**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 4/2026**
**[2026] NZSC 39**

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| BETWEEN | SANCTUARY COMMUNITY ORGANIC GARDEN MAHI WHENUA INCORPORATED<br>Applicant |
| AND | ATTORNEY-GENERAL<br>Respondent |

Court: Ellen France, Williams and Miller JJ

Counsel: W A McCartney for Applicant
R D Butler and A M Cameron for Respondent

Judgment: 28 April 2026

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B There is no order as to costs.**

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**REASONS**

**Introduction**

[1] The applicant, Sanctuary Community Organic Garden Mahi Whenua Inc (the Society), manages community gardens in Mount Albert (the Gardens). The Gardens comprise 0.7 hectares within a site formerly owned by Unitec Institute of Technology. Unitec sold the land to the Crown via an agreement in February 2018 (the Agreement). The Crown purchased the land in furtherance of its obligations to Ngā Mana Whenua o Tāmaki Makaurau (the Collective) and to facilitate development

of the land for housing. The Society lodged a caveat against the title to the land in 2024 seeking to preserve its interest in the preservation of the Gardens.

[2] The Society was not a party to the Agreement but claims a clause in a variation to the Agreement made in March 2018 created an easement in gross or a profit à prendre in its favour (the Variation). The Society's application to sustain the caveat was upheld by the High Court,[1] but that decision was overturned by the Court of Appeal on the Attorney-General's appeal.[2] The Society seeks leave to appeal to this Court from the decision of the Court of Appeal.[3]

## Background

[3] The Society relies for its claimed interest on cl 25.4 of the Variation. That clause provides as follows:

> **25.4 Community gardens**
>
> (a) The purchaser acknowledges the cultural and historical significance of the gardens and fruit forest (occupying up to 7000 square metres) (**Community Gardens**) currently situated on part of what will become Lot 4 following the Subdivision and agrees to consult with Unitec, Iwi and Kaumatua in agreeing and documenting an arrangement for the ongoing use and preservation of those gardens.
>
> (b) To assist the purchaser in respect of the matters set out in clause 25.4(a), following the date that this agreement is unconditional:
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> (i) the vendor will provide written notice to the Sanctuary Community Gardens Mahi Whenua Incorporated (Society) (being the current occupiers of the Community Gardens) that the vendor will transfer ownership of the property including the Community Gardens on Lot 4 to the purchaser on the settlement date; and
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> (ii) the purchaser and vendor will work collaboratively with other interested groups (including Iwi and Kaumatua) in relation to the proposed arrangements for the Community Gardens in order to:
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> (A) have formal documentation finalised before settlement; and

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1 *Sanctuary Community Organic Garden Mahi Whenua Inc v Attorney-General* [2025] NZHC 1240 (Associate Judge Sussock).

2 *Attorney-General v Sanctuary Community Organic Garden Mahi Whenua Inc* [2025] NZCA 691 (Ellis, Edwards and Harland JJ) [CA judgment].

3 We understand that an interim stay of the Court of Appeal's order that the caveat lapse is in place until 29 May 2026.

(B) agree plans to preserve the Community Gardens and demonstrate the cultural links with other sites within the Vendor's Adjacent Land and wider environs that commemorate early occupation by Maori (notably the spring Te Puna, the Marae on the Vendor's Adjacent Land, and the landing site of the waka Mataatua).

(c) the purchaser recognises that the gardens to be preserved may serve multiple purposes, such as enjoyment of students, visitors, residents and the wider community; provision of food to residents; source of future archaeological study; and possible use as an education resource by the vendor.

[4] It is also useful to note by way of further background that, in 2012, the Crown and the Collective entered into a deed regarding historical treaty claims. It was agreed in the deed that the Crown would provide rights of first refusal to the Collective over land owned or occupied by Unitec. Aspects of the deed were implemented by the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. The particular land in issue in the present proceedings was subject to a right of first refusal registered against the title. The rights of first refusal prohibited the disposal of the land including the Gardens subject to certain exceptions. One of those exceptions relates to the disposal of land for state housing purposes as is proposed here.

