable Ōtākiri), representing local residents, and Te Rūnanga o Ngāti Awa (Ngāti Awa), representing the local iwi.

The Environment Court dismissed the appeals by a 2–1 majority, upholding the consents. Sustainable Ōtākiri and Ngāti Awa brought further appeals to the High Court and then the Court of Appeal. Both Courts upheld the Environment Court's decision.

Sustainable Ōtākiri and Ngāti Awa were granted leave to appeal to the Supreme Court.

Issues

The Supreme Court appeals address five issues:

(1) whether the potential environmental effects of plastic waste disposal should have been considered as relevant to the resource consent decision;

(2) whether the environmental effects issue above was properly before the Environment Court and therefore able to be appealed;

(3) whether the proposal was incorrectly classified as a discretionary "rural processing activity" instead of a non-complying "industrial activity" under the Whakatāne District Plan;

(4) whether the tikanga evidence called by Ngāti Awa regarding effects on te mauri o te wai (the mauri of the water) was not properly considered; and

(5) whether the Environment Court should have directly considered the tikanga-related provisions of part 2 of the Resource Management Act 1991 (RMA), in addition to the relevant planning documents.

Sustainable Ōtākiri's submissions focused on the first three issues, while Ngāti Awa's focused on the last two. Sustainable Ōtākiri and Ngāti Awa would answer the five issues above "yes". Ōtākiri Springs, broadly supported by the Bay of Plenty Regional Council and Whakatāne District Council, would answer the issues "no".

Supreme Court decision

By a majority comprising Ellen France, Williams and Kós JJ, the Supreme Court dismissed the appeals. Winkelmann CJ and Glazebrook J would have allowed the appeals and remitted the proposal for reconsideration by the Environment Court.

Majority (Ellen France, Williams and Kós JJ)

Regarding the first issue (effects), the majority held that the potential environmental effects of plastic bottle disposal were relevant "effects" within the meaning of section 104(1)(a) of the RMA (at [97]–[98]). Not every effect will require consideration under that section, but identifying which effects are relevant is an exercise of statutory interpretation in light of facts (at [59]). In this case, the environmental effects of plastic bottle disposal were not too remote

to be relevant as a matter of law. Nor was there any other reason to consider that plastic disposal effects were irrelevant in principle. Instead, how relevant these effects would be to the consenting decision was a question of fact and degree. There was, however, no evidence before the Environment Court upon which to make the required assessment one way or the other (at [99]).

On the second issue (scope of appeal), the majority found that although there is some flexibility in Environment Court procedure, the issue of plastics disposal was not treated as relevant by any party at the application stage, nor at the Environment Court hearing (at [114]–[116]). While one member of the Environment Court raised the issue, no party sought leave to call evidence in relation to it, once it had been raised. Had such an application been made and rejected, that decision could have been appealed (at [117]). It would, however, be unfair now to Ōtākiri Springs and the other respondents to remit the matter at this late stage (at [119]–[120]).

Turning to the third issue (activity status), the majority held that the proposal was correctly classified as a discretionary "rural processing activity" instead of a non-complying "industrial activity" (at [153]). Even though blow-moulding had manufacturing characteristics, it was directly linked to a primary productive use (water extraction) as there was a functional and legal need for co-location based on where the aquifer could be accessed and European Union regulations about the sale of spring water (at [154], [156] and [160]–[164]). Moreover, there was evidence that on-site blow-moulding would reduce heavy vehicle movements; it would be counterintuitive and contrary to the RMA's effects-focused purposes to interpret "rural processing activity" in a way that prevented the introduction of a step that mitigates adverse effects (at [155]).

As to the fourth issue (te mauri o te wai), the majority considered the Environment Court did properly consider and make factual findings based on the tikanga evidence (at [201]–[202]). There was no error of law either in the Environment Court's approach to the issue or in terms of *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 (at [202]).

Finally, regarding the fifth issue (part 2), the majority considered nothing would be gained by resorting directly to part 2 of the RMA (at [210]–[211]). The Environment Court considered matters like Ngāti Awa's kaitiakitanga as they arose on the evidence (at [210]). The tikanga and Treaty of Waitangi-based issues in this case were covered by the relevant planning documents (at [211]).

Dissent (Winkelmann CJ and Glazebrook J)

Beginning with the effects issue, Winkelmann CJ and Glazebrook J agreed that plastic pollution was not too remote to be considered (at [245]). In light of the broad definition of "effects", and the clearly adverse environmental impact of plastic pollution, it was difficult to understand how it could be thought that the production of the plastic bottles was not a relevant effect (at [243]). It was no answer that the production of plastic bottles was otherwise legal, that others produce plastic bottles or that the effects of disposal would be offshore (at [246]).

As to activity status, Winkelmann CJ and Glazebrook J considered the proposal was a non-complying "industrial activity". Blow-moulding amounts to manufacturing and only the definition of "industrial activity" includes manufacturing (at [264]). Further, the Court of Appeal was wrong to categorise the entire proposal as one "operation" and to hold that

blow-moulding could be treated as an ancillary activity (at [268]–[270]). Since the proposal was incorrectly treated as a discretionary activity, the Environment Court failed to consider section 104D(1) of the RMA and whether public notification was required (at [272]).

Regarding te mauri o te wai, Winkelmann CJ and Glazebrook J found the tikanga evidence was not properly considered as the Environment Court did not consider tikanga effects from an end-use perspective. In particular, the Court did not properly consider how the export of the water negatively affects te mauri o te wai, or how the production, use and export of plastic bottles impacts Ngāti Awa's ability to be kaitiaki (at [291]–[292]).

On the part 2 issue, Winkelmann CJ and Glazebrook J agreed that it would add nothing to the analysis (at [273], n 317).

Finally, Winkelmann CJ and Glazebrook J considered it was the consent applicant's responsibility to address all relevant effects, including plastic pollution (at [302]). Since the relevant information was not included with the application, the Councils should have required that the information be provided before considering the proposal. Failing that, the Environment Court should have either declined the application or required the applicant to put the relevant evidence before it (at [305]). Even if it had not been the consent applicant's responsibility to address all relevant effects, Winkelmann CJ and Glazebrook J would not have dismissed the appeal on what is essentially a pleadings point as to the scope of the appeal (at [306]).

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