IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 149/2021

BETWEEN	**MICHAEL JOHN SMITH**
	Appellant
AND	**FONTERRA CO-OPERATIVE GROUP LIMITED**
	First respondent
AND	**GENESIS ENERGY LIMITED**
	Second respondent

SYNOPSIS OF SUBMISSIONS FOR SEVENTH RESPONDENT, BT MINING LIMITED

Dated: 20 July 2022

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AND	**DAIRY HOLDINGS LIMITED**
	Third respondent
AND	**NEW ZEALAND STEEL LIMITED**
	Fourth respondent
AND	**Z ENERGY LIMITED**
	Fifth respondent
AND	**CHANNEL INFRASTRUCTURE NZ LIMITED**
	Sixth respondent
AND	**BT MINING LIMITED**
	Seventh respondent

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May it please the Court:

Introduction

1. Metallurgical (or "coking") coal is an essential ingredient in the manufacture of steel. No coal, no steel.

2. Since the end of August 2017, the seventh respondent, BT Mining Limited (**BT Mining**) has owned and operated the Stockton coal mine, located on the West Coast of the South Island. The Stockton mine is New Zealand's largest coal mine. The metallurgical coal mined at Stockton is exported overseas, which is where the steel-making activity complained of by the appellant (**Mr Smith**) occurs.

3. Mr Smith sues in tort, alleging public nuisance and negligence on BT Mining's part. (His third cause of action alleges breach of some other new/novel/ inchoate duty of care). Mr Smith deliberately pursues his civil claim on the basis that greenhouse gas emissions by the non-party steel-makers who may purchase BT Mining's coal occur in overseas jurisdictions. The substance of his complaint here is that the governments of those foreign sovereign nations do not regulate such emissions in the way he believes they should. Refer:

> "The majority of the exported coal is sent to China, where it is primarily burned in the production of steel",

and:

> "The Greenhouse Gas emissions arising from the burning of coal to produce steel in China are not materially regulated",

and:

> "BT Mining produces coal and exports it to jurisdictions where there is no, or no credible, regulation of Greenhouse Gas emissions."[1]

4. On this basis, Mr Smith asks the New Zealand Courts to fashion a bespoke injunctive remedy against BT Mining, to the effect that greenhouse gas emissions by the overseas steel-makers who use coking coal exported from Stockton must peak by 2025 (and then reduce so as to ultimately cease by

[1] Smith draft amended statement of claim at paragraphs [47], [48] and [77(c)].

2050) – but remain unaffected if the same steel-makers should instead/simply use coal from any other supplier from anywhere else in the world.

5. That such an extraordinary and legally unanchored tort claim as against BT Mining should have been struck out is unsurprising. To put the key propositions at their simplest:

   (a) In no public nuisance case recognised by the New Zealand Courts has the nuisance being complained of occurred in a different country, half the world away from the harm allegedly resulting to the plaintiff;

   (b) In no negligence case recognised by the New Zealand Courts has proximity been upheld on a basis that would mean every person is owed the same alleged duty of care (and thus is a potential plaintiff); and

   (c) In no other novel tort claim has an injunction against a private company been recognised by the New Zealand Courts as being a correct remedial response to alleged policy failings by the governments of foreign sovereign nations.

6. BT Mining does not deny the seriousness of the issue of climate change, nor the importance of society as a whole responding to this challenge in a co-ordinated, effective and enduring way. What BT Mining says, simply, is that the particular civil claim that Mr Smith has chosen to bring against it discloses no reasonably arguable cause of action. That is why the claim was correctly struck out by the Court of Appeal.

7. If the Court of Appeal's decision were to be reversed in the particular instance of BT Mining, the result would truly be opening the gates in New Zealand to litigation by all against all. Indeed, taking Mr Smith's arguments to their logical conclusion, if he may pursue a tort claim against BT Mining then so too may such a tort claim be pursued by and/or against every person on the planet.

The differences with Mr Smith's claim specifically as against BT Mining

8. BT Mining has read in advance draft and respectfully supports and adopts the submissions made by the first to sixth respondents. BT Mining agrees fully with their submissions that the only correct outcome here is for Mr Smith's appeal to be dismissed.

9. On the vast majority of the issues at large, and in particular the legal analyses on public nuisance and negligence, BT Mining's case is on all fours with those of the other respondents. (Likewise, it agrees that Mr Smith's 'fall back' argument of some new/novel/inchoate duty of care cannot save the flawed primary tort claims). The reason BT Mining is filing these separate submissions is because Mr Smith's novel intended claim, specifically as against it, is even more of an overreach than his intended claims against the other respondents.

10. As Mr Smith acknowledged before the Court of Appeal, BT Mining is in a different category to the other respondents. Principally, that is because his tort claim as against BT Mining (but not any other respondent) asks the New Zealand Courts to ignore jurisdictional boundaries between countries, and further to order a bespoke injunctive remedy that is of extra-territorial effect. This is not a proper request to make of the Courts. The correct outcome here was undoubtedly for the entirety of Mr Smith's claim to be struck out. But for the following three reasons, this outcome was and is only even more appropriate for his separate (and distinct) claim against BT Mining.

First, BT Mining is not an emitter of greenhouse gases

11. At the outset, notably, BT Mining is not being sued by Mr Smith for having carried out any relevant or material emitting activity of its own.[2] Rather, Mr Smith's pleaded case asks the Courts to hold BT Mining (a supplier) liable for the emitting activities of other persons/non-parties – those persons being steel-makers who may choose to use coking coal exported from Stockton (or, of course, any other supplier's coal) as an ingredient in the manufacture of steel.

12. As BT Mining's uncontested evidence explains, apart from emissions from diesel used to fuel mining equipment, and fugitive emissions of methane which may occur when coal is unearthed during the mining process, no other CO_2 or CO_{2e} (e = equivalent) emissions occur from the mining of coal at the Stockton mine.[3] To the extent that Mr Smith seeks, without anything more, simply to bundle BT Mining up in a supposedly homogenous group of selected

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[2] Smith draft amended statement of claim at page 5 (above paragraph [42]), and the contrasting headings confirming a lack of any relevant "*emitting*" activity pleaded as against BT Mining.

[3] Tacon affidavit in opposition dated 15 October 2019, paragraphs [16] to [18]. **[201.0046]**

businesses who are "*responsible for about one third of New Zealand's greenhouse gas emissions*,"[4] that submission is palpably wrong.

13. Some CO_2 is emitted from metallurgical coal during the steel-making process – i.e., when the coal is turned into coke – although the larger part is retained as carbon in the coke itself. But, again, that emitting activity is carried out exclusively by BT Mining's customers (or other end-users) who have purchased the coal. Simply, BT Mining is a supplier. It is not the person who is causing the emissions of which Mr Smith now complains.[5]

Second, the non-party emissions complained of occur in overseas jurisdictions

14. Where BT Mining's position differs from the other two 'non-emitter' defendants[6] is that not only is Mr Smith charging it with being liable for the emitting activities of other persons/non-parties – but also when the emissions being complained of occur exclusively in overseas jurisdictions.

15. It is undisputed that metallurgical coal mined at Stockton is not used in steel-making at New Zealand's only steel mill (the Glenbrook mill south of Auckland), and never has been.[7] The purchasers and/or other end-users of this metallurgical coal are exclusively located outside of New Zealand. It is also undisputed that those non-parties will be liable to account for any such emissions in accordance with their own sovereign legal requirements.

16. As Mr Smith's case has evolved over the life of this litigation, he now mounts a direct challenge to supposed regulatory failings by the governments of the foreign sovereign nations in which this steel-making occurs. For example, he now pleads as a fact that "*[t]he Greenhouse Gas emissions arising from the burning of coal to produce steel in China are not materially regulated*":[8]

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[4] Smith SC submissions at paragraph [7].

[5] This conflating of the (very different) position of BT Mining is replete throughout Mr Smith's submissions. Some of the more blatant examples may be seen in paragraph [9] ("*[A]n injunction requiring the respondents to reduce or cease **their emissions***"), paragraph [32] ("*[T]he respondents should stop **their emissions***"), and paragraph [96] ("*[C]essation of **the respondents' emissions** will materially reduce the harm he faces*"). (emphases added)

[6] Being the fifth and sixth respondents (**Z Energy** and **Channel Infrastructure**). As Mr Smith's claim was originally pleaded, BT Mining was the only non-emitter defendant. However, as his position has evolved across the life of this litigation, Mr Smith now appears to accept that Z Energy and Channel Infrastructure are also 'non-emitter' defendants – i.e., suppliers.

