

**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 THE SIXTH RESPONDENT,
CHANNEL INFRASTRUCTURE NZ LIMITED**

Dated: 20 July 2022

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

MAY IT PLEASE THE COURT:

1. When the proceedings underlying this appeal were commenced, Channel Infrastructure NZ Limited (**Channel**) was named The New Zealand Refining Company Limited. It was so named because it operated an oil refinery at Marsden Point.
2. On 31 March 2022, Channel closed its refining operations permanently.¹ In doing so, by its estimate, Channel reduced its CO₂ emissions by 98% – or by more than 1 million tonnes per annum – from its 2019 levels.² It is no longer an emitter of any significance.
3. Channel has made a material contribution to the reduction of New Zealand's total greenhouse gas emissions. Channel estimates that the closure of its refinery will contribute approximately one-third of the reductions proposed in New Zealand's first five-year emissions reduction plan, based upon the New Zealand Government's emissions budget under the Climate Change Response Act for 2022 to 2025.³
4. Channel's business is now the storage and transport of liquid fuels owned by its customers, together with ancillary services such as testing. It operates a shipping terminal, storage tanks, and a pipeline that carries fuels from Marsden Point to Auckland. The pipeline makes a useful contribution to lowering greenhouse gas emissions, as it generates only around 10% of the emissions that would occur if the fuels were carried via road transport.⁴
5. Channel does not deny anthropogenic climate change or the importance to global society of responding to the challenge of limiting it and mitigating its effects upon humanity. It has taken steps to reduce its own emissions very substantially. It says, however, that the claims pleaded against it disclose no reasonably arguable cause of action and that the Court of Appeal was correct to strike them out. It respectfully adopts the submissions of the first to fifth respondents and the separate submissions of the seventh respondent, to the extent the latter are relevant to Channel's position.⁵
6. Channel files these additional submissions to address its specific circumstances, where they differ materially from the other respondents'. Channel's circumstances are relevant both to its own position and to the appellant's claims against all of the respondents.

¹ Affidavit of Jack Watson Stewart affirmed 8 June 2022, paragraph [7].

² Affidavit of Jack Watson Stewart affirmed 8 June 2022, paragraph [8].

³ Ibid. The budget is referred to in more detail in the first to fifth respondents' submissions at [22].

⁴ Affidavit of Jack Watson Stewart affirmed 8 June 2022, paragraph [6(b)].

⁵ In particular, the seventh respondent's submissions at [11] to [13].

Channel's business

7. Channel's primary business is to store and transport liquid fuels owned by its customers. As such:
 - (a) it does not emit greenhouse gases of any significance. It uses electricity to run its pumps and facilities, but the amount it uses has reduced by approximately 85% from its 2019 consumption (after which it began to reduce its refining operations), which has lowered demand for thermal generated electricity from coal-fired power stations;⁶
 - (b) it no longer produces liquid fuels or any other substances that contribute to greenhouse gases; and
 - (c) it does not own, and never has owned, the fuels that it transports.
8. The appellant proposes to amend his claim, in part, in response to Channel's closure of its refinery.⁷ The appellant's proposed amendments do not, however, reflect Channel's changed business. It is not correct, for instance, that Channel operates the Marsden Point oil refinery (it is permanently closed),⁸ nor that it produces or supplies products (it merely transports its customers' products).⁹ While it has been referred to as an importer, its role as such is limited to transporting its customers' imports. As a carrier, Channel is a number of steps removed from the causes of emissions.
9. As Channel is no longer an emitter of any significance, nor a producer or supplier of products that cause emissions, the appellant's claims against it are even less tenable than his claims against the other respondents.

Appellant's claims in tort are not tenable

10. There is a significant distance between the facts of this case and the established circumstances in which the law of torts will recognise a duty.
11. Channel adopts the first to fifth respondents' submission, and the authorities referred to therein, that private and public nuisance claims do not extend to suppliers of products that are used to create a nuisance.¹⁰

⁶ [Affidavit of Jack Watson Stewart affirmed 8 June 2022, paragraph \[9\]](#).

⁷ Proposed amended statement of claim appended to appellant's submissions, relevantly at [36] to [41].

⁸ [Affidavit of Jack Watson Stewart affirmed 8 June 2022, paragraph \[7\]](#).

⁹ See Exhibit "A", page 5, of the affidavit of Jack Watson Stewart affirmed 8 June 2022, "*Channel Infrastructure imports, stores, tests and distributes fuel owned by our customers.*"

¹⁰ [Submissions of first to fifth respondents at \[108\]](#) and authorities cited there.

