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

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MEDIA RELEASE

MICHAEL JOHN SMITH v FONTERRA CO-OPERATIVE GROUP LIMITED AND OTHERS

(SC 149/2021) [2024] NZSC 5

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

The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019, he filed a statement of claim in the High Court against the seven respondents. Each is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned. Mr Smith alleges that the respondents have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, food gathering and spiritual significance to him and his whānau.

Mr Smith raises three causes of action in tort: public nuisance, negligence and a proposed climate system damage tort. He seeks a declaration that the respondents have (individually and/or collectively) unlawfully either breached a duty owed to him or caused or contributed to a public nuisance, and have caused or will cause him loss through their activities. In addition to declaratory relief, injunctive relief is also sought which would require the respondents to either reduce their emissions by specified amounts over a defined period of time, or immediately cease emitting (or contributing to) net emissions.

Procedural history

The respondents applied to strike out the proceeding, arguing that Mr Smith's statement of claim raised no reasonably arguable cause of action. In a strike out application, the question

for the Court is not whether the claim will ultimately succeed or not, but whether it should be allowed to proceed to trial. Only if it is bound to fail should a case be struck out without trial.

The High Court determined that the claims in public nuisance and negligence were not reasonably arguable and struck them out. The Court declined to strike out the claim based on the proposed climate system damage tort. Mr Smith appealed and the respondents cross-appealed. The Court of Appeal struck out all three causes of action.

Mr Smith was then granted leave to appeal to the Supreme Court, the approved question being whether the Court of Appeal was correct to dismiss the appeal and allow the cross-appeal. The Supreme Court also granted the right to intervene to Lawyers for Climate Action NZ Incorporated, Te Hunga Rōia Māori o Aotearoa | The Māori Law Society, and the Human Rights Commission | Te Kāhui Tika Tangata.

Supreme Court decision

This Court has unanimously allowed Mr Smith's appeal and reinstated his statement of claim. The Court held that the application of orthodox, long-settled principles governing strike out meant that Mr Smith's claim should be allowed to proceed to trial, rather than being struck out pre-emptively.

The Court began its analysis by noting that it was dealing with a strike out application. A measured approach to strike out is appropriate where a claim is at least founded on seriously arguable, non-trivial harm. In such a situation the common law should lean towards a full evaluation of the claim based on evidence and argument at trial, rather than pre-emptively eliminating it. Strike out was only appropriate where whatever the facts proved, or legal arguments and policy considerations advanced, at trial, the case was bound to fail.

Next, the Court held that there was no basis to conclude that the law of torts (in particular, public nuisance) in the realm of climate change in New Zealand had been displaced by statute. Neither the Climate Change Response Act 2002 nor the Resource Management Act 1991 had that effect. Rather, Parliament had left a pathway open for the common law to operate, develop and evolve (if that was justifiable in each case) amid that statutory landscape.

The Court then moved on to consider whether Mr Smith's public nuisance claim (where a defendant's acts or omissions must substantially and unreasonably interfere with public rights) was bound to fail. The Court answered this question through the lens of four questions:

a) were actionable public rights pleaded?
b) was independent illegality required?
c) was the "special damage" rule met or required?
d) was there was a "sufficient connection" between the pleaded harm and the respondents' activities?

On the first question, the Court observed that the rights pleaded by Mr Smith—the rights to public health, public safety, public comfort, public convenience and public peace—fell tenably within (or had sufficient relation to) the particular rights traditionally identified as providing foundation for a public nuisance pleading. In doing so it agreed with the conclusion reached by the Court of Appeal.

On the second question, and again agreeing with the Court of Appeal, the Court held that public nuisance in New Zealand does not require the act or omission complained of to be independently unlawful.

On the third question, concerning the special damage rule, the Court differed from the Court of Appeal. The Supreme Court considered the special damage rule, which requires a private plaintiff to have suffered "special damage" to bring a public nuisance claim, requires reconsideration in a 21st century context. And, regardless of whether the rule was revoked, retained or reformed, the Court held that Mr Smith had a tenable claim to meeting its present requirements because of his pleading of damage to coastal land in which he and others he represents claim legal and tikanga-based interests.

On the fourth question, concerning causation, the Court also differed from the result in the Court of Appeal. The Supreme Court referred to a number of authorities suggesting it was arguable that, in the case of public nuisance, a defendant must take responsibility for its contribution to a common interference with public rights, and that its responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others. In any case, on a strike out the Court had to assume that the consequences of those emissions attributable to the respondents' activities was harm to the land and other pleaded interests held by Mr Smith. The Court acknowledged that Mr Smith might face obstacles in obtaining any injunctive remedy requiring cessation (by injunction), but the utility of a declaratory remedy ought not be overlooked.

On the remaining two causes of action, the Court held that where the primary cause of action is not struck out, the authorities generally discourage striking out any remaining causes of action. On the facts, there were good reasons to follow that approach as striking out the remaining claims would be unlikely to produce a material saving in hearing time or other court resources. It was thus neither necessary nor appropriate for this Court to traverse the remaining claims struck out in the Courts below. They too would be reinstated.

On the potential role of tikanga, the Court held that whatever the cause of action, addressing and assessing matters of tikanga at trial could not be avoided where the pleaded harm invoked tikanga-related interests. Apart from any more conceptual impact tikanga may have on the framing of particular causes of action, a trial court will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, generally, whether tikanga-related harm is a legally cognisable form of loss.

Finally, as the Court notes, the refusal of strike out, and reinstatement of Mr Smith's claim, is not an assessment that the claim is bound to succeed at trial. Rather, it is a finding that it cannot be said, at this preliminary stage, that it is bound to fail.

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