[7] Tacon affidavit in opposition, paragraphs [11] to [15]. **[201.0045]**

[8] Smith draft amended statement of claim at paragraph [48]. See also Smith SC submissions at paragraph [62].

(a) In fact, BT Mining exports its metallurgical coal from Stockton to customers located in Japan, South Korea, India and Australia. All four of these countries are party to the Paris Agreement and are taking active steps to mitigate climate change; and

(b) In any event (and anticipating that Mr Smith will say that, on a strike-out application, the Court must assume that his pleaded facts can be proved), there will always be cases where an essential factual allegation is so demonstrably contrary to indisputable fact that the allegation ought not be allowed to proceed further.[9] The undisputed facts in this respect are the very IPCC reports that Mr Smith pleads as providing indisputable evidence as to the nature, effects and mitigation requirements of climate change.[10] From this unchallenged evidence, which Mr Smith himself has adduced, it should be beyond doubt that the Chinese government has in fact regulated for climate change.[11] As just some examples:

(i) China's 14th Five Year Plan has pledged to peak CO_2 emissions by 2030 and achieve carbon neutrality by 2060;[12]

(ii) China has several sub-national emissions trading schemes that exist alongside national level policies to reduce emission intensity, increase energy efficiency and expand renewable energy supplies;[13] and

(iii) China has purpose-built, legally-mandated bodies created specifically for climate mitigation.[14]

17. Turning then to the myriad regulatory responses by the supposedly "myopic" New Zealand Government, Mr Smith's claim consistently ignores the fact that our Parliament has *already* legislated for the specific activity that he complains

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[9] *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at p566, line 31.

[10] Smith draft amended statement of claim at paragraph [56]. See also Smith SC submissions at paragraph [12].

[11] Devane affidavit, exhibit "A". Working Group II contribution to Sixth Assessment Report of Intergovernmental Panel on Climate Change "*Climate Change 2022: Impacts, Adaption and Vulnerability (Summary for Policymakers)*" (February 2022) at [10-74]: *"In case of China, a combination of market-based policies, emissions trading systems, growing number of environmental NGOs and international network appears to be serving as an important tool for climate governance*."

[12] Ibid. Working Group III contribution to Sixth Assessment Report of Intergovernmental Panel on Climate Change "*Climate Change 2022: Mitigation of Climate Change"* (April 2022) at paragraphs [4-34] and [4-67].

[13] Ibid at paragraph [13-61].

[14] Ibid at paragraph [13-15].

of as against BT Mining – namely, emissions from the use of coal that has been exported from New Zealand. This is under Part 4 of the Climate Change Response Act 2002 (**CCRA**).

18. BT Mining is required to participate in the New Zealand Emissions Trading Scheme (**NZETS**) regime because it is a member of the stationary energy sector and mines in excess of 2,000 tonnes of coal in a year.[15] The NZETS regime already specifically addresses (and regulates for) the question of where emissions from the use of exported coal occur. Section 207 of the CCRA provides:[16]

> "A participant who carries out the activity of mining coal, where the volume of coal mined exceeds 2,000 tonnes in a year, listed in Part 3 of Schedule 3 –
>
> (a) **is not required to surrender units in respect of any carbon dioxide emissions from any coal that is exported**:
>
> (b) is required to surrender units in respect of any coal seam gas emissions that result from the activity." (Emphasis added)

19. The policy rationale behind this statutory provision is helpfully summarised by the Environmental Protection Authority/Te Mana Rauhī Taiao as follows:[17]

> "Exported and imported coal
>
> The ETS applies only to emissions generated in New Zealand. Therefore it does not apply to emissions produced in another country by coal exported from New Zealand. This is consistent with our obligations under the UNFCCC and the Kyoto Protocol, **where the country importing and using New Zealand coal, for example Japan, is responsible for the emissions**. On the other hand, **the ETS makes New Zealand companies responsible for emissions from imported coal**." (Emphases added)

20. In this respect, Mr Smith's submission that his claim "*does not cut across New Zealand's international commitments or domestic climate policies*"[18] is untenable in the case of BT Mining. His claim against it is in fact a direct contravention of New Zealand's domestic legislation concerning emissions

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[15] CCRA, Schedule 3, Part 3.

[16] In answer to paragraph 31(g) of Mr Smith's affidavit in opposition **[201.0052]**, section 207 of the CCRA is precisely why BT Mining does not off-set the emissions by overseas steel makers who may use its exported coal.

[17] Refer: https://www.epa.govt.nz/industry-areas/emissions-trading-scheme/industries-in-the-emissions-trading-scheme/stationary-energy/. Mr Smith's pleading that "*those [i.e., overseas] emissions are not regulated in New Zealand*" (Smith amended statement of claim paragraph [77(c)]) is a half-truth which omits to also say that – of course – they are regulated elsewhere. In this way, though, Mr Smith's claim effectively seeks to have it all ways. Regulation by overseas law makers is not good enough. But nor is regulation by New Zealand law makers good enough either. (Everyone else is wrong, and it is only his civil claim against these seven selected defendants which provides the correct formula to addressing the climate change harm complained of).

[18] Smith SC submissions at paragraph [4].

from the use of exported coal, which expressly excludes double counting, and the fundamental principle of reciprocity that underlies the mutual international commitments under the Kyoto Protocol and the Paris Agreement.

21. Mr Smith's claim (i.e., that BT Mining can – and the Courts should require it to – somehow account for emissions by the overseas end users of coal exported from Stockton):

    (a) At best would see a Court imposed double counting of global emissions from this coal use in steel-making;

    (b) In reality, is him asking the Courts to order BT Mining to achieve the impossible – namely to itself police and account for the perfectly legal activities of its overseas steel-making customers (or other end users) who, again, are obliged to account for emissions they generate under their own sovereign country regimes; and

    (c) Is also to ride roughshod over the role of Parliament – which has already specifically considered and enacted law for the very thing that he now seeks contrary private relief against BT Mining for (i.e., emissions from the use of coal that has been exported from New Zealand).

Third, BT Mining did not exist until a decade after 2007

22. Mr Smith's claim against BT Mining also ignores clear and undisputed timings.

23. Mr Smith fixes 2007 as the point in time at which he says all the respondents (both emitting and non-emitting) are to be charged with knowledge that their business activities would contribute to the alleged dangerous anthropogenic interference in the climate system.[19] (And it is this alleged knowledge which is said by him to give rise to a corresponding duty of care in tort). However, the fundamental point taken by BT Mining from the outset of this litigation – and which Mr Smith has consistently ignored – is that, while coal mining has occurred at Stockton since the late 1800's:

[19] Smith draft amended statement of claim, paragraphs [86], [87], [92], [93] and [94]. See also Smith SC submissions at paragraphs [8] and [152(b)]. (Mr Smith's submission in the latter paragraph, i.e. that this timing point is "*broadly admitted*" by BT Mining, is quite wrong).

(a) BT Mining was not even in existence as at 2007, it only being incorporated on 21 September 2016; and

(b) BT Mining's purchase of the Stockton mine (following the Solid Energy insolvency) did not occur until 31 August 2017[20] – so, a full decade *after* the IPCC's Fourth Assessment Report in 2007.

24. On these undisputed (and easily ascertainable) facts, there was even less basis for Mr Smith to ever have selected BT Mining to add the list of unfortunate defendants who he has chosen to sue here.

Summary

25. In concluding, it is respectfully submitted that the Court should not fall into the error (as Mr Smith has largely done) of treating all the respondents as if they are one homogenous group of greenhouse gas emitters. Plainly, they are not. Amongst the respondents, BT Mining is in a very different – and the furthest removed – position.

26. The correct outcome here is undoubtedly for the entirety of Mr Smith's claim to remain struck out, in respect of all the respondents. But this outcome is only even more appropriate as concerns his separate (and distinct) claim as against BT Mining. So even if the Court should be minded to allow Mr Smith's appeal in respect of the claims against the other respondents, that outcome still should not follow in respect of BT Mining.

Dated at Wellington this 20th day of July 2022

R J Gordon / A S Kirk
Counsel for the seventh respondent

** Counsel certify, in accordance with Supreme Court Submissions Practice Note (24 November 2021), that these submissions are suitable for publication (and do not contain any information that is supressed).*

[20] Tacon affidavit in opposition, paragraphs [5] to [10] **[201.0044]**. For the majority of its operational life (from around 1948 to 2017), the Stockton mine has been owned and operated by the Crown. However, Mr Smith's claim gives no accounting whatsoever for this undisputed fact.