12. Channel's position is even further removed from that of the suppliers in those cases because it does not own or supply products; it merely transports them for its customers, who own them throughout the period in which Channel carries them. Counsel has been unable to locate any authority that would support the proposition that a claim in public nuisance may lie against a person who does no more than transport, for its owner, a substance which is later alleged to cause a nuisance when used by a third party.
13. Counsel are also unaware of any case authorities in which a person has been found liable in public nuisance where they have neither made relevant emissions themselves nor produced, owned, or supplied a substance that caused emissions. The law of torts does not generally extend a duty to those who merely provide services to others who (it is alleged) cause an actionable nuisance or other loss or damage to third parties.
14. In terms of climate change cases, the claim against Channel is more indirect than any other such claim brought anywhere in the world. Counsel are unaware of any other climate change claim being brought against a carrier of products.
15. The appellant's insistence upon pursuing his appeal against Channel, notwithstanding that it has ceased being an emitter of any significance, nor even a producer or supplier of products that cause emissions, supports the finding of the Court of Appeal that the pleaded duty against the respondents (in the context of negligence, but the point applies equally to public nuisance) would create a limitless class of claimants and defendants.¹¹ If the pleaded claims may be pursued against Channel, there are no sensible limits to those who may be defendants.
16. Not only is Channel is further removed from the causes of greenhouse gas emissions than the first to fifth respondents (and the seventh respondent insofar as Channel does not own or supply relevant products), it is also further removed than a great many entities that are not parties to this proceeding. Almost every concern in New Zealand, whether public or private, owns, consumes, or permits the escape of substances that contribute to climate change. If a claim in tort may lie against Channel, it may lie against almost anyone. To recognise a duty in these circumstances would give rise to disproportionate and indeterminate liability.

Relief is contrived and ineffective

17. The appellant might have been expected to celebrate Channel's decision to cease its refining activities and reduce its emissions to a tiny fraction of their original amount.

¹¹ [Submissions of first to fifth respondents at \[119.3\]](#) and authorities cited therein.

Instead, he proposes to amend his pleading with respect to the relief he seeks against Channel (along with BT Mining and Z Energy), in an attempt to salvage his claim.

18. The appellant's proposed amendments to the remedies he seeks, far from remedying the defects in his claims, illustrate why they are inappropriate. The remedies now sought against Channel for the most part either reflect changes it has already made or refer to conduct in which it has never engaged. Taking each in turn:
- (a) A declaration is sought that Channel and the other respondents unlawfully breached a duty owed to the appellant and have caused or will cause him loss through their emitting activities, or (in the case of Channel and Z Energy) from the production and supply of fuel products. None of these remedies have any relevance to Channel, as it is no longer an emitter of any significance, nor does it produce or supply fuel products.
 - (b) An injunction is sought requiring each of the respondents to produce (or in the case of BT Mining, Channel and Z Energy, cause in relation to the products they sell) the outcomes listed below. None of these has any application to Channel, as it does not produce or sell products. In addition, the specific outcomes demanded of Channel have almost entirely been achieved already:
 - (i) A peaking of its emissions by 2025. Channel has already achieved this – its emissions peaked prior to 2019, when it began to reduce refining.
 - (ii) A reduction in its emissions in the amount of the pleaded Minimum 2030 Reductions by the end of 2030, by linear reductions. Channel's emissions have already reduced by more than this amount.
 - (iii) A reduction in its emissions in the amount of the pleaded Minimum 2040 Reductions by the end of 2040, by linear reductions. Again, Channel's emissions have already reduced by more than this.
 - (iv) Zero net greenhouse gas emissions by 2050 by continued linear reductions. While not at net zero, the target date is decades hence, and Channel is no longer an emitter of any significance.
 - (c) Alternatively, an injunction (suspended) requiring all the respondents to cease emitting net greenhouse gases or contributing to the net emission of greenhouse gases through the sale of their products. Channel is no longer an emitter of any significance, and it does not sell products.

19. The ineffective and unworkable remedies now sought illustrate the deficiencies in the appellant's claims in addition to those identified in the first to fifth respondents' submissions in relation to remedies, which are respectfully adopted.¹²

Legislative scheme

20. Channel's decision to close its refinery permanently is consistent with the legislative scheme implemented by the New Zealand Government to address climate change. It provides a useful practical illustration of the effect of the New Zealand Government's Emissions Trading Scheme (**ETS**) and other Government policies. One of the factors that influenced Channel in deciding to cease refining was its expectation that if it did not, it would incur increasing costs in complying with the ETS from January 2023, when it was scheduled to participate.¹³ Another was the Government's Sustainable Biofuels Mandate, which encourages an increased use of biofuels for land transport, which Channel aims to transport using its pipeline.
21. While these are not factors that the Court is in a position to make findings upon in the context of a strike-out application, Channel's additional evidence is consistent with the respondents' submission that claims at issue in this appeal are quintessentially suited to the Government's policy expertise and a coherent and well-signalled regulatory response which allows for investment decisions that support the transition in a planned way. These are threatened if ad-hoc litigation is permitted.¹⁴

Conclusion

22. The sixth respondent respectfully submits that the appeal should be dismissed in its entirety. Should, however, the Court be minded to allow the appeal in respect of the other respondents, it should nevertheless dismiss it in respect of Channel.

DATED at Auckland this 20th day of July 2022

A J Horne / J S Hofer
Counsel for the sixth 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 suppressed).

¹² Submissions of first to fifth respondents at [135] to [136].

¹³ Affidavit of Jack Watson Stewart affirmed 8 June 2022, paragraph [6(a)].

¹⁴ Submissions of first to fifth respondents at [34].