IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 30/2022
[2022] NZSC 79

BETWEEN	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY Applicant
AND	AVERIL ROSEMARY NORMAN AND WARWICK BRUCE NORMAN First Respondents
AND	AUCKLAND COUNCIL Second Respondent

Court: O'Regan, Williams and Kós JJ

Counsel: P T Beverley and C A Easter for Applicant
R J Hollyman QC and J W H Little for First Respondents
P M S McNamara and S J Mitchell for Second Respondent

Judgment: 27 June 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the first respondents costs of $2,500.

REASONS

Background

[1] The Tūpuna Maunga o Tāmaki Makaurau Authority is a co-governance entity. It administers the 14 maunga in Tāmaki Makaurau. It was established pursuant to interim Treaty claims redress provided by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act). The Authority is made up

of six members representing mana whenua iwi and six members appointed by Auckland Council | Te Kaunihera o Tāmaki Makaurau.[1] The maunga are held on trust for the "common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland".[2] They are administered in accordance with the Collective Redress Act and the Reserve Act 1977. In the case of inconsistency between the two Acts, the Collective Redress Act prevails.[3]

[2] The Authority decided to remove 345 mature exotic trees from Ōwairaka (commonly known as Mount Albert) and to replant the maunga in indigenous species. Local residents sought judicial review of that decision.[4] Their application was unsuccessful. On appeal to the Court of Appeal, the residents succeeded on two of three grounds.[5] That Court set aside the Authority's decision to remove the exotic trees and the Council's granting of a resource consent for the removal.

[3] The Authority now applies for leave to appeal that decision.

Relevant provisions

[4] The preamble and s 3 of the Collective Redress Act set out the objective and purpose of the Act. Among other things, they recognise that maunga are taonga, and restore to iwi and hapū the ownership and the ability to exercise mana whenua and kaitiakitanga over the taonga.

[5] Section 58 of the Collective Redress Act obliges the Authority to prepare and approve an integrated management plan (IMP) for the maunga, which sets key priorities and policies. The maunga must be administered in accordance with that instrument.

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1 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (Collective Redress Act), s 107(1)(e) provides for one non-voting member appointed by the Crown for the first three years of the Authority's existence, and the option to extend on agreement between the Minister, the trustee and the Auckland Council. There is no indication that there is currently a non-voting member on the Authority.

2 Section 41(2).

3 Section 47(3).

4 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 (Gwyn J) [HC judgment].

5 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2022] NZCA 30 (Cooper, Courtney and Goddard JJ) [CA judgment].

[6] Section 41 of the Reserves Act provides for the preparation, notification and implementation of reserve management plans. Section 41 applies to any IMP.[6] Section 41(5) requires the administering body to give public notice before the preparation of the management plan seeking suggestions from the public and to consider those suggestions in preparing the draft plan. Section 41(6) also requires that the administering body publicly notify the draft plan, in accordance with s 119, and follow a process to invite and consider submissions by interested parties before the plan is adopted.

[7] Section 61 of the Collective Redress Act makes the Council responsible for routine management of the maunga, which it must carry out under the direction of the Authority.

IMP

[8] The Authority prepared a single IMP of general application to all 14 maunga. The proposed IMP was publicly notified on 27 February 2016, following which suggestions were made by interested parties and a hearing process undertaken pursuant to the procedures in s 41 of the Reserves Act. The final form of the IMP was approved on 23 June 2016.

[9] The IMP identifies a range of values sought to be protected and promoted in respect of the maunga, particularly to "rekindle mana whenua connections, such as planting of traditionally used plants, with the ecological and biodiversity values of the Tūpuna Maunga."[7] There are various references throughout the IMP to replanting the maunga in indigenous species and removing "inappropriate" exotic species,[8] but it does not provide expressly for immediate large-scale tree removal generally or in relation to Ōwairaka.

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6 Collective Redress Act, s 58(3).

7 Tūpuna Maunga o Tāmaki Makaurau Authority *Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan* (23 June 2016) at 74.

8 At 95.

The Courts below

[10] In the High Court, the residents argued that removal would be in breach of ss 17 and 42 of the Reserves Act which require the Authority to preserve, protect and maintain the natural environment of the maunga, including trees and bush; that the Authority was in any event obliged to consult with residents on the removal decision; that, consequentially, the Authority's direction to fell the trees was unlawful and that the Council could not validly comply with it; and that the Council had breached the Resource Management Act 1991 (RMA) notification provisions by separately granting consent to remove the trees on a non-notified basis.[9] The residents relied on various affidavits in support of their application for judicial review, outlining the history behind a variety of the exotic trees. The High Court rejected all grounds.

[11] On appeal, the residents pursued the same arguments, with the exception of that relating to the legality of compliance by the Council with an unlawful direction of the Authority. The Court of Appeal rejected the substantive illegality ground,[10] but upheld the consultation and notification grounds,[11] although the reasoning in relation to the consultation ground was different to that advanced by the residents.

[12] On the consultation ground, the Court did not accept that the Authority owed a stand-alone duty to consult with respect to the removal decision itself. The Court considered the key question was whether the removal decision should be characterised as sufficiently important to have been the subject of consultation by express inclusion in the IMP.[12] Both the IMP and the Authority's 2018–2019 Annual Operational Plan made provision for removal of exotic trees, but neither document provided for large-scale exotic tree removal.[13] In the Court's view, such a decision was of considerable significance and should have been clearly signalled in the IMP.[14]

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9 HC judgment, above n 4, at [15].
10 CA judgment, above n 5, at [169].
11 At [213] and [279].
12 At [196].
13 See CA judgment, above n 5, at [206]–[207]. Section 60 of the Collective Redress Act obliges the Authority and Council to agree on an Annual Operational Plan for each financial year. This plan provides a framework for the Council to carry out its functions under s 61.
14 CA judgment, above n 5, at [209].

[13] As to notification, the Court considered the resource consent should have been notified. According to the evidence of the Council, the official who processed the application considered a range of other information before (essentially) coming to the view that any effects of the removal would be minor (at least in the longer term) due to the replanting.[15] An independent planning consultant was then appointed by the Council to make the notification decision under delegated authority. He took the same view and granted the consent on that basis.[16] The Court considered that the evidence before the consultant was incapable of supporting the conclusion that the effects of the removal would not be more than minor.[17] The Court noted that s 3(b) of the RMA required consideration of "any temporary … effect" when making the notification decision.[18] The decision maker had failed to grapple with the temporary denuding effect of the removal and replanting. There had been no assessment of the duration of that effect, and no conditions imposed in that respect. Nor, the Court considered, was the decision maker appraised of the heritage and historical significance of the exotic stands which (as noted) had been the subject of evidence in the judicial review application. The Court concluded that the consent application should have been publicly notified under s 95A of the RMA.[19]

Submissions

[14] The Authority advances arguments under six headings:

(a) the integrity and durability of Treaty settlements is at issue since the appeal relates to the interpretation of a co-governance framework established under such settlement. The proper approach to interpretation of settlement legislation is a matter of significance in terms of the Treaty of Waitangi;

(b) the integrity and durability of the Tāmaki Collective Treaty settlement is also at issue. The appeal involves questions about the ability of the Authority to undertake projects pursuant to the "carefully designed and

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15 At [216]–[218].
16 At [220]–[222].
17 At [268].
18 At [269].
19 At [279].

negotiated" Collective Redress Act. The Court of Appeal's decision undermines that design and introduces non-statutory thresholds and processes not contained in the Collective Redress Act or the Reserves Act. These include an open-ended "significance" threshold for projects requiring consultation and a requirement that the Authority amend its IMP before it can proceed. This involves wastage of limited time and resources, creating uncertainty;

(c) the Court of Appeal decision has impacts on other Treaty settlement co-governance arrangements including those in relation to the Waikato River and Urewera arrangements;

(d) the introduction of the 'considerable significance' threshold makes it likely that reserve administering bodies generally might now be required to amend their reserve management plans under s 41 of the Reserves Act leading to uncertainty and difficulty; and

(e) the effect of the notification decision is that (contrary to other and recent authority in the High Court),[20] the decision maker will be required to make notification decisions not on the basis of information before them, but in anticipation that there may exist other information not reasonably available at the time of the decision.

(f) In addition, the Authority expresses concern in relation to the (obiter) view of the Court of Appeal suggesting it was "not clear" to that Court how the inclusion of the Reserves Act in a schedule to the Conservation Act could render decisions of an independent statutory body subject to s 4 — this in light of the large number of reserves administered by independent reserve boards in New Zealand.

[15] The Council abides in relation to leave and reserves its position with respect to a substantive appeal.

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[20] Citing *Lake Tekapo Community and Friends Inc v MacKenzie District Council* [2021] NZHC 1354 at [17].

[16] The residents oppose leave, arguing (essentially) that the Court of Appeal's decision was procedural rather than substantive and applied settled principles in that respect. It does not therefore affect the integrity and durability of Treaty settlements generally or the Tāmaki Collective settlement. Nor does it affect the administration of other reserves in any substantive way.

Analysis

[17] The Court of Appeal decided the matter on a relatively narrow procedural issue, in respect of which it adopted an orthodox approach. We do not see that the decision affects the integrity or efficacy of the Tāmaki Collective settlement or co-governance arrangements generally.

[18] We agree that the powers of and constraints upon Treaty-based co-governance entities may in some instances give rise to Treaty issues of wider import,[21] but this is a case that turns on its own facts. We are unable to see any question of principle arising. We also agree that the proper interpretation of s 4 of the Conservation Act and its effect on the Reserves Act does give rise to potential Treaty issues, but since the Court of Appeal's observations were in obiter, (and it expressly left the point open) it is inappropriate to grant leave on that question alone. It is therefore not necessary in the interests of justice to grant leave to appeal.[22]

[19] The application for leave to appeal is dismissed.

[20] The applicant must pay the first respondents costs of $2,500.

Solicitors:
Buddle Findlay, Wellington for Applicant
Duncan King Law, Auckland for First Respondents
Simpson Grierson, Auckland for Second Respondent

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21 Senior Courts Act 2016, s 74(3).
22 Section 74(2).