**Court of Appeal**

[5] In rejecting the Society's construction of the clause and allowing the appeal, the Court of Appeal began with a consideration of the text of the clause. The Court concluded that the agreement reflected in cl 25.4 was not to preserve, but to consult and to collaborate with those identified in the clause with the object of preserving the Gardens, albeit not necessarily in the same location. There would be no need to consult, as provided for in the clause, if there was an existing agreement to preserve. The Court of Appeal also relied on various other textual references in cl 25.4 to support its conclusion.

[6] The Court went on to say that, "more importantly", even if it was possible to construe the clause as giving rise to an agreement to preserve the Gardens in their

current location, that was not sufficient to establish the grant of an interest in land to the Society.[4]

[7] The Court took the view that its construction of cl 25.4 accorded with the interpretation of the Agreement and Variation as a whole.

[8] The Court also considered affidavit evidence about matters which predated and postdated the Variation. In terms of the pre-Variation matters, the Court considered that an intention to confer an interest in land on the Society was at odds with the very purpose of the sale itself. Unitec was selling surplus land which had been rezoned for housing development. The Crown's obligations to the Collective included the opportunity to develop the land for housing. Those were rights preserved by the rights of first refusal registered against the title for land.

[9] As to post-Variation conduct, the Court considered little weight should be accorded to the statements made on behalf of Unitec by its interim Chief Executive at the time and in Unitec's annual report which were relied upon by the Society. Nor did the Court consider that a Cabinet minute, also relied on by the Society, supported the Society's case.

**The proposed appeal**

[10] The Society emphasises the historical and cultural importance of the Gardens and the adverse impact of removal of the caveat. It maintains the High Court was correct that the Society had a reasonably arguable case. In developing the points it wishes to argue, the Society submits that cl 25.4(a) reflects the fact the parties were agreeing to consultation, and agreeing and documenting arrangements for use of the Gardens, not to preservation itself. But, critically in the Society's submission, that was because it had already been agreed that the Gardens would be preserved.

[11] The Society also submits that this is not a case for summary determination. Rather, the proper interpretation of the clause is said to require examination of all the background knowledge available to the contracting parties. The Society says that

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4 CA judgment, above n 2, at [52], citing *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 118, [2019] 1 NZLR 750.

discovery is accordingly of "unusually high importance" here where it does not have access to the pre-contractual communications that formed part of the parties' background knowledge. The argument is that the manner in which courts deal with the absence of discovery when assessing whether a reasonably arguable case is established is a matter of general or public importance and general commercial significance in terms of s 74(2)(a) and (c) of the Senior Courts Act 2016.

**Our assessment**

[12] The Society's arguments reprise matters addressed by the Court of Appeal. There is no challenge to the principles applied by the Court of Appeal in relation to either the interpretation of the contract,[5] or as to applications to sustain a caveat. Rather, the proposed appeal would turn on the application of those principles to a bespoke clause in a variation to a specific agreement. Applying the settled principles of interpretation, the Court of Appeal found that the construction of cl 25.4 was clear and that further discovery was not necessary. In these circumstances, no questions of general or public importance or of commercial significance arise.

[13] Nor do we see an appearance of a miscarriage of justice, as that term is used in the civil context, arising from the decision of the Court of Appeal where the proposed appeal has insufficient prospects of success.[6] In terms of the text of the clause, as the Court of Appeal observed:[7]

> Consultation with the named parties (which do not include the Society) is part of the process of agreeing and documenting an arrangement for the ongoing use and preservation of the Gardens. The object of the consultation was to secure agreement on the preservation of the Gardens, meaning that object had not been realised as at the date of this clause. There would be no need to agree to consult, or to agree, if agreement had already been reached.

[14] We add that, although the clause expresses the hope that the Gardens will continue, where and under whose ownership is not addressed. The nature of the group to be consulted suggests that this is intentional. There is, for example, no apparent

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5 The Court of Appeal applied *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; and *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

6 Senior Courts Act 2016, s 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

7 CA judgment, above n 2, at [45].

assumption that, if the Gardens are preserved, the Society will continue in its present role. The approach of the Court of Appeal is also consistent with the commercial context. Finally, as the Court of Appeal also noted, on the question of an interest sustaining a caveat, there is no language in cl 25.4 constitutive of an interest in land, and no language of grant.

## Result

[15] The application for leave to appeal is dismissed. As was the position in the Court of Appeal, we make no order as to costs.

Solicitors:
Cowan Law Ltd, Auckland for Applicant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent