**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 141/2014**
**[2015] NZSC 67**

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| BETWEEN | NGĀTI WĀHIAO<br>Applicant |
| AND | NGĀTI HURUNGATERANGI, NGĀTI TAEOTU ME NGĀTI TE KAHU O NGĀTI WHAKAUE<br>Respondents |

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| Hearing: | 1 April 2015 |
| Court: | Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ |
| Counsel: | J E Hodder QC and F E Geiringer for Applicant<br>D J Goddard QC, J P Kahukiwa and B D Huntley for Respondents |
| Judgment: | 15 May 2015 |

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**JUDGMENT OF THE COURT**

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

**B We make no award of costs.**

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**REASONS**

(Given by O'Regan J)

## Introduction

[1] This is an application for leave to appeal against a decision of the Court of Appeal.[1] In that decision, the Court of Appeal granted leave to appeal to the Court of Appeal against a decision of the High Court dismissing an application by the

[1] *Ngāti Hurungaterangi v Ngāti Wāhiao* [2014] NZCA 592.

respondents to appeal to the High Court[2] on certain questions of law arising out of an interim decision of an arbitration panel.[3] We will refer to this judgment of the High Court as the first High Court decision. The Court of Appeal granted leave to the respondents to appeal to the High Court from the decision of the arbitration panel on four questions of law.

[2] After the submissions from both applicant and respondents had been received, the Court sought additional submissions on whether the Court had jurisdiction to deal with the application for leave to appeal and the proposed appeal. A hearing on the jurisdiction question was held on 1 April 2015.

[3] In this judgment we deal with both the jurisdictional issue and the substantive application for leave to appeal.

**Background**

[4] The jurisdictional issue involves consideration of a rather unusual appeal provision in the Arbitration Act 1996 and in order to place the consideration of that provision in context, it is necessary to trace the history of the proceedings in some detail.

[5] The applicant and the respondents were parties to an arbitration to determine beneficial entitlements to the fee simple estate in certain land in the Whakarewarewa Valley in Rotorua that was vested in a trust by legislation.[4] On 7 June 2013, the arbitration panel issued an interim decision, in which it determined the beneficial entitlements.

[6] The respondents were dissatisfied with the outcome of the arbitration and wished to appeal to the High Court. The question of appeals from arbitral awards to the High Court is governed by cl 5 of sch 2 to the Arbitration Act, which relevantly provides:

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2 *Ngāti Hurungaterangi v Ngāti Wāhiao* [2014] NZHC 846 [First High Court Decision].

3 *Ngāti Whakaue and Pukeroa Oruawhata Trust v Tuhourangi and Ngāti Wāhiao* (Interim Decision) Bill Wilson, Erima Henare and Kevin Prime, 7 June 2013.

4 The Whakarewarewa and Roto-a-Tamaheke Vesting Act 2009.

**5 Appeals on questions of law**

(1) Notwithstanding anything in articles 5 or 34 of the Schedule 1, any party may appeal to the High Court on any question of law arising out of an award—

(a) If the parties have so agreed before the making of that award; or

(b) With the consent of every other party given after the making of that award; or

(c) With the leave of the High Court.

(2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more of the parties.

(3) The High Court may grant leave under subclause (1)(c) on such conditions as it sees fit.

(4) On the determination of an appeal under this clause, the High Court may, by order,—

(a) confirm, vary, or set aside the award; or

(b) remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration or, where a new arbitral tribunal has been appointed, to that arbitral tribunal for consideration,—

and, where the award is remitted under paragraph (b), the arbitral tribunal shall, unless the order otherwise directs, make the award not later than 3 months after the date of the order.

(5) With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave or from any determination of the High Court under this clause.

(6) If the High Court refuses to grant leave to appeal under subclause (5), the Court of Appeal may grant special leave to appeal.

[7] The key provisions in the present context are cls 5(5) and 5(6). Clause 5(5) is unusual because it provides for an appeal against a High Court decision refusing leave to appeal. We are not aware of any other provision to this effect: normally a refusal of leave cannot be appealed, but in many cases there is provision for a second look because a superior court can grant special leave. The provision for appeal in cl 5(5) applies only where the High Court has *refused* leave. There is no similar

provision allowing a party that is dissatisfied with a decision *granting* leave to appeal to appeal against that decision.

[8] Clause 5(6) deals with the situation where the High Court refuses leave to appeal to the Court of Appeal against a High Court decision refusing leave to appeal against an arbitral award. In that event, the Court of Appeal can, if it considers leave should be given, grant special leave for an appeal to the Court of Appeal against the High Court decision refusing leave.

[9] The present case was a case to which cl 5(1)(c) applied. In order to appeal, the respondents needed to get leave from the High Court. So they applied to the High Court for leave to appeal to the High Court on a number of questions of law arising out of the interim decision of the arbitration panel. Duffy J refused leave in the first High Court decision. In essence, Duffy J determined that the questions of law in respect of which leave to appeal was sought were not seriously arguable and therefore could not substantially affect the rights of the parties.[5] She did, however, accept that they had the appearance of being questions of law.

[10] The respondents wished to take the matter further. In accordance with cl 5(5) of sch 2 they applied to the High Court for leave to appeal to the Court of Appeal against the first High Court decision. That application for leave to appeal was dealt with by Duffy J on the papers. She delivered a judgment in which she refused leave to appeal to the Court of Appeal.[6] We will call that judgment the second High Court decision.

[11] The respondents then decided to pursue the matter in the Court of Appeal. Under cl 5(6) of sch 2, they applied to the Court of Appeal to grant special leave to appeal to the Court of Appeal against the first High Court decision.

[12] That required the Court of Appeal to determine whether it should give special leave to appeal, contrary to the second High Court decision. If it decided that special leave should be given under cl 5(6) of sch 2, the Court of Appeal would then need to

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5 First High Court Decision, above n 2, at [10]–[11].

6 *Ngāti Hurungaterangi v Ngāti Wāhiao* [2014] NZHC 2311.

determine a substantive appeal against the first High Court decision under cl 5(5) of sch 2. If the substantive appeal against the first High Court decision were successful, then the Court of Appeal could give leave to the respondents to appeal to the High Court on questions of law arising from the arbitral award.

[13] In fact, the Court of Appeal conflated these steps into one decision. The judgment of the Court provided:

> A Special leave to appeal is granted to the applicants [the respondents in this Court] pursuant to art 5(6) of the Second Schedule of the Arbitration Act 1996 against the refusal of the High Court by judgment dated 29 April 2014 [the first High Court judgment] to grant leave to appeal on questions of law arising from the interim award of an arbitral tribunal (the Panel) delivered on 7 June 2013.
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> B The questions of law are:
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> 1 Did the Panel err in law in:
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> (a) failing to make findings (supported by reasons) as to who the beneficial owners of the lands at issue were pre-1893?
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> (b) failing to determine the parties' claims to the lands having regard to those findings?
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> (c) allocating beneficial ownership of the lands according to broad conceptions of fairness, rather than identifying the persons entitled to beneficial ownership of the lands?
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> 2 Did the Panel err in law in finding that Crown purchases of individualised interests in the lands after 1893 resulted in loss of the mana whenua of the hapu in respect of those lands?
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> 3 Did the Panel err in law be treating Crown purchases of individualised interests in land post-1893 as a relevant consideration in determining the dispute before it?
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> 4 Did the Panel err in law in its approach to s 348 of the Te Ture Whenua Maori Act 1993?
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> C The proceeding is remitted to the High Court to determine the applicants' appeal on the identified questions of law in accordance with the application for special lease dated 17 October 2014.
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> D The applicants are entitled to costs against the respondent for a standard application on a Band B basis with usual disbursements.

[14] The Court of Appeal did not give reasons for its decision, apparently on the basis that, as it was granting leave to appeal, r 27(2)(b) of the Court of Appeal (Civil) Rules 2005 applied. That provision says that the Court need not give reasons for giving leave to appeal to the Court of Appeal from a decision of the High Court. The apparent rationale for that rule is that the Court granting leave should not indicate its view at the leave stage on matters it will come to deal with when the substantive appeal comes before it.

[15] It is true that the Court of Appeal decision did involve the granting of leave to appeal to the Court of Appeal against the first High Court decision. It was not therefore necessary to give reasons for this aspect of the decision because r 27(2)(b) applied. However, the Court of Appeal was not only granting leave to appeal to the Court of Appeal against the first High Court decision (under cl 5(6)) but also determining the actual appeal against the first High Court decision (under cl 5(5)). Although the Court of Appeal judgment does not actually say it allowed the appeal against the first High Court decision and quashed that decision, it must in fact have done so as that was the only basis on which it could have granted leave to the respondents to appeal to the High Court on questions of law arising from the decision of the arbitration panel. As the Court of Appeal was determining an appeal, in our view it ought to have given reasons. Those reasons needed to address the substantive reasoning of the first High Court decision, to show why the High Court Judge had erred in that decision and why her decision to refuse leave to appeal to the High Court on questions of law arising from the decision of the arbitration panel should be reversed. The reasons could have been brief and in a form that avoided as far as possible any indication of the Court of Appeal's views on matters that were to be resolved by the High Court when hearing the substantive appeal on questions of law arising from the decision of the arbitration panel.

[16] The applicant now seeks leave to appeal to this Court against the Court of Appeal decision. In effect the decision under challenge comprises two separate decisions, namely the decision to grant special leave to appeal against the first High Court decision (under cl 5(6)) and also the decision allowing the appeal against the first High Court decision which, as a result of the grant of special leave, came before

the Court of Appeal under cl 5(5). The focus of the application for leave to appeal to this Court is on the latter.

**Jurisdiction**

[17] The applicant says that this Court has jurisdiction to hear and determine its appeal under s 7 of the Supreme Court Act 2003. That section provides:

> **7 Appeals against decisions of Court of Appeal in civil proceedings**
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> The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceeding, unless—
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> (a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or
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> (b) the decision is a refusal to give leave or special leave to appeal to the Court of Appeal.

[18] Counsel for the applicant, Mr Hodder, said this section should be interpreted in a straightforward way. He said the applicant's appeal comes within this section because:

(a) There was a "civil proceeding" in the Court of Appeal.

(b) The applicant was a party to that proceeding.

(c) There has been a decision in that proceeding.

(d) The applicant seeks to appeal against that decision.

[19] There was no dispute about those factors. So the Court has jurisdiction unless one of the exceptions in s 7 applies. We will deal first with s 7(b), as that can be dealt with briefly.

[20] Mr Hodder said the decision of the Court of Appeal is not a decision refusing to give leave or special leave to appeal to the Court of Appeal, so the exception in s 7(b) does not apply. We agree. On the contrary, the decision was a decision to give special leave to appeal to the Court of Appeal as well as a substantive appeal

decision reversing the first High Court decision. The effect of the reversal of the first High Court decision was that the Court of Appeal then granted leave to the respondents to appeal to the High Court on questions of law arising from the arbitral award. But that second aspect of the Court of Appeal decision also does not come within the exception in s 7(b) of the Supreme Court Act.

[21] Mr Hodder said the exception in s 7(a) does not apply because there was no enactment to the effect that there is no right of appeal against the Court of Appeal decision. Counsel for the respondents, Mr Goddard, took issue with this. He argued that the exception in s 7(a) applied because cl 5 of sch 2 to the Arbitration Act implicitly makes provision to the effect that there is no right of appeal against a decision in the nature of the decision of the Court of Appeal in the present case. He said that s 7(a) of the Supreme Court Act should be construed so that it applied if there was an implicit provision in another enactment to the effect that there was no right of appeal, rather than requiring that this be stated explicitly.

[22] Mr Goddard said it was implicit in cl 5 of sch 2 to the Arbitration Act that an appeal to this Court was not available in the present case. It was notable that cl 5(5) allows a party to appeal to the Court of Appeal against a decision of the High Court refusing leave to appeal on a question of law arising out of an arbitral award, but does not allow such an appeal if the High Court grants leave. He said this must implicitly also apply in circumstances where the Court of Appeal grants leave to appeal to the High Court on questions of law arising from an arbitral award. He said it would be incongruous if there was no right of appeal against a decision of the High Court granting leave, but there was such an appeal from a decision of the Court of Appeal granting leave.

[23] Mr Goddard said that the fact that no reasons had been given in the Court of Appeal judgment supported his argument. He said the Court of Appeal acted in accordance with longstanding practice in not giving reasons, and that that practice was predicated on the basis that there would be no appeal against the decision granting leave. Otherwise, he argued, reasons would be required so that a proper evaluation could be made by this Court in dealing with an application for leave to appeal or a substantive appeal.

[24] As we have already said, we consider that the Court of Appeal ought to have given reasons in this case, because it was dealing with a substantive appeal, not just an application for leave to appeal.

[25] We accept there is a degree of inconsistency that decisions of the High Court granting leave are not subject to appeal whereas decisions by the Court of Appeal granting leave may be. But we do not think that the existence of this inconsistency can be elevated to the status of a provision in the Arbitration Act to the effect that there is no relevant appeal against the Court of Appeal decision in this case.

[26] In his oral submissions, Mr Goddard supplemented his argument. He pointed out that cl 5 of sch 2 to the Arbitration Act applies "notwithstanding anything in arts 5 or 34 of Schedule 1".[7] Schedule 1 sets out rules applying to arbitrations generally, in cl 5 deals with the extent of Court intervention in arbitration proceedings. It says:

> In matters governed by this schedule, no Court shall intervene except where so provided in this schedule.

[27] The only provision in sch 1 dealing with Court proceedings is cl 34, which deals with applications to set aside an arbitral award. Clause 34(1) says:

> Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).

[28] Paragraphs (2) and (3) set out the (limited) grounds on which an award can be set aside and the time period within which such an application must be made. Mr Goddard said cl 5 of sch 2 is essentially an exception to the restrictions on the involvement of the Courts in arbitral proceedings set out in cl 5 and 34 of sch 1. He argued that the restraint on the involvement of Courts applies not only at the High Court level, but at all levels of the judicial hierarchy, citing the decision of the Court of Appeal of England and Wales in *Geogas SA v Trammo Gas Ltd*.[8]

[29] None of this persuades us that the Arbitration Act makes provision to the effect that there is no right of appeal against the decision of the Court of Appeal on appeal from a decision of the High Court refusing leave to appeal to the High Court

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7 Clause 5(1).

8 *Geogas SA v Trammo Gas Ltd* [1993] 1 Lloyds Rep 215 (CA).

on question of law arising from an arbitral award. In our view, s 7(a) of the Supreme Court Act applies only where there is a statement in another enactment that no appeal to this Court is available or that the decision under challenge is final. We do not think "makes provision to the effect that there is no right of appeal" extends to a situation where there is no provision at all, but a general theme in the legislation indicating limited involvement for the Courts.[9]

[30] At the hearing there was also discussion of the approach to leave decisions taken in *Lane v Esdaile*, in which the House of Lords held that there was no appeal to the House of Lords from the refusal by the Court of Appeal to grant leave to appeal from a judgment of the High Court when the time for appealing had expired.[10] To some extent s 7(b) reflects the approach in *Lane v Esdaile*. Beyond that, we do not think it assists in the construction of the statutory provisions for appeals to this Court.[11]

[31] In summary we are satisfied that the general wording of s 7 applies in this case. The Court of Appeal was dealing with an appeal under cl 5(5) of sch 2 to the Arbitration Act. Decisions by the Court of Appeal dealing with appeals from the High Court are appealable to this Court. The exceptions in s 7 do not apply. That is because the Arbitration Act does not make provision to the effect that there is no right of appeal against the Court of Appeal's decision and because the Court of Appeal's decision in this case was not a decision refusing to give leave to appeal to the Court of Appeal.

[32] We therefore determine that this Court does have jurisdiction to deal with the application for leave to appeal and, if leave were given, it would have jurisdiction to deal with the proposed appeal.

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9 We see this conclusion as consistent with the approach taken by the High Court of Australia in *Roy Morgan Research Centre Ltd v Commission of State Revenue of the State of Victoria* [2001] HCA 49, (2001) 207 CLR 72.

10 *Lane v Esdaile* [1891] AC 210 (HL).

11 See the comments to the same effect by Kirby J in *Roy Morgan Research*, above n 9, at [46]–[48].

**The substantive application**

[33] The application for leave to appeal is advanced on the basis that the matters which the applicant seeks to raise on appeal are matters of general or public importance[12] or matters of general commercial significance.[13] It is not suggested that a substantial miscarriage of justice may occur unless the appeal is heard.[14]

[34] Before turning to the criteria relied on by the applicant, we briefly consider the applicability of s 13(4) of the Supreme Court Act. That provision says that leave to appeal should not be given against an order made by the Court of Appeal on an interlocutory application unless this Court is satisfied that it is in the interests of justice to hear and determine the proposed appeal before the proceeding concerned is concluded. The decision of the Court of Appeal in the present case to grant leave for an appeal from the first High Court decision to the Court of Appeal was an interlocutory application, but that is not the case in relation to the second aspect of the decision, the allowing of the appeal against the first High Court decision and the granting of leave to the respondents to appeal against the arbitral award to the High Court. Section 13(4) does not therefore apply. However, given the nature of the decision of the Court of Appeal, we see the rationale of s 13(4) having some relevance (by analogy) to the decision on the present application as to whether leave to appeal to this Court should be granted.

[35] The applicant submitted that the approach taken by the Court of Appeal in formulating the questions on which leave was given could be inferred from the nature of the questions themselves in the context of the deed, the arbitral award and the legal framework relevant to review of arbitral awards. For this reason the absence of reasons in the Court of Appeal decision was not an impediment to identifying the alleged errors of law. The respondents, on the other hand, argue that the absence of reasons made it impractical for this Court to deal with an appeal from the Court of Appeal decision. They said this emphasised the fact that the application for leave to appeal was premature.

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12 Supreme Court Act 2003, s 13(2)(a).
13 Supreme Court Act, s 13(2)(c).
14 Supreme Court Act, s 13(2)(b).

[36] Mr Hodder had detailed criticisms of the questions of law for which leave to appeal to the High Court was given.[15] He argued that either they were not, in truth, questions of law or they were not seriously arguable and therefore leave should not have been given applying the test set out in the decision of the Court of Appeal in *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd*.[16] He accepted that question 4 was a question of law, but said that it was not "seriously arguable" and leave should not have therefore been given on that basis.

[37] We accept that, if the questions on which the Court of Appeal gave leave were not, in truth, questions of law, that would be an error of law on its part. But the first High Court decision does not suggest that the questions on which leave was sought were not questions of law – rather, Duffy J considered they were not seriously arguable or did not arise on the facts of the case. And the reality is that this Court could not resolve this issue without undertaking a detailed review that would cover much of the ground that the High Court will cover when it deals with the appeal. This highlights the fact that the Court of Appeal decision has many features of an interlocutory decision and the consequent factor that the present application for leave is premature.

[38] Mr Hodder was particularly concerned that the applicant would not be able to argue in the High Court that the questions identified by the Court of Appeal were not in truth questions of law or were questions of law in respect of which leave should have been given. He said this problem arose because the Court of Appeal identified them as "questions of law", and this would be effectively binding on the High Court when considering the appeal from the decision of the arbitration panel. We do not consider that this concern is justified, because as can be seen from the text of the questions, each question begins with the words "Did the Panel err in law". That leaves it open to the High Court to determine that, even if the panel did err, the error was not an error "in law", and therefore not properly amenable to challenge in the High Court. Mr Goddard conceded this during the hearing on 1 April 2015. To the extent that the applicant's concern is that the relevant question of law is not seriously

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15 These are set out in the quotation at [13] above.

16 *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [54].

arguable, it will obviously be able to press that argument in the substantive appeal hearing when the merits of the point will be assessed in detail.

[39] Mr Hodder argued that the matters the applicant wishes to raise in its proposed appeal to this Court are matters of general or public importance and/or matters of general commercial significance. He argued that the Court of Appeal decision has not correctly applied the criteria in *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd*, and has effectively lowered the bar for appeals to the High Court from arbitral awards, thus compromising the principles of party autonomy and arbitral finality. He said this was a matter of general and commercial importance, because Courts need to be vigilant to ensure that the legal framework for arbitration of disputes established by the Arbitration Act is protected.

[40] We do not accept that submission. In the absence of any reasons, it cannot possibly be argued that the Court of Appeal has altered the law as stated in its earlier decision in *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd*. At most, it can be argued that the Court of Appeal did not correctly apply those principles. Even if that were correct, it would not amount to a matter of general or public importance or a matter of commercial significance.

[41] Mr Hodder argued that the effect of the Court of Appeal judgment in this case was to encourage "dressing up" as "questions of law" issues which are questions of judgment and/or mixed questions of law and fact. Again, we do not accept that, because, in the absence of reasons, there is nothing that can be taken from the decision of the Court of Appeal to be treated as a precedent for future cases. In any event, if that submission were well founded, it would be a matter that could be raised on a substantive appeal once the substantive High Court appeal has been dealt with.

[42] Mr Hodder also said the Court of Appeal judgment undermined the principle of "full and unqualified acceptance of the findings of fact of the arbitrators", as reflected in cl 19(2) of sch 1 to the Arbitration Act and highlighted by Steyn LJ in *Geogas SA v Trammo Gas Ltd*.[17] Again we do not consider there is anything in the Court of Appeal decision that can properly be construed as compromising either

[17] *Geogas SA v Trammo Gas Ltd*, above n 8, at [228].

cl 19(2) or the *Geogas* principle. The most that can be said is that the Court of Appeal may not have acted consistently with those principles. But even if that were correct, it does not indicate any resiling from them.

[43] The other grounds on which the application was advanced reflect the same theme, and we respond in the same way to them.

[44] We conclude that the grounds for the granting of leave are not made out in this case.

[45] The application for leave to appeal is therefore dismissed.

[46] As the applicant's position on jurisdiction was upheld and the respondents' position on the substantive application was upheld, we consider it appropriate that no award of costs be made.

Solicitors:
Chapman Tripp, Wellington for Applicant
Corban Revell Lawyers, Auckland for Respondents